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Sovereignty-based arguments and immigration: Searching for a European constitutional moment?

Commentato [SP1]: Mi sembrava che il titolo avesse bisogno di un completamento, ma non so se questo sia quello giusto. Ma un riferimento alla dimensione costituzionale mi pare sintetizzare bene il nostro percorso (dalla concezione pre-costituzionale della sovranità da parte di alcuni Stati al potenziale funzione costituzionale dei principi dei trattati, solidarietà in primis). Vedi tu!

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Abstract

The article articulates a twofold claim: a) sovereignty-based argument finds a fertile ground in EU's weaknesses in terms of immigration strategy and b) sovereignty arguments in immigration issues can (and must) be confronted with the legal instruments afforded by the existing framework of EU law. To develop the argument, this article is divided in two parts. The first part addresses sovereignism in immigration law and policies, by exploring sovereignist claims and their translation into domestic legislation and policies, with specific reference to the Italian context. It then analyses the recent changes in migration law, within the EU, as to test to what extent arguments based on sovereignty stand as bulwark against a full cooperation among EU member states. In the second part, the article examines the legal instruments that EU institution can use and develop to implement solidarity and reduce the margin for the use of sovereignty-based arguments in immigration policies.

Keywords

Sovereignty, sovereignism, Common European Asylum System, Immigrants' disembarkation, Borders control.

1 Introduction: sovereignty, *sovereignism* and (missing) solidarity

The word *sovereignism* stands out in many contemporary debates on European immigration. It refers to political claims associated with a form of nationalism asserting the need to take policy decision making back to the nation-state level. Within the EU, it is then used to refer to a kind of neo-nationalism with an anti-EU integration *côté*.

Interestingly enough, in Europe the term firstly appeared in the form of the Gallicism *souverainism* in public debate.¹ The preference for the French locution was due to the simple fact that between the nineties and the early thousands French politics witnessed the overflowing of claims associated with the need to restore both authentic French identity and state leading role in ascertaining political priorities.

For a while, the term was studied only within the context of researches on populism, as if it is causally connected to populist claims. For sure there is some true in this intuition: sovereignism is always justified with the invocation of the will of the people or better the prioritization of the will of the people over any other moral (and even humanitarian) concern.² Moreover, sovereignism shares another distinctive claim with populism, that is the assertion of an anti-pluralist society: the political community need to be homogeneous and purified from the “false” people.³

Such a neologism echoes those theories conceiving sovereignty as: a) states’ *necessary feature* and b) *unavailable* to state authorities.⁴ Unavailability refers here to the fact that state powers cannot decide voluntarily to limit or renounce to exercise sovereignty without endangering the very existence of the state (and retract popular will). In other words, state powers have to protect sovereignty in order to accomplish their duty to preserve the existence (and the identity) of the state.

An interesting example is the Hungarian Constitutional Court decision concerning the abstract interpretation of Arts B, C and E of the Fundamental Law.⁵ According to the Court, Art. B, which states that “Hungary shall be an independent, democratic rule-of-law State” and then recognises the popular sovereignty principle, implies that the Government cannot exercise sovereign powers in a

¹ Le Dréau C., 2009. L’Alliance pour la souveraineté de la France et l’émergence du militantisme souverainiste (1997-2002). *Les cahiers Trice*, vol. 4, issue 2, pp. 129-146. The connection between sovereignty-based arguments and immigration has been explored also outside Europe by scholars who tried to identify how some migration policies in the US were essentially presented in public debate as unescapable options to protect the sovereignty of the nation, identified with the absolute prioritization of borders control: Demo A., 2005. Sovereignty Discourse and Contemporary Immigration Politics. *Quarterly Journal of Speech*, vol. 91, issue 3, pp. 291-311. See also Bosniak L., 1996. Opposing Prop. 187: Undocumented Immigrants and the National Imagination. *Connecticut Law Review*, vol. 28, pp. 555-619 who argues that resistances to affirmative approaches towards the rights of undocumented immigrants depends on “the near sacred commitment in conventional political discourse to one of the cardinal norms of the system of state sovereignty – that countries have the rightful authority to control both the entry of foreigners into the national territory and (within certain limits) the terms of their membership once present” (at p. 567).

² See the study, which combines quantitative and theoretical analysis, carried out by Baldassari M., Castelli E., Truffelli M. and Vezzani G. *Anti-Europeanism: Critical Perspectives Towards the European Union*. Springer, Berlin, Germany. The A. consider souverainism, neo-nationalism and neo-populism as related political claims, causally connected to the same sociological and political roots and equally expressing an anti-Europeanism agenda.

³ Mueller J.-W., 2017. Populism and Constitutionalism, in: *Oxford Handbook of Populism*. C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo and P. Ostiguy (Eds) Oxford Handbook, pp.590-606, Oxford University Press, Oxford, UK.

⁴ Reference is made here to the scholarly tradition that identifies sovereignty as coextensive with the concept of state: Quaritsch H. (1970). *Staat und Souveränität*. Vol. 1. Athenäum Verlag, Frankfurt, Germany. German scholarship elaborated on that tradition, during the Nineteenth century, assigning sovereignty to the State as opposed to the people. According to such a stream of scholarship sovereignty is then state’s will as moral person (Gerber), or state’s self-determination and self-limitation (Jellinek) or, finally, state’s power to decide its own competence (Laband). See Grimm, D., Cooper B. (2015). *Sovereignty: The Origin and Future of a Political and Legal Concept*. Columbia Studies in Political Thought and Political History. Columbia University Press, New York, United States.

⁵ Art. B (1) states: “Hungary shall be an independent, democratic rule of law State”. Art. C affirms the separation of powers principle and the enforceability of the Fundamental Law. Finally, Art. E lays down the foundation of EU membership by specifying at para. (2) that: “With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure”.

way that undermines the features of Hungary as independent and democratic state. It follows that even if another article of the Fundamental Law, Art. E, establishes that the State and the EU jointly exercise the competences that have been conferred to the EU, the Court can always perform a *sovereignty review* to preserve the principles enshrined in Art. B.⁶ Therefore, the Court can decide that the Government has acted *ultra vires* if it curtails Hungarian sovereignty by implementing an EU policy that is intrusive of Hungarian independency or identity. It was even too easy for the Government to use that decision to justify its duty to protect the integrity of Hungarian sovereignty and to resist EU obligations. In that sense, sovereignty is a power that the Government cannot entirely dispose of, even when the constitution is there to authorize the transferral of portions of that power to the EU institutions. Such an interpretation of the constitutional principle of sovereignty is *sovereignist* insofar it links that principle – identified with the insuperable expression of popular will – with the vindication of national powers *vis a vis* the EU in the context of conferred competences.

One can argue, with wide scholarly support in European continental scholarship, that sovereignist claims express a pre-constitutional idea of sovereignty.⁷ One that disregard that constitutional states conceive sovereignty as a power exercised in constant dialogue with the international community because the exercise of sovereignty encounters limits in both the constitution and the constitutionally sanctioned international obligations. Post-World War II European constitutionalism does not interpret sovereignty as a mean for supporting isolationist agenda. While sovereignty still entails both internal and external independence, it has become, with the constitutional state, an instrument for achieving international equality and cooperation rather than international juxtaposition of national powers. Therefore, there is room to argue that *sovereignism* is a challenge to European integration process implying a regression in European constitutional culture.

Indeed, in its English version, the term *sovereignism* became the label for a group of Eastern European governments, which also form the Visegrad group, characterized by both identity agendas and European scepticism. Some of those governments have been defined populist and illiberal for their anti-élites and anti-pluralist inclinations.⁸ Moreover, they share the same strong criticism against European policies, which is functional to reducing or excluding the effectivity of European (and, more broadly, international) obligations.

The core political claim of this group of states establishes a logical connection between a) the need to restore the centrality of the state and b) the protection of the true people, *vis a vis* not only the corrupt élites, but also the non-members of the political community as historically identifiable.⁹

In some cases, judicial reasoning provided support to those political claims. Once again, Hungary is the clearest example. Indeed, the Hungarian Constitutional Court has justified the sovereignty argument precisely in the context of immigration in a recent decision on the application of the *non refoulment* principle. The Court was called to interpret Art. XIV of the Constitution, which prescribes that foreigners shall not be entitled to asylum if they arrived in Hungary through any country where they were not persecuted or threatened with persecution.¹⁰

⁶ Halmai G., 2017. The Hungarian Constitutional Court and Constitutional Identity. *verfassungsblog.de*, available at the URL <<https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>>.

⁷ Among Italian scholarship: Silvestri G. 2019. Corte costituzionale, sovranità popolare e “tirannia della maggioranza”. *Questione giustizia*, issue 1, pp. 22-28.

⁸ This group includes governments of Czech Republic, Hungary and Poland.

⁹ The Hungarian Prime Minister emphatically stated: “Migration for us is surrender”. He linked the adoption of social welfare measures sustaining women with children with the need to protect the true (Hungarian) people from a possible invasion of migrants. He launched the initiative in the annual state of the nation address as reported by many newspapers all around the world: Walker S., 2019. Viktor Orbán: no tax for Hungarian women with four or more children. *The Guardian*, available at the URL <<https://www.theguardian.com/world/2019/feb/10/viktor-orban-no-tax-for-hungarian-women-with-four-or-more-children>>.

¹⁰ Hungarian Constitutional Court, decision n. 2/2019. Art. XIV, para 4, Hungarian Constitution states that «A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution». The decision is available at the URL <<https://hunconcourt.hu/dontes/decision-2-2019-on-the-interpretation-article-r-1-24-1-and-xiv-4-of-the-fundamental-law/>>.

To some extent the rule subverts the logic of asylum protection: the hosting country does not intend to offer protection unless it is compelled to do so. If there is an alternative, namely another country the foreigner passed through without asking for asylum protection, then there can be no obligation on Hungary to receive and process asylum request as Hungary is not clearly the first country of potential asylum.

The Court offered an interpretation based on a sovereignty account. According to the Court, «the right to asylum is not the refugee's own individual subjective right as it stems from relevant international treaties undertaken by Hungary as an external restriction of its sovereignty, and its fundamental regulations may be formed independently by the Hungarian State – due to its internal sovereignty – within the limits of the international treaties».¹¹ In other words, the decision distinguishes the legal protection of refugees, stemming from the 1951 Geneva Convention on Refugees, from the condition of those who seek asylum under Hungarian law, which is regulated by Hungarian legislation. Thus, the Court allowed the Government to channel potential refugees through the stricter domestic asylum qualifications. In doing so, the Court consented to a substantial reduction of the number of individuals entitled to international protection.

Political parties in other European countries borrowed the arguments of the Visegrad group. As a result, sovereignism is a term that can be applied to political claims transversally present in the European political spectrum: such as the ones purported by the Italian Lega, the French Rassemblement national or by parties like Alternative for Germany or Danish People's Parties. There is a reason for that: the preoccupation with singling out the true people out of those who abusively occupy political spaces (both the élites and the "others") reflects the crisis of the People: the increasing inability to perceive political participation as effective as well as the diffuse perception of inhomogeneity and profound divisions within the civil society.¹² In such a context, immigrants become an easy target of resentment, distrust and exclusion.

For all the above reasons, sovereignist politicians intend to protect national interests by also defending the borders from the flows of immigrants. There is no shortage of examples: Hungarian referendum on immigrants' quotas, Slovakia and Check Republic's support to the Hungarian government's challenge of the EU relocation plan, Italian recent approach to borders control.¹³ Whether or not associated with some sort of open populist rhetoric, sovereignist claims purport to safeguard fellow citizens by prioritizing their needs and preferences over those of non-citizens.¹⁴ Thus, the exclusion of immigrants has a twofold purpose: protecting the political community's integrity from migration fluxes and allowing states to concentrate their resources exclusively on citizens. There may be different explanations for the preference for the fellow-citizens, including arguments on the importance of sharing the same ethos and culture. For sure, sovereignism conceive of solidarity as an essentially infra-state value. It is based on bonds of trust and loyalty that can exist only within the nation and, most importantly, are not due outside the national borders.

Against this backdrop, our claim is twofold: a) sovereignty argument finds a fertile ground in EU's weaknesses in terms of immigration strategy and b) sovereignty arguments in immigration issues can (and must) be confronted with the legal instruments afforded by the existing framework of EU law. To develop the argument, this article is divided in two parts. The first part addresses sovereignism in immigration law and policies, by exploring sovereignist claims and their translation into domestic legislation and policies, with specific reference to the Italian context (para. 2). It then analyses the recent changes in migration law, within the EU, as to test to what extent arguments based

¹¹ Id. at 44.

¹² As also discussed by Mueller, *supra* note 3. In that sense, populism also reflect the crisis of democracy, which should accept and reconcile the societal divisions as reflected in the political arena and synthesized, with changing and provisional equilibrium, in democratic processes and representation: Lefort, C. (1988). *Democracy and Political Theory*. University of Minnesota Press, Minneapolis, United States.

¹³ See *infra* para. 2.

¹⁴ As a matter of fact, anti-immigration policies are generally associated with nationalist and protectionist agenda: Tassinari F., Poiares Maduro M., 2018. Why European Populists Idolize Putin and Trump. *New Perspectives Quarterly*, Vol. 35, Issue 4, pp. 36-39.

on sovereignty stand as bulwark against a full cooperation among EU member states (para. 3). In the second part, the article examines which are the legal instruments that EU institution can use and develop to implement solidarity and reduce the margin for the use of sovereignty-based arguments in immigration policies (paras. 4 and 5). Eventually, the article offers some conclusion as to the role of the EU in facing a time sovereignty *revirement*.

2 Exploring sovereignist arguments and their implementation: the case of the Italian decision to close ports (June-August 2019)

Anytime the former Italian Minister for internal Affairs, Matteo Salvini, referred to his immigration policy, after he took office in June 2018, he clarified that priority had become stopping migration fluxes. He justified his position by suggesting that any other effort to cope with mass migration by applying the existing framework of international and EU law amounted to helping (or tolerating) human smugglers. Consistently with such a narrative, his first move was the closing of Italian ports to boats carrying migrants, including NGO's rescue boats operating in SAR zones. With Salvini Italy went through a year, from June 2018 to August 2019, of sovereignist immigration policy.

The (former) Minister for Internal Affairs explained that the length of the procedures connected with reception and asylum requests fostered the illegal stay of migrants who were enjoying protection and shelter counting on the inefficiency and slowness of the system of migration management. In his narrative, migrants were taking advantages from both the international protection (mostly the principle of *non refoulement* and the right to asylum) and the Italian legislation regulating reception, according to EU law.¹⁵ For the same reason, the implementation of EU law and obligations, including the principle of non-refoulment, was described as a trap: Italy was stolen of its sovereignty and deceived by EU institutions. The latter obliged Italy to apply the first country of asylum rule, thus putting Italy at the forefront of migration crisis with no meaningful support.

Salvini's rhetoric leans on arguments that have been purported, between 2015 and 2016, by previous Italian (and European) governments to claim support from the EU to manage the migration crisis. He escalated a path that was looming in Italian immigration policy. The reduction of the number of immigrants to be received and eventually relocated was the final goal of other governments, before Salvini took office. The Minniti-Orlando Decree, for example, established Accommodation Centres for Repatriations in every Italian regions with a view to increase deportations of immigrants to their state of origin or to third countries.¹⁶ The Decree also reduced asylum seekers' chances to get the international protection by limiting the appeal against the denial of the status of refugee.¹⁷ Similarly, the memorandum of understanding on cooperation with Libya, concluded in February 2017, aimed at incentivizing Lybia to patrol its territorial sea with a view to

¹⁵ Scherer S., 2018. Echoes of Trump as Italy's Salvini gets tough on migrants. *Reuters*, available at the URL <<https://www.reuters.com/article/us-europe-migrants-italy-salvini/echoes-of-trump-as-italys-salvini-gets-tough-on-migrants-idUSKBN1JM24H>>. The rise of *legghism* as an ideology specifically targeting migrants as a threat to national security and identity has been discussed in political science even before Salvini took office as Minister of Interior Affairs: Dalla Torre, G., 2019. Sovranismo. *Studium*, Vol. 113, Issue 3, pp. 325-330. On more recent developments of Italian political scenario in the context of immigration crisis: Mellino M., 2019. Racism, anti-racism and migration: Italy at the heart of the new European political situation. *Revue européenne des migrations internationales*, vol. 34, issue, pp. 11-19.

¹⁶ Law Decree no. 13/2017 (later converted with amendments into Law no. 46/2017).

¹⁷ Esposito, F., 2017. A Critical Look at the Italian Immigration and Asylum Policy: Building 'Walls of Laws', available at URL <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/07/critical-look>>.

prevent as much as possible the departure of migrants from Lybian coasts.¹⁸ To that effect, the Italian government also loaned twelve patrol vessel to the use of Lybian coastguard.¹⁹

From such a viewpoint, there is some continuity in the identification of the final objective of migration policy: the reduction of the number of migrants in absolute value. At a closer glance, though, there are two distinctive sovereignist and populist arguments connoting Salvini's policy choices. First of all, only Salvini connected such final objective with the need to gain control of Italian (political and cultural) destiny. Previous governments tended to link the grip on immigration policy to a call for action on the EU side. On the contrary, Italian sovereignist experience was characterized by associating the turn in immigration policy with the decisive moment in which Italy was getting her sovereign power back. Sovereign power, in turn, meant power to decide on both Italian policy and Italian identity. Secondly, Salvini clearly identified NGOs as potential problems as they were allegedly interfering with Lybian coastguard operations by rescuing migrants that would have been otherwise handled by Lybian authorities.²⁰

Indeed, the implementation of sovereignist arguments has often taken the form of executive decisions, rather than that of parliamentary acts. On some occasions, those decisions were not even formalised in legal act, as it was the case with the first orders to close ports that were given via emails and phone calls by the Minister of Interior Affairs. Minister Salvini, however, entrenched the policy of ordering the closing of ports in a decree he successfully proposed to the approval of the Council of Ministers. Art. 1, Law Decree no. 53/2019 (so called *decreto sicurezza-bis*) confers the Minister of Interior Affairs the power to adopt measures to deny or limit the entry of boats into territorial seas, with a view to prevent irregular migration. The Law Decree specifies that the Minister has to respect international obligations, including human rights obligations. Pursuant to Art. 1, Minister Salvini blocked the Sea Watch 3, which was trying to approach the territorial sea in June 2019.²¹

The captain of the boat sought a remedy by challenging the order before the Italian Administrative Tribunal (TAR Lazio) and asking for a stay of the executive act as to allow the disembarkation of immigrants who were alleged to suffer for the harsh conditions of the journey and the precarious situation on board the boat. On a summary examination of the facts, the Italian Tribunal dismissed the case because vulnerable individuals had been, meanwhile, allowed to leave the boat.²² Therefore, the administrative judge found unnecessary to deal with the legitimacy of the ministerial measures, maintaining that the situation of emergency had been handled by Italian authorities. The act was legally valid and continued to apply.

¹⁸ Liguori A., *The 2017 Italia-Libya Memorandum and its consequences*, in: G. Cataldi, A. Liguori, M. Pace (eds.), *Migration In The Mediterranean Area And The Challenges For "Hosting" European Society*, Editoriale Scientifica, Napoli, 2018, pp. 215-226, available at URL <http://www.jmcmigrants.eu/jmce/wp-content/uploads/2018/02/II-VOLUME_Migration-and-hosting-european-society.pdf>; Palm A., *The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?*, available at URL <<https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>>. The English version of the memorandum of understanding between Italy and Libya is available at the URL <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

¹⁹ Law Decree no. 84/2018. See also *Italy to donate 12 more patrol boats to Libya*, available at URL <http://www.ansa.it/english/news/politics/2018/06/27/italy-to-donate-12-patrol-boats-to-libya-2_50fd3373-b797-4347-a7bf-fb04c8ea79a7.html>. See also Mancini M., *Italy's new migration control policy: stemming the flow of migrants from Libya without regard for their human rights*, available at URL <<http://www.sidi-isil.org/wp-content/uploads/2018/11/M.-Mancini-IYIL-Vol.-27-pp.-259-281-1.pdf>>.

²⁰ The assumption according to which NGOs are responsible for incentivising or even increasing the number of illegal immigrants has been questioned in recent research that show how it is a mystification of available data. Indeed, the number of disembarkation did not increase in parallel with the increasing in the number of people whose lives have been saved in the Mediterranean Sea: Cusumano E., Villa M., 2019. Sea Rescue NGOs: a Pull Factor of Irregular Migration. *Policy Brief, Migration Policy Centre*, issue 2019/22.

²¹ Zirulia S., *Decreto-sicurezza bis: novità e profili critici*, dirittopenalecontemporaneo.it; Benvenuti M., 2019. Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini. *Diritto immigrazione e cittadinanza*, issue 1.

²² Tar Lazio, Decreto cautelare *ante causam*, n. /2019.

By following the TAR Lazio logic, however, it was clear that had the boat found no other port in a country willing to take immigrants, the latter would have been disembarked eventually, on account of the progressive deterioration of health and sanitary conditions on the boat. In other words, the situation was necessarily temporary and needed to be managed, at least by making sure that the boat found an alternative port. The decision was far from being the final say on the matter. Nonetheless, for the sovereignist narrative the boat denied to entry the Italian territory was the clear manifestation of the triumph of national will against external agents (NGOs, the EU, international obligations), which would have preferred to impose on Italian authorities the presence of the 43 occupants of the boat.²³

Two months after the Sea Watch 3 case, another NGO's boat rescuing migrants in the Mediterranean Sea, the Open Arms, was denied the entry in Lampedusa. The NGO operating the boat, Foundation Proa sought the annulment of the Minister's order to stop Open Arms from entering the territorial sea. This time the Administrative Tribunal suspended the Ministry's order maintaining the risk of misrepresentation of the facts as the government was denying the entry to a boat that had rescued migrant in a clear situation of distress that the government was not able to dispute.²⁴ Indeed, the Open Arms was described by the government as having rescued migrants in situation of distress in the Libyan SAR zone. Nonetheless, later on the government tried to justify its decision to deny the entry to Lampedusa on the basis of the fact that the boat was not "inoffensively crossing" the territorial sea, but rather trying to reach out the Italian coast with a view to let immigrants disembark. Indeed, according to international law, the inoffensive passing through territorial sea has to be allowed unless it creates a threat to national security or public safety.²⁵

Given the previous description of the circumstances under which the Open Arms performed the rescue of immigrants, it was evident the logical inconsistency in the position of the government: admitting there was a situation of distress and then denying help and rescue because of the threat the boat was alleged to intentionally create. In addition to that, the court found substantive reasons to hold that the order violated the law.

More specifically and on substantive grounds, the decision reiterates principles that can hardly be open to discussion: the existence of international obligations that cannot be overridden by ordinary legislations, the inclusion among those principles of the duty to disembark immigrants risking life or inhuman treatments, and finally the obligation to examine asylum claims of immigrants asking for international protection as derived from both international legal sources and the Constitution. The Administrative Tribunal just restated the principles of immigration law, thus revealing the weakness of the sovereignty narrative when confronted with the reality of the legal framework.

The simple question that one is tempted to ask is: what is the difference between the situation of the Sea Watch 3 and that of the Open Arms in legal terms? The decisive difference, which led the same court (the Administrative Tribunal of Lazio) to an opposite result, was the concrete situation of people on board of the two boats and the specific circumstances of their rescue in the SAR zones. It seems therefore that new Law Decree does not add much to the already existing framework, whereby states keep their last word on the entry of migrants except for the international obligations they have to respect. Among these international obligations both the principle of *non-refoulement* and the obligation to help boats in distress are included.

The order of closing ports was pointless in many respects. Either it led to a harm wrestling situation with other European countries (such as Malta and Spain) for the identification of safe harbour for the NGOs' boats or to a harm wrestling situation with migrants, who had to resist until their condition was considered serious enough to allow them to enter the territory. The order,

²³ De Sena P., Starita M., 2019. Navigare fra istanze "stato-centriche" e "cosmopolitiche": il caso "Sea-Watch" in una prospettiva conflittuale. *Sidiblog* available at URL < <http://www.sidiblog.org/2019/07/14/navigare-fra-istanze-stato-centriche-e-cosmopolitiche-il-caso-sea-watch-in-una-prospettiva-conflittuale/> >.

²⁴ Tar Lazio, Sezione Prima Ter, no. 5479/2019, proceeding no. 10780/2019 R.G.

²⁵ Conv. Geneva, 1958 on Territorial Sea, Arts 14-17; Conv. Montego Bay, 1982, on the Law of the Sea, Arts 17-21.

however, worked in the sovereignist narrative as it was the exhibition of domestic resistance to an external will, no matter how reasonable the latter had been. That the order had (also) a demonstrative character is clearly shown by the fact that, in the Open Arms case, the Minister of Interior Affairs reiterated the denial to entering the territorial sea even when six EU Member States (France, Luxembourg, Germany, Portugal, Romania, Spain) announced their willingness to take the migrants on board of NGO's boat, that is when the availability of an Italian port was no longer indispensable.²⁶ The implementation of the sovereignist argument was then completely detached from any concrete intention to solve the situation of migrants or even from any distinct purpose to send a political message to the EU regarding the need to improve cooperation or to change the existing framework for managing mass migration.

3 Where are we now? The Malta joint declaration of September 2019 and its implications

Both the results of EU elections, with Orban's party entering the PPE and the apparent sidelining of populist parties, and the (at least temporary) marginalization of Lega in Italian politics, may lead to reconsidering the real strength of sovereignist rhetoric in immigration policies.²⁷

At a closer look, sovereignty is still, especially in its degenerative version, the bulwark against the implementation of a common immigration policy. To clarify this statement, one has to consider the most recent development in immigration policy within the EU.

After the failed attempt to amend the Dublin Regulation, the EU institutions seem to be still stuck in a situation in which Member States are unable to reach consensus neither on the reform of the existing legal framework nor on the adoption of measures of general application to coordinate the redistribution of the burden to keep migrants arriving to European states' borders.

In June 2019, the Council Presidency presented working paper including guidelines on temporary arrangements for disembarkation.²⁸ It was followed by a series of discussions in Helsinki and Paris that substantially paved the way for the ministerial meeting held in Malta on 23 September 2019. Only four Member States participated to the meeting: Italy, France, Germany and Malta under the aegis of the Finnish Presidency and the Commission. The meeting resulted in a joint declaration setting out the scheme for future possible arrangements and calling for other Member States to participate to the new mechanism envisioned to deal with disembarkations.²⁹

The Malta joint declaration is an example of intergovernmental cooperation and by reading it through it is evident that the four Member States do not intend it to be eventually transformed into a piece of EU legislation. Indeed, states agree that, on the hand, the new scheme will be applicable for six months, with one possible renewal, on the other, the reform of the Common European Asylum System must still be pursued on different though complementary grounds.³⁰

The declaration aims at introducing a new relocation mechanism based on five essential rules: 1) states have to ensure the 'dignified disembarkation' of migrants taken abroad on high seas on a vessel; 2) states can always offer an alternative place of safety on a voluntary basis, informing the

²⁶ Abellan Matamoros C., 2019. Open Arms: Situation of migrants stranded at sea is 'untenable' says European Commission. *EuroNews*, 16 August 2019, available at the URL <<https://www.euronews.com/2019/08/16/open-arms-situation-of-migrants-stranded-at-sea-is-untenable-says-european-commission>>.

²⁷ The Identity and Democracy group, which includes national parties characterised by anti-immigration propaganda and Euroscepticism, gained 73 seats, meaning the 9,72% of the European Parliament. Data can be accessed at <<https://election-results.eu/european-results/2019-2024/>>.

²⁸ Council of the European Union, working paper, WK 7219/2019 INIT, Brussels, 12 June 2019, available at the URL <https://www.statewatch.org/news/2019/jun/eu-council-wk-guidelines-on-temporary-arrangement-disembarkation.pdf>.

²⁹ Joint declaration of intent on a controlled emergency procedure. Voluntary commitments of Member states for a predictable temporary solidarity mechanism, 23 September 2019, at point 3, available at the following address: <<http://www.statewatch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>>.

³⁰ The added value of the declaration is questioned by Carrera S., Cortinovis R., 2019. The Malta declaration on SAR and relocation: a predictable EU solidarity mechanism?. *CEPS Policy Insight*, no. 2019-14, available www.ceps.eu.

Commission; 3) in case of disproportionate migratory flaws in a participating state, an alternative place for a safe disembarkation shall be proposed; 4) persons rescued by state-owned vessels shall be disembarked in the territory of their flag state; 5) vessels engaged in rescue operation shall be required to comply with the instruction given by the Rescue Coordination Centre and abstain from interfering with Search and Rescue operation of the official coast guards of African states, including Lybia.

To some extent the declaration rationalised *ex post* the management of mass migration of the last six months. Indeed, EU Member States engaged in harm wrestling over the identification of the safe place of disembarkation, with Malta refusing on a number of occasions the designation made by Italy.

The declaration raises concerns as to its contribution to the implementation of the solidarity principle within the EU as well as to the consistency with the overall EU migration law. For example, it is remarkable then that the joint declaration puts down in word the argument, purported by some sovereignist leader like Salvini, according to which vessels should firstly approach the state of their flag. Finally, it reiterates the cooperation with coast guards of littoral African states and, by doing so, it discourages NGOs from engaging in SAR zones patrolled by states like Lybia that are not signatory members to the 1951 Convention on Refugees.

Therefore, if one looks at the declaration from the viewpoint of the sovereignist arguments as explored so far, it does not seem that it paves the way for a radical different narrative of the proper way to manage mass migration or, even less, of the relevance of states responsibility in taking care of migrants rescued in a situation of distress.

From a more policy-oriented perspective, the Declaration insists in the same direction that has been followed so far: the design of relocation plan, which operates according to an emergency logic; the prevention of disembarkation operations by transferring borders control to coastal states irrespective of careful assessment of human rights standard; the exclusion of any attempt to establish binding rules on burden sharing of refugees. In fact, states mention the need to revise the Common Asylum System, yet they do not offer any policy direction, neither seem to believe in the possibility to strengthen EU competences on migration, for example by reducing the opt-out opportunity.

The joint declaration was discussed with all Member States at the Home Affairs Council held on 8 October 2019. The Commission urged Member States to subscribe to the Malta declaration as a concrete effort to improve intra-EU solidarity. Despite discussions and encouragements from EU institutions, Member States are still reluctant to transform the Malta agenda into a common effort to put in place a new mechanism for the 'dignified disembarkation' of migrants. Indeed, the Home Affairs Council did not take an official position on the Maltese joint declaration. The laconic synthesis, to be found on the report of the Council meeting, simply states that: "ministers discussed the state of play on migration. They took the opportunity to have a general overview of the migration situation in the EU across all routes, with a particular focus on the increase of arrivals in the Eastern Mediterranean and the recent declaration between France, Germany, Italy and Malta on temporary arrangements for disembarkation".

The joint declaration has the merit to bring the word 'solidarity' back into states' migration policy and agenda. At the same time, it shows that Member States are not interested in reinvigorating the (failed) relocation plan. The major flaw of the Maltese effort is its intergovernmental nature, which risks placing the core issue of contemporary migration fluxes (the arrival of migrants and their disembarkation) outside the current political efforts of the EU as unitary polity and most importantly the long-term goals of European integration.³¹

In the same days of the Council meeting in which the Malta declaration found many resistances, the EU concluded an agreement with Montenegro concerning the operations of the European Border and Coast Guard Agency (Frontex) in the country. The agreement aims at strengthening both the

³¹ Intergovernmentalism may indeed produce controversial effects on European integration: on the one hand it can achieve results by allowing states to prioritize their national interests, on the other, it can have negative effects on European integration and its democratic processes as explained by König, T. 2018. Still the Century of Intergovernmentalism? Partisan Ideology, Two-level Bargains and Technocratic Governance in the post-Maastricht Era. *Journal of Common Market Studies*, vol. 56 Issue 6, pp. 1240-1262.

cooperation with Montenegrin authorities on patrolling state borders and the efficiency of migrants return operations. It is part of a broader policy of consolidating borders control actions in the West Balkans, which is part of the East Mediterranean route of migration, and more generally in areas exposed to migratory fluxes. The new agreement joins a series of borders control operations that Frontex has launched to support Member States in detecting illegal immigration.³² The latest one is the Themis operation, launched in February 2018. It combines activities finalised at rescuing migrants with security objectives. In the statement of the aims of Themis operation, Frontex expressly refers to the security component of the initiative by stating that one of the main purposes is to collect information, detect false documents and prevent the terrorist threat.³³ In that respect, Themis goes even further than the preceding Triton operation. The latter focused essentially on borders control and prevention of illegal migration according to a limited mandate, while Themis has a broader scope both in geographic and operational terms.³⁴

Thus, if one looks at the major steps taken in the last months after the European election, one may conclude that: a) policy choices are mainly driven by either preventative approach, such as strengthening borders control and patrolling operations or by emergency responses, such as plans for coordinating the disembarkation and return procedures and b) there is some consistency in this approach, meaning it does not represent a decisive change in European migration policy or agenda.

There is room to conclude that even if the sovereigntist narrative did not win the European Parliament, sovereignty concerns are reflected in current European policy initiatives if one looks at: the prioritization of borders control over other policy purposes and the prevalent voluntary basis of the mechanism envisioned for cooperation and solidarity in the crucial steps of managing the arrival of migrants. In that sense, sovereigntist narrative may not dominate current European policy on immigration but may be *consistent* with some of the directions it has recently taken. Precisely for this reason it is now necessary to focus on EU law as to highlight what it can do, with its existing tools, to reintroduce priorities that are coherent with the political project of integration and solidarity among Member States.

4 Turning back to EU Law: the existing framework and the meaning of sovereignty

The potential features of Malta Agreement turn back the reference point to the EU level: do EU institutions still have a concrete role in orienting the management of migration at the national level? Can this role be considered still effective before the raising of Member States' sovereigntist rhetoric and policies?

As emphasised in para. 3, the achievement of a sustainable coexistence of national sovereignty and concrete implementation of European asylum law represents one of the key-issues European institutions are currently facing. A collaborative interplay between national sovereignties and European integration represents a physiological development towards the effective establishment of a common asylum system: the challenge is not focusing on whether this interplay occurs, but on how and how far it can legitimately go.

In general terms, EU law and its institutional framework can be grasped in a dual dimension with respect to national sovereignties. Firstly, European law can be a trigger of confrontation between States' interests – mainly border control and national security – and European objectives – the implementation of a common European system for migration –, in all those cases where Member

³² To the ones mentioned in the text, one has to add: operation Poseidon, focusing on Greek borders and operation Minerva concerning the area between Spain and Morocco. The centrality of borders control in the development of European integration is discussed by Scott J.W. (2018). *Rebordering Central and Eastern Europe*, in: The Routledge Handbook to Regional Development in Central and Eastern Europe. London, Routledge, The United Kingdom.

³³ The mandate of the Themis operation is stated at the URL <<https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>>.

³⁴ Themis operates in Central Mediterranean Sea and targets migration fluxes coming from Algeria, Tunisia, Libya, Egypt, Turkey and Albania. Themis replace the Triton operation, which was carried out by Frontex from 2014 to 2018.

States try to weaken or even prevent the concrete implementation of European measures (see the case of relocation). Secondly, European law, and especially European and national courts, can act as a fence – or better, if we assume the existence of a physiological interaction between sovereigntist and European instances, as an equalizer – to the drifts Member States tend to provoke. In the former case, it becomes necessary to assess the compatibility of States' attitude – both concretely abstentionist (Spain) or expressly adverse (Hungary, Poland, Slovakia) – with the core values the Union is grounded on and which orient European policy on migration, such as solidarity, mutual trust and burden sharing between Member States. In the latter case, courts, both at the European and national level, become essential in guaranteeing a 'non-sovereigntist' interpretation of European law in the field of migration.

Migration management undoubtedly represents one of the areas in which state sovereignty tends to express itself - to impose itself - in a strong way. Controlling migration is a physiological outcome of the exercise of state sovereignty, as migratory flows directly involves some of the most consolidated *topoi* of state sovereignty: the territory and the control of its borders, as well as fundamental interests such as public order and the security of citizens. It is therefore a matter of reaching a reasonable – and sustainable – balance between sovereign resistance and integrationist inputs, as both principles and competences defined by the Treaties (articles 78-80 TFEU) and the existence of wide-ranging "safety valves" for national sovereignty at the level of secondary law clearly show (i.e. Dublin III Regulation; minimum standards for reception and procedure).

This dynamic interplay has shifted from a "trench" confrontation, in which both States and the EU aimed to preserve and defend the respective areas of influence, to a "strategy" conflict, aimed at gaining additional areas of expression of one's constitutional identity and, from States' perspective, at reducing or completely eliminating the implementation of European-derived measures that can even only theoretically limit or make the spaces of expression of national sovereignty recede. As happened in the past, this trend goes through the role of European and national courts as judges of the Union.

The attitude taken by the Court of Justice in assessing the arguments of Hungary and the Slovak Republic, aimed at declaring the illegitimacy of the decisions concerning the relocation of asylum seekers registered in Italy and Greece, becomes paradigmatic in emphasising this trend³⁵. Faced with the use of the argument of the respect for Member States' sovereignty, the Court of Justice considers that the choice of European institutions cannot be considered disproportionate or manifestly unreasonable, given the exceptional circumstances that have characterized that historical phase and the consequent need to adopt extraordinary and temporary measures of involvement of all Member States, with a view to implement the principles of solidarity, burden sharing and mutual trust (art. 80 TFEU). Therefore, relocation cannot be considered as a measure that excessively affects the «sovereign right of each Member State to decide freely on the admission of nationals of third countries to their territory».³⁶ Mandatory allocation of asylum seekers among Member States does not disproportionately affect even a further prerogative, traditionally attributed to State's sovereignty, namely, in the words of Polish applicants, «the exercise of the Member States' responsibility to maintain law and order and to safeguard internal security».³⁷ Indeed, according to the Court, the Decision offers receiving States adequate mechanisms to suspend the transfer in the event of attested risks for national security. Therefore, what in the perspective of the recurrent States is considered an illicit interference in matters traditionally referable to the exclusive exercise of state sovereignty is interpreted by the European institutions as the attempt to balance, on the one hand, national interests in controlling arrivals and in preserving public order and national security, on the other hand the need

³⁵ CJEU, Joined Cases C-643/15 and C-647/15, Republic of Slovakia and Hungary v Council of European Union, 6 September 2017.

³⁶ Advocate General Bot's Opinion in Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, 26 July 2017, §243.

³⁷ § 315.

to guarantee the efficient functioning of the common European asylum system, through the activation of extraordinary measures based on the principle of solidarity between Member States.

Anticipating a hint that will be taken up again in the conclusions, the principle of solidarity comes to take its place in the reading the Court of Justice offers as an essential tool for balancing between sovereign needs and Europeanist instances, recognizing, however, priority to the formers. Solidarity is intended as an «emergency management» tool, which expresses an almost exclusively intergovernmental nature and which legitimizes interferences from the outside exclusively in exceptional circumstances.³⁸ This approach applies also in all those cases in which the duty to take charge of an asylum application is conditioned to the free expression of state sovereignty.³⁹ Within these dynamics, courts become decisive in preserving the need to guaranteeing the effective protection of rights of individuals seeking protection, coherently with a less 'sovereignty-' and more 'rights-' based interpretation of EU law. National judges can be particularly vital in ensuring an interpretation of European standards not based on a 'legal' idea of sovereignty, rather open to a constitutional understanding of sovereignty which in turn includes also international and supranational obligations freely undertaken by States.

In order to highlight the role that European law can play in bringing this competition back to physiology, we will briefly dwell on some specific issues, which may contribute to the definition of the perimeter within which this confrontation is intended to unfold. Preliminary, it is necessary to recognize the unavoidable existence of a decisive variable in detecting the concrete intertwining between spaces for and limits to national sovereignties: the effective implementation of principles and measures adopted at the European level decisively depends on sovereign will of Member States to effectively comply with them, as the substantial failure of relocation mechanism unequivocally shows. National courts can be decisive in straightening up the detachment between rules and praxes.

In the context of relocation, the Spanish Supreme Court found the government to be in breach of its obligations to take on a quota of asylum seekers based on Council's Decision, by failing to provide adequate measures to guarantee the effective implementation of the relocation mechanism.⁴⁰ Significantly, to demonstrate the existence of a communication channel between the Court of Justice and national judges, Spanish Court systematically recalls the judgment on relocation by the CJEU, placing itself as guarantor at national level of the general principle of loyal cooperation between States and the European Union (Article 4.3) and the principle of solidarity between States in the field of immigration and asylum.⁴¹ Mirroring the Court of Justice's reasoning, Spanish judges criticized the government for not having activated the mechanisms of flexibility or suspension of relocation provided for by the Decisions,⁴² already defined as possible "safety valves" for national sovereignty in this context. By having renounced the use these balancing tools between individual state sovereignties and common European commitments, the existence of serious administrative burdens cannot constitute a legitimate reason for being exempted from the implementation of EU law;⁴³ at the same time, even the widespread non-fulfilment of relocation obligations between the Member States can justify the omissive behaviour of Spanish authorities.⁴⁴

However, sovereign - or sovereigntist - tensions can also find expression through the judicial channel at the national level as we already discuss when tackling the case of the ruling of the Hungarian Constitutional Court concerning the legal nature of the right to asylum (see para. 1). As

³⁸ Mitsilegas, V.(2014) Solidarity and Trust in the Common European Asylum System. *Comparative Migration Studies* 2(2), p. 187.

³⁹ I.e. the sovereignty clause in Dublin III or Council Directive 2001/55 / EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons.

⁴⁰ Spanish Supreme Court, STS 2546/2018, 9 July 2018 (see Moya, D. (2018) Are National Governments Liable if They Miss Their Relocation Quota of Refugees?. *VerfBlog*, <https://verfassungsblog.de/are-national-governments-liable-if-they-miss-their-relocation-quota-of-refugees/>).

⁴¹ Art. TEU 78.3 TFEU.

⁴² See Paragraph 15 of the Relocation Decision 2015/1523 and Article 4.5 of the Relocation Decision 2015/1601.

⁴³ § 17.

⁴⁴ *Ib.*

anticipated above, the Court stands for the antagonism, instead of the integration, between «external restriction of sovereignty» and «internal sovereignty», which seems to recall a pre-constitutional conception of States' sovereignty.⁴⁵ In the Hungarian case, it allowed the Court to support a weak interpretation of the “safe third country” criterion, according to which a un rebuttable presumption of “safety” is not merely derivable from the official qualification as “safe” of a third State, in absence of a concrete assessment based on updated, reliable and comprehensive facts.⁴⁶ In this case, the balance between spaces for and limits to sovereignty has found a further specification at the international level, following the judgment in which the ECtHR found Hungary in violation of art. 3 ECHR for the breach of the duty to carry out an assessment of the existence of a real risk of inhuman and degrading treatment in a chain-refoulement situation to Serbia when information about such a risk is ascertainable from a wide number of sources.⁴⁷

In the referred judgment, the ECtHR acknowledged States – in the concrete case, Hungary – «the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens»; at the same time, according to the Court a right to political asylum cannot be derived neither from the Convention nor Protocols.⁴⁸ Notwithstanding, the ECtHR must assess whether the concrete exercise of States' prerogatives have been exercised in compliance with the rights recognised under the Convention. In the case of Hungary, Court assessed whether effective guarantees were provided for protecting applicants against arbitrary refoulement, be it direct or indirect, to the country from which they fled, according to art. 3 ECHR.⁴⁹ ECtHR's approach confirms that the key-factor is not the existence, but rather the concrete exercise, of States' sovereign powers and their compatibility with international obligations in the field of asylum law: thus, it becomes a matter of mutual integration instead of exclusion between States' prerogatives and migrants' rights.

It is worth coming to a preliminary conclusion. The interplay between state sovereignties and European institutions must be considered physiological within the EU, but it can produce conflicting outcomes: a greater integration or, as it is happening in the field of asylum law, the strengthening of intergovernmental logics.

EU law and the European judicial system can play a pivotal role in boosting a more solidarity and rights-based approach, as we will see in the next paragraph. It may also contribute to avoid what has been predicted by A.G. Bot in its Conclusions to the CJEU's relocation case: the risk that the explicit resistance (Hungary, the Republic of Slovakia, but also Czech Republic and Poland) and the concrete non-fulfilment (see the Spanish case above) of Member States' duties «may give the impression that, behind what is by common consent called the ‘2015 migration crisis’, another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project».⁵⁰

5 The role of the CJEU and national judges in managing States' sovereigntist arguments: From antagonism to compatibility between European integration and national sovereignties

The acknowledgment of a wide space for States' sovereignties represents a constitutive element of the building of a common European asylum system. Dublin III Regulation and Schengen are all

⁴⁵ See *supra* para. 1.

⁴⁶ ECtHR, *Ilias and Ahmed v Hungary*, IV Session, 14 March 2017. Binetti Armstrong, A., 2019. Chutes and Ladders: Non refoulement and the Sisyphean Challenge of Seeking Asylum in Hungary. *Columbia Human Rights Law Review* 50(2), pp. 95 ff. The Grand Chamber recently confirmed the violation of art. 3 ECHR in the referred case (21 November 2019).

⁴⁷ § 118.

⁴⁸ § 112.

⁴⁹ § 113.

⁵⁰ Advocate General Bot's Opinion in Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, 26 July 2017, § 24.

based on Member States' supremacy. They retained «the right to unilaterally re-introduce border controls and to return asylum seekers to the first country of entry in order to protect an 'essential aspect of sovereignty', i.e. control over frontiers».⁵¹ Accordingly, both the principle of mutual trust, which is the legal basis of the entire Dublin system, and that of solidarity, conceived as an exceptional tool to share among Member States the burden of asylum seekers reception,⁵² are interpreted in the light of a common exclusionary logic. Thus, mutual trust becomes a selective tool to limit responsibility rather than to share it.⁵³ Solidarity, which could contribute to limit the former, is then intended mainly as state-centric tool,⁵⁴ thus leaving «little, if any space for the application of the principle of solidarity beyond EU citizens or those 'within' the EU and its extension to third-country nationals or those on the outside».⁵⁵ If interpreted according to one of the main features of constitutionalism – personalism – this approach does not acknowledge adequate space for the protection of individuals' needs: courts, both European and national, can play a key-role in «developing the concepts of solidarity and trust from the perspective of the asylum seeker and not primarily of the state».⁵⁶ A sovereigntist conception of States' prerogatives inevitably goes against this outcome. By referring to legal and political sustainability of sovereigntist rhetoric as a parameter, it is possible to detect an: a) 'enshrined', b) 'integrated/embraced' and c) 'untenable' sovereignty's discourse within the EU law.

Within the Dublin system, the identification of the country of first entry as a general criterion for the distribution of the applications for international protection undoubtedly belongs to the first category (*enshrined* sovereignty). Same is true for the exception envisaged by art. 3, second paragraph, of the Dublin Regulation, the *cd.* sovereignty clause.⁵⁷ As widely known, the implementation of this clause does not automatically entail the duty to take care of the asylum request for Member State in which the applicant is located. Rather, it is intended as 'last resource' measure, once it is not possible to identify a competent third Member State by applying all other criteria set for by Dublin Regulation. Thus, national sovereignty is the rule, while solidarity represents merely the exception. The effective implementation of the solidarity principle depends on the coincident will of the State concerned.

The CJEU proposed a more flexible interpretation of art. 3.2 Dublin Regulation, according to which the criterion of the existence of «systemic flaws in the asylum procedure and in the reception conditions» must apply also when concerns related to asylum seekers' health arise. In *C. K. v Slovenia*,⁵⁸ the Court has held that there is a duty to assess in practice the existence of the risk of violation of rights guaranteed by the Charter and the duty to refuse the transfer if this risk also occurs in cases other than systemic deficiencies. In fact, the Court has recognized that a real risk of inhuman or degrading treatment can also occur when the transfer as such, in light of the health conditions of the applicant, may represent a source of risk pursuant to art. 4 of the Charter of Fundamental Rights

⁵¹ Jabko, N. and Luhman, M. (2019) Reconfiguring sovereignty: crisis, politicization, and European integration. *Journal of European Public Policy* 26(7), p. 1047.

⁵² Mitsilegas, V. Solidarity and Trust in the Common European Asylum System, p. 186.

⁵³ Art. 3 Dublin III; see Costello, C. (2012) Dublin-case NS/ME: Finally, an end to blind trust across the EU?. *A&MR* 2, pp. 83-92.

⁵⁴ Mitsilegas, V. Solidarity and Trust in the Common European Asylum System, p. 187.

⁵⁵ Ibidem.

⁵⁶ Ivi, 199.

⁵⁷ According to which «where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible». Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

⁵⁸ *C. K. and Others v Slovenia*, C-578/16, 16 February 2017; see Imanovic, S. and Muir, E. (2017) The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?. *European Papers* 2, pp. 719-728.

of the European Union,⁵⁹ regardless of the quality of the reception system as a whole. Although it is necessary to adopt a strong presumption of compatibility of the transfer conditions with European standards (in light of the principle of mutual trust), States have a duty to assess the risk in the specific case, remaining with the applicant to provide «objective evidence».⁶⁰ For this purpose, it is not sufficient to merely assess consequences connected to the physical transfer of the person. National authorities must also consider «all the significant and permanent consequences that might arise from the transfer».⁶¹ In case of risk, when it is not possible to adopt precautions aimed at eliminating it, the State has the duty to suspend the transfer if health conditions do not allow it.

Under those circumstances, the State does not have the duty to activate the discretionary clause pursuant to art. 17.1 of Dublin Regulation.⁶² This is coherent with the CJEU case-law, according to which the activation of the discretionary clause is not subject to any particular condition and, in principle, it is for each Member State to determine the circumstances in which it wishes to use that option. In order to clarify the absolute nature of this principle, it is worth stressing that not even considerations relating to the best interests of the child shall oblige a Member State to activate the clause and examine itself an application for which it is not responsible.⁶³

This interpretation may contribute to the harmonisation between sovereignties and solidarity, on the one hand, and to the strengthening of both rights-centred discourse⁶⁴ and the idea of a European sovereignty, on the other hand.⁶⁵.

Cases of *integrated/embraced* sovereignty occur when solidarity measures are intended as the rule and the free exercise of national sovereignty becomes the exception. In this case, European measures limit the exercise of sovereign powers of Member States, albeit in exceptional cases and for a limited period of time as in the case of relocation. However, States' instances are not completely disregarded. Rather, they are integrated in the regulatory structure by means of clauses aimed to relax or suspend States' duties. As already mentioned, decisions on relocation totally fall within this category: the rule becomes the duty to share the burden, according to article 80 TFEU; the exception is limitation of such duty which can be activated only under exceptional and well-grounded circumstances linked to national security and public order. Under this structure, any States' initiative aimed at hindering or avoiding its effective implementation outside the established cases, must be considered in violation of EU law, even when adopted with the aim of protecting well-routed state interests, such as national security and borders control; and even more so when States recall national interests barely compatible with the core values of European rule of law (art. 2 TEU), such as the will to preserve ethnic homogeneity of their population that is different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory.⁶⁶

These last cases fall within the category of *untenable* sovereignty, which is expression of a sovereigntist rhetoric (i.e. the use of concepts like ethnic or cultural homogeneity of a population) and aims to avoid solidarity duties by imposing a pre-constitutional conception of State's prerogatives.

The effective implementation of a common European asylum system hangs on the ability of European institutions to resist to and react against such national policies. Advocate General

⁵⁹ § 73.

⁶⁰ § 75.

⁶¹ § 76.

⁶² § 85-86.

⁶³ CJEU, C-661/17, M.A. S.A. and A.Z v International Protection Appeals Tribunal and Others, 23 January 2019, § 71. Notwithstanding, when a State freely decides to take charge of the application, it must decide in light of the presumption that it is «in the best interest of the child to consider his situation as inseparable from that of his parents» (§ 90).

⁶⁴ Rizcallah, C. (2017) The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection. *EU Law Analysis*, 20 February 2017 (<http://eulawanalysis.blogspot.co.uk/2017/02/the-dublin-system-ecj-squares-circle.html>).

⁶⁵ Vitiello, D. (2018) The Dublin System and Beyond: Which Way Out of the Stalemate?. *Diritti umani e diritto internazionale* 3, p. 478.

⁶⁶ Hungary and the Republic of Slovakia c. Council, § 302.

Sharpston⁶⁷ has recently confirmed that the interplay between sovereign instances – i.e. internal security and order pursuant to art. 72 TFEU – and European initiatives – relocation mechanism pursuant to Articles 78.2 and 80 TFEU – must not be understood as an overwhelming conflict (art. 72 TFUE as «conflict of laws rule») but more properly as an essential coexistence (art. 72 TFUE as «rule of co-existence rule»).⁶⁸ Therefore, competence to act in the specified area remains with the Member State; nevertheless, actions must respect the overarching principles that the Member State signed up to when it became a Member State and any relevant rules contained in the Treaties or in EU secondary legislation⁶⁹. Accordingly, not even national security reasons can give States «carte blanche to disapply a valid measure of EU secondary law with which they happen not to be in perfect agreement».⁷⁰ It cannot happen even invoking one of the mantra of sovereigntist rhetoric – the deference owed to national identities ex art. 4 TFEU – in order to ensure social and cultural cohesion, as well as to avoid potential ethnic and religious conflicts.⁷¹

If cases of *untenable* sovereignty represent a pathological drift, those belonging to *entrenched* and *integrated/embraced* sovereignty must be intended as physiological. National judges can make the recalled rule-exception dynamic more flexible and open to consider interests other than those typically connected with State's sovereignty, such as the effective exercise of solidarity among Member States and protection of migrants' rights (solidarity clause, humanitarian visas, non-refoulement).

It is worth recalling the consolidated trend among national courts to directly implementing those solidarity-based and rights-oriented measures settled at the European level. Accordingly, States' prerogatives may find expression not only through a political, but also judicial channel, according to a constitutional idea of sovereignty. All those cases in which national judges decide to suspend Dublin transfers in order to avoid concrete and serious risk for applicants' rights due to systemic deficiencies, refoulement (also indirect) and other risks which may entail the violation of art. 4 CFREU (ex 3.2 Dublin III Regulation) are consistent with this approach.⁷² If former cases represent the results of the implementation of standards progressively settled by the CJEU case-law,⁷³ cases in which national judges do not follow CJEU's precedents can also be traced back to a constitutional-oriented exercise of national sovereignty by courts. On that regard, CJEU excluded the existence of a duty for Member States to issue humanitarian visas ex art. 25 Visa Code to people in need of protection, even when families with minors are involved.⁷⁴ Notwithstanding, the Tribunal of Rome (Italy⁷⁵) ordered the Ministry of Foreign Affairs to issue a humanitarian visa for an unaccompanied minor in Libya on the ground of art. 25 Visa Code, in the light of: the high level of risk in Libya, the minor's need for urgent healthcare and the impossibility to access medical assistance in Libya or in his country of origin. Other cases of direct implementation of EU standard are represented by those judgments in which national courts ordered competent authorities to effectively register asylum applications that had not

⁶⁷ Opinion to Joined Cases C-715/18, C-718/18 and C-719/18 (following an infringement procedure adopted by the Commission against Poland, Hungary and the Czech Republic for failure to implement of decisions on relocation), delivered on 31 October 2019.

⁶⁸ § 212.

⁶⁹ *Ib.*

⁷⁰ § 221.

⁷¹ § 224.

⁷² See European Council on Refugees and Exiles (ECRE), *To Dublin or not to Dublin*, Policy note, 16, 2018, where it is stressed that «Courts are usually prepared to scrutinise Dublin procedures and halt dangerous transfers, provided that asylum seekers are able to effectively access a remedy. Yet, litigation is a reactive or remedial measure. It is not an adequate substitute for sound and rights-compliant policy from the start» (4). More recently, see also Asylum Information Database (AIDA), *The implementation of the Dublin III Regulation in 2018*, March 2019, 17 ff.

⁷³ Besides *C. K. V Slovenia*, see also *Ibrahim v Germany* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, 19 March 2019) and *Jawo v Germany* (Case C-163/17, 19 March 2019).

⁷⁴ CJEU, *X and X v Belgium*, case C-638/16PPU, 7 March 2017; see Morgades-Gil, S. (2017) *Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power?*, *European Papers* 2, pp. 1005-1016.

⁷⁵ Tribunal of Rome, 21 February 2019. An outline of the judgment is available in English at: <https://www.asgi.it/wp-content/uploads/2019/05/Ordinary-Court-of-Rome-presentation.pdf>.

been previously registered at the time of the request of international protection, due to the suspension of Schengen⁷⁶ or due to the enactment of push back policies at the border.⁷⁷

6 Concluding remarks

Sovereignty represents a conceptual and factual bulwark to the full implementation of a common European migration policy. It is conceptual because the fundamental setting of EU migration law is designed after the idea that sovereignty cannot be questioned without harming states' internal power to decide over their own affairs. It is factual because states continue to be reluctant towards any attempt to transfer more powers to EU institutions or even to agree on mechanisms designed to effectively sharing responsibility to receive migrants in their territory. The intergovernmental agreement signed in Malta exemplifies it as the joint declaration largely puts in words what states have been doing since the end of the emergency measures elaborated by the EU (i.e. the relocation mechanism).

Against this backdrop, the shift between a sovereignty-based paradigm and a sovereignist narrative justifying anti-EU claims is easily achieved. Indeed, any argument about bringing the final decision on immigrants at the domestic level is consistent with the existing framework of EU law on immigration. More decisively, such a narrative is consistent with the direction that EU policy is taking, even if sovereignist parties seemed to have been defeated at the European elections.

For these reasons, it is necessary to overturn, or at least re-equalise, the priority currently acknowledged to the sovereignty paradigm, which is exemplified by the criterion of the country of first arrival. At the same time, the principle of solidarity needs to be implemented in a non-emergency way. It means that solidarity must be interpreted not simply in functionalist terms, as it is still the case if one considers the prevalent emergency and security paradigms dominating borders control operations as well as burden sharing strategies. On the contrary, the principle of solidarity must be understood as an integrationist tool, which is designed to strengthen political cooperation with a view to building a real common immigration strategy and policy.

From such a viewpoint, it is worth recalling that «any decision regarding the future structure of the EU asylum system should be informed by the fact that a reform of the Dublin III Regulation is not only a practical matter but also a constitutional and regulatory one».⁷⁸ In other words, addressing the issues surrounding the functioning of the Dublin system necessary implies to face the constitutional dimension of the European integration project.

In the absence of a political way out, i.e. the reform of Dublin and/or a rethinking of borders control policy, the sovereignist narrative and its anti-EU implications may remain at large in domestic political communities as well as in the European civil society.

⁷⁶ The case of the French-Italian border is especially relevant: see *ex plurimis*, Mme Salam & M. Daniel v préfet des Alpes-Maritimes, Administrative Court of Nice, 2017, No. 1701211; M. M. H. Association Nationale D'Assistance et al., Administrative Court of Nice, 22 January 2018, No. 1800195 (source AIDA: <https://www.asylumlawdatabase.eu/en/case-law/france-nice-administrative-tribunal-23-february-2018-1800714#content>).

⁷⁷ An overview of the European context is provided by Parliamentary Assembly of the Council of Europe, Pushback policies and practice in Council of Europe member States, Committee on Migration, Refugees and Displaced Persons Rapporteur T. Strik, Report, 8 June 2019; European Agency Support Office (EASO), EASO Annual Report on the Situation of Asylum in the European Union, June 2019, 112.

⁷⁸ Küçük, E. (2016) The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?. *European Law Journal*, 22(4), p. 468.