

Managing immigration in the European Union between nationalist egoism and cosmopolitan temptations[♦]

by *Graziella Romeo*

Abstract: La gestione dell'immigrazione di massa nell'Unione europea tra egoismi nazionalisti e tentazioni cosmopolitiche – The article aims at arguing that the EU mass migration policy is largely built on a national sovereignty-based paradigm. The central claim is that the EU has not taken advantages from the cosmopolitan theories that contributed to the development of the EU as transnational political project. To develop the argument, the article is divided into two parts with the first part (para. 2) providing a theoretical framework on the opposing views of the sovereignty-based model of managing migration and the cosmopolitan one. The second part (paras 3 and 4) is designed to put to the test the regulatory framework of the EU immigration policy in light of the cosmopolitan approach. Consequently, the article focuses on the most challenging issues raised by the definition of supranational rules designed to assign responsibilities among States on the management of mass migration.

Keywords: Immigration; European Union Common Asylum System; Nationalism; Cosmopolitanism; Fundamental Rights.

1685

1. Introduction

The article aims at arguing that the EU mass migration policy is largely built on a national sovereignty-based paradigm. The central claim is that the EU has not taken advantages from the cosmopolitan theories, which contributed to the development of the EU as transnational political project, as far as immigration policy is concerned.

To develop the argument, the article is divided into two parts with the first part (para. 2) providing a theoretical framework on the opposing points of view of the sovereignty-based model of managing migration and the cosmopolitan one. The second part (paras 3 and 4) is designed to put to the test the regulatory framework of the EU immigration policy in light of the cosmopolitan approach. Consequently, this part focuses on the most challenging issues raised by the definition of supranational rules that provide for the sharing of responsibilities to manage mass migration among States.

Ultimately, the article shows that immigration is a subject matter in which sovereignty continues to be the essential criterion for allocating powers between

[♦] The essay reproduces a speech to the conference “Constitutional Challenges in Hungary and Italy”, Budapest 2 December 2016 and it is updated to March 2017.

the EU and Member States and in which solidarity links between Member States are weak. It is then argued that a transnational polity needs to embrace a cosmopolitan approach as far as mass migration is concerned.

2. The national sovereignty-based paradigm and the cosmopolitan alternative

A national sovereignty-based paradigm is used as justification for controlling borders and deciding upon foreigners' admittance in the territory of the State. The national sovereignty-based paradigm is grounded on the primacy of national sovereignty and generally coupled with the myth of the ethnic uniformity of the citizenry.

As it has been argued by Luca Baccelli, "even Aristotle considered the ethnic definition of citizenship to be 'popular and rough'".¹ And indeed all arguments claiming that citizenship should be founded on bonds of a genealogical or biological nature, which are logical premises for xenophobic or racist policies, have easily been dismissed on a theoretical level.²

However, such a paradigm has some deeper theoretical foundations in political philosophy. One can name the Communitarians. The positions within this academic literature differ in several respects, above all as regards the idea of community. Nevertheless, all communitarian theories may be synthesized by the rejection of rights theories founded on methodological individualism, namely on an atomistic conception of the individual agent, who interacts with the world irrespective of any reference to specific historical and social contexts. Whilst not generally sharing rigidly genealogical visions, Communitarians distinguish citizens and foreigners in light of the idea that only citizens belong to the same historical "community of destiny"³ or to a specific form of political organisation that represents the constitutive element of the identity of its citizens.⁴

Interpreting the citizen as a member of a particular nation that shares the same ethos makes impossible to pursue an 'open border' policy: as a matter of facts, immigrants alter the cultural, historical and traditional links between the individual and the State. Thus, communitarians address the question of immigration by invoking identity values as a defense against dynamics of "contamination" of globalised societies. The boundary for exclusion is defined by

¹ L. Baccelli, *Cittadinanza e appartenenza*, in D. Zolo (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari, 1994 155. Reference is made to Aristotele, *Politica*, in *Opere*, Vol. III. R. Laurenti (ed.). Roma-Bari, 1993, 72.

² R. Aron, *Is Multinational Citizenship Possible*, 41 *Social Research* 638-656 (1974). See also Z. Bauman, *The Fate of Humanity in the Post-Trinitarian World*, 1 *Journal of Human Rights*, 283, 285 (2002).

³ Community of destiny is a term that appears many times in Habermas's studies. He used it to refer to a particular understanding of nationalism founding the need that bases the bond between fellow countrymen on the sharing of same values and ethnicity: J. Habermas, *Die Einbeziehung der Anderen. Studien zur politischen Theorie*, Frankfurt, 1999. For a critical perspective on this concept, see J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge (Mass), 1996.

⁴ A. Etzioni, *Communitarianism*, in M.T. Gibbons et al. (eds), *The Encyclopedia of Political Thought*, Hoboken (NJ), 2014, 620.

the idea of a homeland with a common identity. The right to limit entry into the country then assures the polity's boundary in order to preserve those elements of identity that classify membership to the community.⁵ Scholars belonging to this cultural tradition believe that the rediscovery of cultural identities as well as the valorisation of the sense of belonging to ethnic communities play the predominant role of preserving the community itself. An additional (and somehow) coherent feature of the communitarian theory is the intent of resisting the centrifugal forces that characterise contemporary political communities and foster supranational integration.

Cosmopolitanism is the alternative account. Virtually under any cosmopolitan theory, the root of social inequalities lies in the inability for a very large number of citizens from economically disadvantaged countries to obtain protection for their fundamental rights. According to cosmopolitan theorists, interpreting human rights as citizenship rights means denying universalism and generating a "great apartheid that excludes the vast majority of humankind from fundamental guarantees".⁶ In other words, commentators who herald the arrival of a really cosmopolitan conception of rights tend to identify citizenship with the last example of a privileged status, that is a factor of exclusion and inequality, rather than a driver of emancipation and equality.⁷

However, not every cosmopolitan theorist thinks that the concept citizenship should be abandoned. Some scholars rather argue that such a concept should be defined starting from the values of human dignity and solidarity, as applicable on a universal scale.

Sheila Benhabib promotes a concept of citizenship as 'ongoing process' of construction of cohabitation.⁸ Authors like Benhabib disregard historical and cultural bonds of belonging: the basic assumption is that the circuit of belonging is not based on pre-existing cultural and ethic givens,⁹ but is permanently reasserted on the basis of the actual participation in a socio-political organisation rather than on the sharing of a collective identity to be preserved and

⁵ M. Walzer, *Spheres of Justice*, New York, 1983, 42. He justifies the regularisation of immigration with the need to preserve the cultural identity of the host society. Indeed, the author asserts that in cases involving workers accepted into the country and who are lawfully resident, the rules requiring their exclusion from citizenship should be tempered in order to take into account distributive implications (at 60).

⁶ L. Ferrajoli, *Dai diritti del cittadino ai diritti della persona*, in D. Zolo (ed). *La cittadinanza*, supra note 1, 289. See also É. Balibar, *Per Althusser*, Italian transl. Roma, 1991, 7.

⁷ K.A. Appiah, *Global Citizenship*, 75 *Fordham Law Review* 2375-2392 (2006).

⁸ S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge (Mass), 2006. The idea of citizenship as an ongoing process for the construction of social cohabitation owes a debt to the theory of communicative democracy formulated by Habermas in: J. Habermas, *Discourse Ethics*, It. transl., Rome-Bari, 1983. With regard to the issue of cohabitation between different cultures, Kymilka proposes the multicultural model of citizenship, under which cultural identity is protected not as a function of the perpetuation of the group, but as a free individual choice: see W. Kymilka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, It. transl., Bologna, 1999.

⁹ H. Köchler, *Il concetto di nazione e la questione del nazionalismo. Lo «stato-nazione» tradizionale e una «comunità-stato» multiculturale*, in T. Bonazzi and M. Dunne (eds), *Cittadinanza e diritti nelle società multiculturali*, Bologna, 1994, 63. See also R.E. Goodin, *What Is So Special About Our Fellow Countryman?*, 98 *Ethics* 663 (1988).

perpetuated. This theory has the benefit of taking into account processes involving the erosion of state sovereignty and thus is sensitive to the reality of the existence of international declarations on human rights. The ‘ongoing process’ account considers the state community as open to dialogue with supranational and international bodies and institutions.¹⁰ As a consequence, contemporary citizenship is defined not only through democratic dialectics but also through penetration by supranational legal orders.

From this viewpoint, the entry of immigrants does not alter the political community. In fact, migrants enrich the polity, in the long run, and change its shape and characteristics.¹¹

The risk, however, is one of distorting the concept of citizenship or transforming its content to such an extent as to render the use of the category radically inappropriate.¹² To overcome an objection of such a kind, Italian constitutional literature has pursued the path of research into cosmopolitanism, identifying its basis in the very text of the Constitution, namely Article 11. The constitutional provision is construed by resorting “to a substantive criterion for interpreting norms that refers to a system of ‘culture’ and to a socially elaborated ‘meaning’”.¹³ Pursuant to Article 11 of the Italian Constitution, the State undertakes to contribute “through a national effort and collaboration with other countries to satisfy the right of individuals as such to work, education and social assistance”.¹⁴ From this point of view, “the people would not necessarily be a uniform element, but would end up being comprised of various layers of individuals, all endowed with equal basis legal status and who then differentiate themselves through other relations”.¹⁵ The boundary of national community is thus permeable, provided that a connection is established between the foreigner and the accepting State.

The attempt to construe a “new” meaning for the concept of citizenship, totally detached from membership to a particular national community, has also been made by political philosophers adhering to pure cosmopolitanism. According to such a literature, the political community around which bonds of belonging are developed is the global civil society. Within this context, rights must be recognised to citizens of the world transcending national borders. The bonds of belonging are dissolved into a more comprehensive synthesis, which must presuppose a “critical reappraisal of local identities”.¹⁶ As Dahrendorf has put it, the historical task of creating a civil society will be concluded only when

¹⁰ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge (Mass.), 1996.

¹¹ This is for example the position of W. Kymilka, *supra* note 8.

¹² L. Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 23 *Immigration and Nationality Law Review* 409 (2002) and Id., *Universal Citizenship and the Problem of Alienage*, 94 *Northwestern University Law Review* 963 (1999).

¹³ U. Allegretti, *Costituzione e diritti cosmopolitici*, in G. Gozzi (ed.), *Democrazia, diritti, costituzione*, Bologna, 1997, 174.

¹⁴ Id., 176.

¹⁵ Id., 176.

¹⁶ R. Dahrendorf, *The Modern Social Conflict*, New York, 1988, 57.

there are citizenship rights for all human beings.¹⁷

Authors, such as David Held and Bryan Turner,¹⁸ make the case for a genuine cosmopolitan citizenship by interpreting human rights as (global) citizenship rights which deserve a sort of heightened level of protection. Human rights are still conceptualised as claims that are recognised and protected in a socio-political community. Nevertheless, the socio-political community does not necessarily exclude those who are not formal citizens – the increasing interconnectedness of the world relationship as well as the spread of a global culture make the nation-state an unsuitable political framework for housing citizenship rights. The logic of solidarity should be contextualized in polities that are ‘contaminated’ by multiculturalism and globalisation. According to Turner, the globalisation and the “consciousness of the possibility of ‘one world’” may be able to create the sociological conditions for the decline of anthropological relativism and scepticism about a common ontology, thus creating the basis for authentic human rights even in the absence of a common legal tradition.¹⁹

Other authors employ human rights law to support the gradual emptying of the concept of citizenship as an effect directly attributable to the on-going expansion of non-citizens’ rights. This is an alternative viewpoint so far it tends to qualify the overcoming of the concept of citizenship as the result of the development of a human rights framework, especially while not exclusively within supranational legal orders.²⁰

Supporters of the cosmopolitan nature of rights do not necessarily preconceive the establishment of a global legal order. On the contrary, they rely on a “global civil society” in order to express a sense of belonging to the global community, which may exist irrespective of the establishment of one single legal/political entity on a world scale.

¹⁷ Id., 58.

¹⁸ D. Held, *Citizenship and Autonomy. Political Theory and the Modern State*. Stanford (Cal.), 1989, *passim*. B.S. Turner, *Outline of a Theory of Human Rights*, 27 *Sociology* 489, 492 (1992) and Id., *Contemporary Problems in the Theory of Citizenship. Citizenship and Social Theory*, London, 1993, 14.

¹⁹ B.S. Turner, *Outline of a Theory of Human Rights*, *supra* note 18, 499.

²⁰ A. Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *Global Constitutionalism* 53 (2012). An alternative way of dealing with the question of the universal basis for rights is offered by those theories proposing models of translational distributive justice. Those scholars consider that conceptualising solidarity from a global perspective imposes on the economically most advanced states the responsibility to act through distributive policies on a global scale in order to ensure protection for the individual legal rights recognised as universal. H. Shue, *The Burdens of Justice*, *The Journal of Philosophy* 603 (1983). The argument recalls Rawls’ theory of justice where the philosopher acknowledges a duty of assistance for richer societies in favour of the poorest. However, in this case the achievement of global justice is incorporated into the more general theory of peace between peoples and is therefore conditional on the objective of guaranteeing the international order; see J. Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”*, Cambridge (Mass), 1999. It must be emphasised that these arguments have also been put forward by philosophers who, starting from Rawlsian principles of justice, link up the problem of global justice with that of weak subjects in contemporary States and, in doing so, presuppose an ethic of care that is sensitive to all possible manifestations of social justice; see M.C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, 2006, 30 and 230.

The approach that prefers the idea of a world state as a reference paradigm is different in both (some) premises and consequences. Such an approach may be named institutional cosmopolitanism or globalism. This school of thought contemplates the establishment of a single world legal order, which establishes itself as the political institution for global governance. The global society is not only able to express a common belonging, but translates it into the establishment of a political and legal subject that sustains the fate of the entire world. Within this context, the guarantee of rights would be assured by the existence of a global political and legal apparatus. National citizenships would dissolve into world citizenship and, consequently, it would no longer make any sense to talk about non-citizens and migrants' rights.

In sum, cosmopolitan approaches offer an alternative to the insufficient level of protection that human rights law afford to immigrants. As a matter of fact, human rights imperatives have limited scope when it comes to migration. Human rights indeed cover some situations such as the arrival of migrants to the territory of a State or the condition of migrants' holding, while the final decision on their admissibility is pending. What human rights norms cannot guarantee is the right to enter the country or the right to have the status of refugee granted. On the contrary, human rights confer immigrants both the right not to be sent back to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion²¹ and the right to have the asylum application examined.²²

In any case, far from isolating mass migration from human rights law, the 'conceptual autonomy' of the issues surrounding non-citizens' rights makes even more important to understand the legal questions raised by the migration phenomenon from the perspective of transnational studies.

3. Cosmopolitanism and transnational law

Cosmopolitan theories have been used, at times, to describe transnational legal systems. This occurs first of all with authors maintaining that citizenship is progressively transforming from a status built around the statist paradigm to a status qualifying a transnational membership.²³ Thus, far from representing the strained and unnatural outcome to legal globalisation, the overcoming of a state-centric conceptualisation of rights is in reality the result of the constitutional component of democracy. Such an argument is based on the original limitation on state sovereignty, which occurred when the democratic constitutional order recognised human rights as the ultimate foundation for its legitimacy. In this way, it is back to constitutional democracy itself that the overcoming of the "nationalisation" of fundamental rights is to be traced.

²¹ This is the content of the principle of *non-refoulement*, which is incorporated in Art. 33 of the Refugee Convention relating to the status of refugees of 1951.

²² J. Allain, *The jus cogens nature of non-refoulement*, 13 *International Journal of Refugee Law* 533 (2001).

²³ E. Pariotti, *La giustizia oltre lo Stato: forme e problemi*, Torino, 2004, 43.

The normative side of the argument is that supranational integration actually requires the transformation of citizenship and makes the case for a global (or better transnational) civil society.²⁴

In such a scenario, the concept of sovereignty is gradually abandoned in favour of the principle of subsidiarity,²⁵ which represents an alternative criterion to allocate powers. In highly integrated legal systems such as the EU, the principle of subsidiarity justifies the exercise of power by supranational entities on behalf of Member States. If the latter fail to properly address the citizenry's needs, the supranational institutions step in, without questioning the State sovereignty. From this viewpoint, sovereignty is replaced by subsidiarity, which provides complementary justification for the exercise of public authority.

The crisis of sovereignty is also coupled by the increasing importance of 'public reason',²⁶ a necessary, rational and publicly disputable criterion providing legitimisation for decisions taken by public authorities. In the context of transnational legal orders, the concept of 'public reason' involves multiple actors (legislators, courts, civil society) that participate in a public discourse enterprise.

The principle of subsidiarity, and to some extent the theory of 'public reason', provides a framework that is alternative to the state paradigm insofar the exercise of power does not correspond to an act of state sovereignty. Contemporary studies on supranational integration tend to replace the principle of sovereignty with the principle of subsidiarity to make sense of the allocation of powers in context such as the EU.²⁷

This entire conceptual framework though is not satisfactory when it comes to the issue of migration in the EU context. In fact this conceptual frame proves to be weak.

First of all, the managing of mass migration is still grounded on a pure exercise of state sovereign power. Member States keep the 'last word' when it comes to the decision on admission of a third country national into their territory. Moreover, the EU has limited powers, which can be essentially synthesized in harmonizing the national legislation and ensuring a minimum level of solidarity in managing the massive influx of immigrants.

4. Managing mass migration in Europe: the complicate interplay between a sovereignty-based model and the exercise of supranational powers

In the original frame of the (not yet existing) Union, the status of non-EU nationals was put outside the competences listed in the founding Treaties. The

²⁴ R. Dahrendorf, *The Modern Social Conflict*, *supra* note 16, 56.

²⁵ M. Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in L. Dunoff and J.P. Trachtman (eds), *Ruling the world? Constitutionalism, International Law and Global Governance*, Cambridge (Mass.), 2009, 219.

²⁶ W. Sadurski, *Defending Public Reason*, *Sydney Law School Research Paper*, No. 14/31, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2410718, at 3.

²⁷ M. Kumm, *The Cosmopolitan Turn in Constitutionalism*, *supra* note 25, at 220.

choice matched the initial essentially economic aims of the European Community.

Competences on asylum and immigration were first introduced with the Maastricht Treaty and then with Treaty of Amsterdam. There were some major limitations including the requirement of unanimity for voting on these subject-matters and the limitation on the possibility for domestic courts to refer matters to the European Court of Justice.²⁸ The Treaty of Lisbon changed the frame and expanded the power of the Union in the field of migration. Article 67 of the Treaty on the Functioning of the EU (hereafter: TFEU) states that the Union shall frame a common policy on asylum immigration and external border control, which is based on solidarity between Member States and fair towards third-country nationals. The legal bases for the adoption of secondary sources in this area are now Article 79 and 80 of TFEU.

Those primary sources coexist with the exclusive competence of Member States on public order and national security.²⁹ Immigration raises both security and public order issues so the Member States' exclusive competence somehow clashes with the need of a truly coordinated approach on mass migration. The regulation of immigration is still characterized by high fragmentation, mainly given the uncertain allocation of some competencies between the Union and Member States, especially in the area of border control. Moreover, immigration policy still largely relies on international agreements between the EU and other international partners concerning the relocation of migrants.

The Commission's 2015 communication on the European Agenda on Migration³⁰ seems to take a more holistic approach to the issue of migration, insisting on the importance of relocation and shared responsibility among Member States as well as of borders control. Nevertheless, after two years, relocation and sharing responsibility are still among the major problems the EU is facing in managing mass migration. The reason is that the interplay between the domestic and the EU level proves to be complicated in light of the fragmentation that is still characterizing the immigration policy.

4.1. The EU legal framework on immigration

The European legal framework on immigration is articulated in a number of secondary sources. The Common Asylum System resulting from the combination of those acts strives for harmonizing the procedures to be followed in processing asylum requests, guaranteeing a minimum level of human rights and unifying the type and the scope of the qualifications that can be granted to

²⁸ More specifically, the Maastricht Treaty designated migration and asylum as “matters of common interest” (article K.1). The Amsterdam Treaty formally delegated powers over asylum and migration to the EU institutions, by inserting a new title IV on visas, asylum, immigration plus other policies related to the free movement of persons.

²⁹ Art. 4(2), Treaty on the European Union (TEU).

³⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

migrants in every Member States. After many revisions, the System brings the concepts of admissibility, responsibility and safety to the forefront of European asylum procedures by the introduction of an obligation on Member States to deem applications inadmissible only on the basis of ‘first country of asylum’ and ‘safe third country’ grounds.

The general rule is that the asylum requests will be examined in the country of first arrival, except that it is possible to identify a ‘first country of asylum’, – another country in which the applicant obtained the status of refugee or enjoyed sufficient protection, including benefiting from the application of the principle of *non-refoulement*.³¹

The Dublin Regulation³² established criteria and mechanisms for determining the Member State responsible for examine an asylum application lodged in one of the Member State by a third country national. The Regulation has been substantially amended in 2013 by the Dublin Regulation III,³³ in order to include the respect of Article 4 of the Charter of fundamental rights of the EU among the criteria justifying the transferal of migrants to a third country, which in turn needs to be assessed as “safe”.

A system of four directives addresses qualifications,³⁴ harmonization of asylum request procedures³⁵ and standards for the reception of asylum seekers and, more generally, applicants for international protection.³⁶

There are two major problems in the functioning of the System. The first is related to qualifications and will be addressed in the next subparagraph as it is linked to the more general issue of the interplay between domestic and EU law. The second is the transferal of the responsibility to process asylum requests and the relocation mechanisms.

All those sources include norms designed to enhance cooperation between Member States with a view to share responsibility in examining and accepting asylum requests. In order for a State to transfer an individual to another State’s responsibility, some kind of connection between the migrant and the third country is needed. Rules are dictated by national legislations so there is no clear definition of the sufficient connection that is required to be already established between the applicant and the third country.

Case law from both supranational and domestic courts operating in countries with longer experience in the application of the “safe third country” rule have clarified that an asylum seeker cannot be considered to have a

³¹ Art. 35 of the Directive no. 2013/32/EU, 26 June 2013.

³² Council Regulation no. 343/2003, 18 February 2003, Official Journal L 050 , 25/02/2003 P. 0001 - 0010.

³³ Parliament and Council Regulation no. 604/2013, 26 June 2013.

³⁴ Directive no. 2011/95/EU of the European Parliament and of the Council 13 December 2011.

³⁵ Directive no. 2013/32/EU of the European Parliament and of the Council 26 June 2013.

³⁶ Directive no. 2013/33/EU of the European Parliament and of the Council of 26 June 2013.

“sufficient connection” with a third country merely on the basis of transit or short stay.³⁷

In any case, Article 3, para. 2 of the Dublin Regulation III expressly allows a Member State to consider more than one option for the purpose of transferring the responsibility to process an asylum request. Article 3 clarifies that 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 EU, the determining Member State shall continue to examine the criteria for the transfer in order to establish whether another Member State can be designated as responsible.

The possibility to transfer the migrant to a safe third country outside the EU is allowed but subject to the rule set forth in the Directive regulating the harmonization of asylum requests procedures. More precisely, Article 38 of the aforementioned Directive compels Member States to consider the compatibility of the third country’s human rights standards with the ones required under international and EU law.

The concept of ‘safe third country’ is highly controversial as it is the centre of the relocation issue. A country can be designated as ‘safe third country’ if it fulfils four conditions relating to safety and asylum practices:

- a. life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion.
- b. the principle of *non-refoulement* in accordance with the Convention relating to the status of refugees of 1951 (hereinafter Refugee Convention) is respected.
- c. the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected.
- d. the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.

The applicant can challenge the designation of the third country either on the basis of the lack of sufficient connection or on humanitarian grounds, that is providing evidences that they may risk inhuman and degrading treatment if transferred in the designated country.

The concept of ‘safe third country’ cannot be applied ‘at the border’ for the purpose of an immediate refusal of the migrants because its application is bound

³⁷ See the European Court on Human Rights case law on the need for an assessment based on individual circumstances: ECtHR, *Hirsi Jamaa v. Italy*; *Georgia v. Russia (I)*, Appl. No. 13255/07, judgment of 3 July 2014; *Sharifi and Others v. Italy and Greece*, Appl. No. 16643/09, judgment of 21 Oct. 2014; *Khlaifia and Others v. Italy*, Appl. No. 16483/12, judgment of 1 Sept. 2015.

to individual assessment and most importantly requires judicial control. In that sense, the relocation occurs months after the entry into the territory of the State and the placement into temporary holding camps, when the managing of mass migration is already in place in the State of first arrival.

In sum, the whole system is designed to manage migration by addressing the massive influx of individuals and by processing asylum requests at the same time in which a common policy on border control is still problematically realised.³⁸

Moreover, Member States have different level of attractiveness for migrants with some individuals trying to access a country just because it is on the way to their final destination. Sometimes, States have *de facto* eluded the system by encouraging secondary migration to more attractive counterparts. For example, States put at the forefront of migration influx have refused to identify irregular migrants before opening human corridors to the nearest countries, which in turn heightened controls at its borders.³⁹ From this viewpoint, the system encourages a sort of negative competition between Member States, who tend to skip their responsibility.

In order to address those issues, the European Migration Agenda introduced the 'hotspots approach' with a view to assist frontline States to identify, fingerprint and register incoming immigrants. The hotspots approach consists in the EU Agencies intervening in those States through Migration Management Support Teams, which rely on personnel and equipment made available by other Member States. The support includes the registration of asylum claims, the preparation of files and the relocation of claimants, while it excluded the reception of claimants and the processing of claims as well as the return of immigrants.

The support proved to be only partially effective; more specifically it proved to be essentially a way to better cope with the responsibility already established under the Dublin systems.

The Council then took another step, adopting two decisions establishing provisional measures for the benefit of Italy and Greece, the two frontline countries in the global immigration emergency. Both decisions approach the issue of mass migration through the relocation mechanism, which is designed to derogate from the Dublin Regulation until September 2017. Relocation is only applicable to immigrants who have lodged their applications for international

³⁸ M. Den Heijer, J. Rijpma, T. Spijkerboer, *Coercion, Prohibition, and Great Expectations: The Continuing Failure Of The Common European Asylum System*, 53 *Common Market Law Review* 607, 610 (2016). The new Regulation 2016/1624 of the Council and the Parliament, of 14 September 2016 established a European Border and Coast Guard Agency, with the task of coordinating borders control. The Agency employs Member States' personnel, but it has the important task of defining the strategy for an integrated management of patrol and intervention operations. Besides this effort to create a common strategy the system of borders control still prioritise national responsibility over an authentic European solidarity. See also P. De Bruicker, *Solidarity as a sovereignty-reducing penalty for failing to meet responsibility in the European Border and Coast Guard*, available at odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf.

³⁹ This was for example the case in Italy, with a human corridor opened towards Austria.

protection in Italy or in Greece and for whom those States would have otherwise been responsible pursuant to the Dublin Regulation.⁴⁰ The applicant has no right to choose the relocation State or to, as such, refuse relocation.

Empirical data demonstrate that the relocation is not effective mainly due to the criteria restricting the eligibility to the scheme firstly to persons ‘in clear need’ of protection and to persons coming from countries with a high percentage of success in asylum requests. Those criteria *de facto* compel frontline States to deal with the most difficult situations, such as those in which an extradition is most likely needed.⁴¹

4.2. The interplay between EU law and domestic law on immigration: the issue of human rights standard

The interplay between domestic law and EU Law is further complicated by the inconsistencies in human rights standards across the EU. The functioning of the Common Asylum System rests upon a strict cooperation between Member States on the assumption that they all guarantee the same level of protection of basic rights. The differences in human rights standards indeed have crucial consequences when it comes to the application of certain rules, including the “Safe Third Country” requirement. If a State fails to meet the requirement, the transferal of the individual to the State’s responsibility cannot be completed.

Recently the Italian Council of State delivered two major judgments declaring two other Member States unsafe countries for the purpose of the application of the Dublin Regulation and thus suspending transfers of asylum seekers in Hungary and Bulgaria. The Italian Council found the transferal to be in violation of Article 4 of the Charter of fundamental rights of the EU.

More specifically, with the first decision,⁴² the Italian administrative judges held that Hungary is unsafe because of three concurring factors. The first one was the border barrier, which was built on the borders shared with Croatia and Serbia to stop the migration influx. According to the Italian judicial authority, the fence clearly exemplifies the cultural and political climate and the existence of a strong sentiment against immigrants and refugees. The second factor is the practice of indefinite detention of asylum seekers, who may be requested to perform public utility work in order to ‘reimburse’ costs connected to assistance and shelter. Finally, the Council of State mentioned the infringements procedures that have been initiated by the European Commission against Hungary short after the passage of a new law amending the asylum procedures in order to heighten the requirements for the refugee status to be granted.⁴³

⁴⁰ See Art. 3, Council Dec. 2015/1523 (EU) of 14 September 2015 and

⁴¹ F. Maiani, *Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?*, in *EU Immigration and Asylum Law and Policy/Droit et Politique de l’Immigration et de l’Asile de l’UE*, available at eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/.

⁴² Council of State, dec. no. 4004 of 2016.

⁴³ The Commission delivered a press release to announce the starting of the infringement procedure on 10 December 2015. The press release is available at europa.eu/rapid/press-

In the second judgment,⁴⁴ the Council of State found Bulgaria to be unsafe relying on some proofs of the country's violation of human rights standards including the practice of *refoulement* of immigrants, who do not enjoy the guarantees prescribed by both EU law and other international instruments and *jus cogens* principles. An additional proof of violation was the material condition of asylum seekers, who live in overcrowded refugees camps or temporary holding centres,⁴⁵ with no medical assistance and under the constant threat of xenophobic attacks.⁴⁶

The Italian judgments have been followed by similar decisions issued by courts in Austria and Belgium, which temporarily suspended the transferal of migrants to Greece due to the poor condition of refugees' camps.⁴⁷

More generally, the Dublin system suffers persistent dysfunctions and the transferal rates, with some exceptions, are extremely low if compared to the number of procedures initiated in Member States pursuant to the Dublin regulation.⁴⁸ The operation of the system has been almost paradoxical at times, since relocation schemes with different aims run in parallel. As a consequence, countries put at the forefront of migration have received, under family reunification and relocation regulations, more immigrants than they had been able to transfer in safe third countries.

The lack of a comprehensive and coherent policy on migration has consequences on the functioning of the system, which rests upon the efforts of some countries, while at the same time producing phenomena of 'internal resistance' in others. These phenomena explain the political success of some extreme rights parties. Those political movements take advantages from the populist anti-immigrants, which in most cases became anti-European, sentiments.⁴⁹

release_IP-15-6228_en.htm.

⁴⁴ Council of State, dec. no. 3998 of 2016.

⁴⁵ Such as the Harmanli camp, which was supposed to shelter 450 individuals and currently host more than 1,000 migrants.

⁴⁶ A short English summary of the two judgments can be found at www.asylumineurope.org/news/28-02-2017/italy-council-state-suspends-transfers-hungary-and-bulgaria, last access: 28 March 2017.

⁴⁷ See the AIDA (Asylum Information Database) 2016 report, available at www.asylumineurope.org/news/16-03-2017/dublin-update-2016-no-change-deeply-dysfunctional-dublin-system, last access: 28 March 2017. The European Commission released a memorandum to recommend on the conditions for resuming Dublin transfers of asylum seekers to Greece, see Memo 16/4253 of 8 December 2016, available at europa.eu/rapid/press-release_MEMO-16-4253_en.htm, last access: 28 March 2017.

⁴⁸ Sweden has the highest transferral rate (43.2%), while Germany and Italy are among the countries with lowest transferral rates (respectively 7.1% and 0.4%): see AIDA, The Dublin system in 2016: Key figures from selected European countries, March 2017, available at www.asylumineurope.org/news/16-03-2017/dublin-update-2016-no-change-deeply-dysfunctional-dublin-system, last access: 28 March 2017.

⁴⁹ The European Commission reported that the European Barometer has revealed that EU citizens continue to see immigration and terrorism as the biggest challenges facing the EU: the data can be accessed at ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2137.

4.3. ... and theoretical and practical hurdles

The exercise of national sovereign power on admissions coexists with the European Union's responsibility to manage mass migration from Third Countries. This responsibility can be qualified as a responsibility *vis à vis* both the Member States, especially those at the forefront of the global emergency, and to some extent the international community.

Against this background, the weak political integration within the context of migration policy has a crucial consequence: the impossibility to find *Hohfeldian* correlatives, on the national-constitutional level, to some legal situations recognized under supranational law, in the very moment in which the two levels of governance need to find a legal (as well as a political) synthesis.⁵⁰

Two legal situations exemplify the dysfunctional interplay between the two levels of governance.

The first is the right to entry, which is essentially a domestic right as far as non-nationals are concerned. In fact, it is up to the States to decide on admission of foreigners. The right to entry is conceptualised as a human right only for nationals, who cannot be denied the right to return in the territory of the State whose nationality they possess. In the EU context, the right to entry of EU nationals in the territory of a Member State whose nationality they do not possess is conceptualised as 'freedom of circulation'. Accordingly, Member States refusing the admissions of EU nationals or limiting their right to entry act in violation of EU law – the legal and political integration of the European system determines the existence of a domestic correlative to the legal situation (the freedom to circulate) recognised under European law.

Things get more complicated concerning non-EU nationals, as there is neither European centralised procedure to decide on admission to the European territory, nor an authentically centralised system of borders control.

The only legal tool drawing near to a right to entry is the application of the *ius cogens* principle of *non-refoulement*, which at least protects migrants from being sent back, in case life threatening situations. Once a migrant manages to arrive at a Member State's border, there is no European legal instrument granting them the right to entry the territory of that State. Human rights law cannot fill the gaps left open by the flaws in the interplay between domestic and supranational law. The consequence is the lack of an adequate level of protections for migrants.

The second, and even more complex legal situation exemplifying the interplay between the national and supranational systems, is the right of asylum.⁵¹ First of all, EU law defines "asylum seekers" individuals that, in domestic jurisdictions, fall either into the category of asylum granted individuals or into the category of refugees. Indeed, in some European States, including

⁵⁰ Reference is made to Hohfeld's theory of legal correlatives according to which a right is a legally enforceable claim always assisted by a correlative duty: W.N. Hohfeld, *Fundamental conceptions as applied in legal reasoning and Other Legal Essays* (1923), W. Wheeler Cook (ed.), New Haven, 1964.

⁵¹ R. Boed, *The State of the Right of Asylum in International Law*, 5 *Duke Journal of Comparative and International Law*, 1, 3 (1994).

Italy⁵² and Germany,⁵³ the right of asylum and the right of refuge consist in two different legal situations, with only the first one being a constitutional right, generally encompassing protection from purely political prosecutions or restrictions of political freedoms. The (constitutional) right of asylum is then narrower in its scope than the (international) right of refuge.

The result is that the EU regulatory frame on asylum has so far expanded the application of the Refugee Convention, while leaving the States free to run their domestic asylum applications in parallel. However, both the Refugee Convention and the constitutional right of asylum do not cover some of the specific circumstances of contemporary mass migration, such as economic migration,⁵⁴ or migration prompted by a generalised climate of political tension, even if the Convention proved to be resilient in adapting to some of the new forms of migration because courts generally adopt an interpretation sufficiently broad to encompass them. In any case, the two legal instruments have been elaborated in a completely different context and were not designed to address the problems of mass migration.

The Common European Asylum System then lies on fragile grounds in the sense that it operates within the context of already existing international and constitutional norms, which are constantly proving to be in need of being reframed. The lack of a coherent immigration policy reflects itself on the need to rely on external sources (the Geneva Convention) even when the latter are clearly forced into adaptation to the new challenges of mass migration.

5. How to manage mass migration in a transnational polity?

Theories on cosmopolitanism propose moving beyond the pair citizenship/non-citizenship. From this viewpoint, those theories ‘unhinged’ the conceptual frame used in inquiries into the relationship between individuals and States and opened up the possibility to conceive transnational legal systems.

Cosmopolitan theories have deeply influenced the shaping of the European political community, at least from when the rights discourse penetrated into the reasoning of the European Court of Justice (ECJ). The ECJ strongly contributed to the creation of a genuine European citizenship, which does not depend on the individual’s ability to be an economic actor and thus to contribute or be part to the Union’s economic objectives.⁵⁵

⁵² See Art. 10, Italian Constitution. A. Cassese, *Art. 10*, in *Commentario della Costituzione. Principi fondamentali*, Bologna, 1975, 532.

⁵³ See Art. 16, Grundgesetz. B. Schmidt-Bleibtreu, *Art. 16a Asylrecht* in B. Schmidt-Bleibtreu, F. Klein (eds), *Kommentar zum Grundgesetz*, München, 1999, 428.

⁵⁴ M.J. Trebilcock, *The case for a liberal immigration policy* in W.F. Schwartz (ed.), *Justice in Immigration*, Cambridge, 1995, 219. Economic migration raises different problems of political theory, such as the compatibility of open border with classical free-trade theory which assumed that goods could often readily be traded across national borders but that the factors of production employed to produce those goods (land, capital, and labor) were fixed and immobile.

⁵⁵ See for example the ECJ *Martínez Sala v. Freistaat Bayern*, dec. 12 May 1998, C-85/96, in which the Court recognised social benefits also to economically inactive citizens. A different

Cosmopolitan theories, however, have not penetrated the European legal system in the field of migration policy, as sovereignty rhetoric remains a bulwark against undesired migrants.

The problem of managing mass migration with a holistic approach has arisen because States autonomously define their own polity, that is who is citizen and who is not. In that sense, the inability to express a single European *demos* translates into the inability to define the non-*demos*.

Against this background, the phenomenon of mass migration raises a question, which is at the same time methodological and substantive in nature – how should this phenomenon be managed within a transnational polity where there is a divergence between the final decision on admission and the supranational responsibility to face the emergency?

An effective policy on mass migration should consider, in the long run, reshaping the interplay between supranational and domestic law by transferring the final decision on admission at the supranational level. In the short run, the introduction of a mechanism of burden sharing among Member States based on incentives and sanctions with a view to foster cooperation and to reduce solipsistic closures, which in the end results in dangerous nationalisms. These mechanisms should prevent free riders and opportunistic behaviours and tighten the solidarity bonds between Member States.