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DOMESTIC ASYLUM PROCEDURES BETWEEN EU LAW AND POPULIST PARTIES' AGENDA: A GROWING CHALLENGE TO ASYLUM SEEKERS' HUMAN RIGHTS? THE CASES OF ITALY, SWEDEN AND THE UK

Supervisor: Prof.ssa SARA PENNICINO

Candidate: ELISA ENRIONE
Matriculation No. 1176241

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Contents

List of abbreviations

AIU	Asylum Intake Unit
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CNDA	Commissione Nazionale per il Diritto di Asilo
COI	Country of Origin Information
CPR	Centro di Permanenza per il Rimpatrio
CRRF	Comprehensive RefugeeResponse Framework
CSM	ConsiglioSuperioredellaMagistratura
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EMU	European Monetary Union
EU	European Union
FSM	Five Star Movement
FTTIAC	First-Tier Tribunal Immigration and Asylum Chamber
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights

ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
JHA	Justice and Home Affairs
LAS	League of Arab States
MEP	Member of European Parliament
MP	Member of Parliament
OAS	Organization of the American States
OAU	Organization of the African Union
OHCHR	United Nations Office of the High Commissioner of Human Rights
RSD	Refugee Status Determination
SD	Sweden Democrats
SIPROIMI	Sistema di protezione per i titolari di protezione internazionale e per i minori stranieri non accompagnati
SPRAR	Sistema di Protezione per Richiedenti Asilo e Rifugiati
TFEU	Treaty on the Functioning of the European Union
TUE	Treaty of the European Union
UDHR	Universal Declaration on Human Rights
UKIP	United Kingdom Independence Party
UKVI	United Kingdom Visas and Immigration
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestinians Refugees in the Near East
UTIAC	Upper Tribunal Immigration and Asylum Chamber

Introduction

In the last two decades Europe has seen a dramatic rise and development of populist parties which have increasingly gained large consensus and electoral support in their national political arenas but also in the European Parliament, as evident in the last elections of May 2019. Even though anti-establishment populism enjoyed success in some countries, such as Italy, Switzerland and Norway, already in the 1990s, it grew enormously all around Europe since the turn of the century and even more following the financial crisis of 2008. According to a research by the Guardian, between 1998 and 2018, the number of Europeans voting for populist parties in national votes has surged from 7% to more than 25% (Henley 2018). The recent boom in voter support for right-wing and populist parties in European states can be seen as a backlash against the political establishment, but the wave of discontent is also related to concerns about globalisation, immigration, a dilution of national identity and the EU itself. Nationalist right-wing populist parties arose in most EU member states, such as the far-right Alternative for Germany (AfD) which first entered the Parliament in 2017, the far-right Vox party, entered in Spanish parliament for the first time this year, the Freedom Party (FPÖ) in Austria, the National Rally, formerly National Front (NF), in France, the League in Italy which was at government with the Five Star Movement for the last year.

Probably, the most striking case we think of talking about far-right populism is that of Hungary where Prime Minister Viktor Orbàn and its Fidesz party won the national elections for the third consecutive time in 2018. Its campaigns have been mainly focused on the theme of immigration and using slogans attacking the EU and its approach to migration and Muslim immigrants “invading” Europe and threatening the national security, social cohesion, and Christian identity of the Hungarian nation. Such anti-EU and anti-immigration stances are very common in radical right populist parties’ agendas and in most EU countries became the critical themes on which electoral debates took place and on which to gain public support and electoral success.

Hungary is an evident example of a country where the populist radical right has gained electoral majority in the last years, especially thanks to the large inflow of immigrants in 2015, and thus power to intervene through legislation modifying relevant aspects of the country's legal order. Such a relevant change took place following the electoral victory of Orbàn party in 2010, which began the country's constitutional transformation, in particular through the Fundamental Law of 2011. Some of these amendments created European concerns, such as the laws on the early retirement of judges or the early dismissal of the data protection commissioner – both interventions which have been object of judgments by the CJEU between 2012 and 2014[1].

As regards the fundamental area of asylum and immigration, in September 2015 Orbàn Government introduced a "state of crisis due to mass migration", prolonged until March 2019: it implied that special rules applied to third-country nationals irregularly entering and/or staying in Hungary and to asylum seekers, and that certain provisions of the Asylum Act were suspended (Hungarian Helsinki Committee 2019, p.12). Besides material measures evidently introduced to stop the arrival of immigrants from the Serbian border, like the construction of barbed wire fences, the government introduced several amendments to laws on asylum, modifying – tightening - the procedures for the grant of international protection and limiting access to services and integration support to asylum seekers.For example, an amendment of September 2015 to the Hungarian Criminal Code made unauthorized border crossing punishable by three to ten years imprisonment. People convicted of unauthorized border crossing generally remained in immigration detention pending removal to Serbia, which Hungary deemed a safe country to which asylum seekers could return (Goździak 2019).

Legal amendments that entered into force in July 2016 allow the Hungarian police to automatically push back asylum seekers who are apprehended within 8 km of the Serbian-Hungarian or Croatian- Hungarian border, without registering or allowing

[1]C-286/12, Commission v Hungary, Nov. 6, 2012 (early retirement of judges); C-288/12, Commission vHungary, Apr. 8, 2014 (early dismissal of the data protection commissioner through constitutional reform)

them to submit an asylum claim, in a summary procedure lacking the most basic procedural safeguards (Hungarian Helsinki Committee 2017, p.11). Other legal changes modified the duration of residence permits issued for asylum or subsidiary protection which, since 2016, was dramatically reduced from 10 to 3 years for the former and from 5 to 3 years for the latter. Both the European Court of Human Rights and the Court of Justice have intervened in the last years in order to assess the compatibility of such interventions under EU primary and secondary legislation and with European human rights law provisions, like in the ECtHR's judgment O.M. v. Hungary of 5 October 2016 on the legality of detention[2].

It is very interesting to notice that in Hungary, but today in most European countries as well, immigration and asylum are the main issues used by the radical right populists to attack the EU. Similar discourses are used by Orbàn and by Eurosceptics all around Europe: a particular focus is put on the issue of national sovereignty and the need of each country to take back control over its laws and take decisions autonomously without the 'interference' of the Union. The expression used by the Hungarian Prime Minister "*Hungarians decided that only we Hungarians can decide with whom we want to live. The question was 'Brussels or Budapest' and we decided this issue is exclusively the competence of Budapest*" (Goździak 2019), is not so different from the UKIP's campaigns for Brexit or former British Prime Minister Theresa May's wordings like "*to take back control of our laws*", "*working very carefully to ensure that […]powers are repatriated from Brussels back to Britain*" and "*We will get control of the number of people coming to Britain from the EU*"[3].

Brexit is a fundamental example of how a strongly-Eurosceptic populist party, without even being within the national Parliament, was able to put the issue of borders control and the need of limiting immigration, not only among the most debated issues for the general public, but also among the top priorities of the

[2] The Court found that detention was not assessed in a sufficiently individualised manner and that the authorities did not exercise particular care in order to avoid situations facing an asylum seeker on account of his sexual orientation.

[3]These expressions are extracted from a speech at Lancaster House in London on 17 January 2017, whereformer Prime Minister Theresa May set out the Plan for Britain, including the 12 priorities that the Government would have used to negotiate Brexit.

agenda of Government and of most political forces. Through a strong campaign on these arguments, the UKIP was able to influence British people and, partly, also the Conservative Party, to call into question UK relationship with the European Union: following the 2016 referendum, it reached its main objective which was the exit of the UK from the Union to "take back full sovereignty on British affairs".

The choice of the theme of this thesis was, thus, inspired partly by the contemplation of the above-mentioned recent developments of populist forces all around Europe and in particular the Hungarian case which is the most evident and alarming as to the challenges to the country's democratic structures and to the asylum seekers' rights. On the other hand, this interest was linked to the direct experience of internship I have made in 2018 at the Specialized section on immigration of the Venice Court: the result was the willingness to analyse the asylum procedures of three EU member states and find out how anti-immigrant populist parties exercise influence on the national asylum systems which, in turn, impacts asylum seekers' rights and procedural guarantees enshrined in EU law.

My reasoning started from looking at the current competition occurring between member states and the EU on the division of competences regarding the asylum matter: this is the main ground for the criticisms and the attacks addressed to the Union at present. In such a period of enormously increased arrivals of third-country nationals to Europe, indeed, governments – especially in countries at EU external borders, but not only – claim to take back those powers they devolved to the Union during the 1990s as enshrined in the founding treaties, especially the 'full sovereignty' on the control of national borders and the power to decide who can enter their territory. Evidently, this 'struggle' has favoured the rise of populist parties which in turn use to attack the incapacity of the EU to effectively intervene and decide on relevant matters like immigration to increase their consensus and power to influence public opinion and national policies on asylum from within or even outside the parliaments. Considered the increasing consensus gained by populist forces, characterised by Eurosceptic and anti-immigration – often xenophobic – stances, the research question I want to ask through this work is: to

what extent this increasingly powerful presence of the populist radical right influences national policies on immigration and the organization of domestic asylum procedures? And looking at the consequent impact on asylum seekers' rights and guarantees, are they sufficiently protected by the judiciary as currently organised and functioning in the appeal phase of the procedure?

The choice of analysing the cases of Italy, the UK and Sweden, as I will discuss more deeply in the first chapter, is mainly because, despite all the differences that distinguish them, they share two main commonalities: the membership in the EU (at the moment of writing the UK has not formally left the Union yet) and the presence of increasingly strong populist parties in their national political arenas. Italy, in particular, is the case I know better thanks to my internship which allowed me to experience from 'the inside' the work of the judicial body in the appeal stage of the asylum procedure and note also some challenges and difficulties occurring in that phase. The UK is evidently a relevant case because of the strong influence exercised by populists resulted in the decision to exit from the Union with consequences that will affect asylum seekers. Sweden is also a really interesting case as the rise of populist forces in a Scandinavian country is maybe quite unexpected, even more in Sweden which has been one of the most 'open' European countries to asylum seekers, especially from Syria.

After identifying the main commonalities and differences of these three countries, in particular regarding their belonging to different judicial traditions and their relationship with the EU (Chapter 1), I consider the main standards protecting refugees and asylum seekers' rights existing at international level, but focusing on the protection system in Europe and the right to asylum enshrined in EU law (Chapter 2). Besides briefly looking at the Common European Asylum System (CEAS) instruments, I put my attention on the procedural guarantees codified in the Directive 2013/32/EU, importantly integrated by the case law of the Court of Justice of the EU. As highlighted in the text, indeed, the CJEU is currently showing a positive judicial activism as to the interpretation of EU law provisions on asylum, that binds member states to implement them in the correct way, respecting, in particular, the

procedural safeguards enshrined in EU legislation to be read in the light of human rights provisions.

The judgment of 14 May 2019[4] is an example of how the Court exposed itself to limit attempts of some member states to push back or expel asylum seekers who were not granted international protection towards countries where they risked facing persecution or ill-treatment. The Court clarified that, although the Geneva Refugee Convention permits states to derogate from the principle of *non-refoulement* where a refugee has committed a serious crime and presents a threat to the nation, EU member states are expected to conform with the European Charter on Fundamental Rights (Articles 4 and 19(2))which prohibits any exposure to torture and ill-treatment or punishment (EDAL 2019). As a result, member states cannot return refugees to their countries of origin if there is a possibility that they would face such treatment, even if they have been convicted for serious crimes (ECRE 2019). This interpretation evidently limits member states' discretion to expel or push back asylum seekers, even those who are revoked refugee status.

Another fundamental sentence was ruled by the CJEU on 29 July (Torubarov case), which reaffirmed the necessity for member states to ensure the right to an *effective* remedy (Article 47 of the Charter of Fundamental Rights), allowing national courts of appeal in the asylum procedure the power to vary administrative decisions rejecting applications of international protection. Thus, we can consider the recent rulings of the Court as the most effective tool to stem populist interventions in domestic asylum policies aimed at reducing procedural guarantees in an effort to disincentivize the arrival and staying of third-country nationals.

My work, then, continues with the analysis of the asylum procedures of the three countries concerned, with a particular focus on the appeal phase and the functioning of the judicial body dealing with asylum appeals and the relative challenges (Chapter 3).A specific chapter is dedicated to follow the development of the populist parties existing at present in Italy, the UK and Sweden and their increasing influence on national legislation and policies, especially regarding

[4] Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403

immigration and asylum matter (Chapter 4). Through this study, my intent is to focus on the structure and functioning of asylum procedures, which on one side are determined by EU law and CJEU case law that have harmonised national asylum systems, and on the other side aremodified and challenged by the position of power gained by the radical right populists in national politics. Consequently, it is important to find out whether asylum seekers' rights are still fully protected during asylum procedures, despite the increasing influence and intervention of populist parties on national asylum policies and legislation.

CHAPTER I – Research method and legal context: the choice of Italy, the UK and Sweden

In this chapter, I explain the method used in this thesis and put the attention on some theoretical legal aspects which differentiate Italy, the UK and Sweden and, thus, are at the basis of the comparison as regards the current status of these countries' national asylum systems. After considering the method employed for the analysis and the reasons underpinning the choice of comparing these three countries, I will focus on the main differences among them as to their legal systems and the different relationship they have with the European Union.

1. Research method and scope of the analysis

For this thesis, I have done a legal analysis on the organization of the asylum procedures in Italy, the UK and Sweden, realized through a specifically judicial method: the process consisted of the study of the countries' legal frameworks, not of the policies, notably by consulting legal documents and reports. This work, thus, is the result of a research of the doctrine and of positive law, that is, legal documents like national and EU laws and reports. Moreover, I have used a comparative methodology to answer my research question choosing three comparators on the basis of some comparability conditions, by similarities and differences, which I explain more in depth in the following.

My starting point for the choice of the countries to compare was Italy for a simple and concrete reason: I spent three months as an intern at the Specialized section on immigration of the Venice Civil Court, which deals inter alia with the appeals against administrative decisions rejecting applications for international protection. Thanks to this experience I could directly observe how the appeal phase of the asylum procedure works in Italy and note what are the main challenges that the asylum seekers and the judges face in this process. Then, by consulting with my supervisor, the choice of other comparators was influenced by the willingness to analyse other

two countries with different legal systems but still within the EU framework, to understand whether and how much this difference can affect the structure and functioning of the national asylum procedures.

The following choice of the UK and Sweden was only in part due to the language factor, that is the possibility to access documents and sources mainly in English (as regards Sweden, indeed, most official documents and websites of the Government and institutions are available also in this language). But more relevant than the language bound was the willingness to take under scrutiny one country for each judicial family: Italy as an example of civil law jurisdiction, the UK as an example of common law country and Sweden as one of the Scandinavian countries considered as 'mixed' jurisdictions. The sense of this choice, indeed, was to find out whether there is also a correlation between the belonging to a judicial family, with a certain division of state competence on asylum seekers, and the organization of the asylum procedure.

The choice of these three countries was not only related to differences in their institutional setting, but also to some factors that they have in common, first of all the membership to the European Union, even considering the peculiar situation of the UK which, at the moment of writing, is in the middle of the process for the exit from the Union – which should take place on 31 October. Although the participation of Britain in the EU has been particular and different from that of Italy and Sweden since the beginning, still they are all members of the Union: this constitutes a key common feature while analysing how the structure of the national asylum systems is influenced by EU law and what are the implications of this 'Europeanization'. Differently from Italy and Sweden, the UK opted out of the CEAS' second phase instruments setting common standards on asylum, however, it implements the minimum standards set by the first phase directives and regulations of 2001-2005.

Membership of the EU as the basis to study the impact that Union law on asylum has on member states' asylum systems is particularly relevant to note also the implications of this influence on domestic politics, which most probably is one of

the reasons form any political parties to recently focus on the refugee issue and the (often criticised) role of the Union in dealing with it.

Another common feature explaining the choice of these three EU member states is that they all are facing the rise of increasingly strong populist parties – especially of the right wing – which share Eurosceptic and anti-immigration stances. As we will see in the following chapters, such parties are gaining increasing consent among citizens and, thus, influence on national policies, especially thanks to their discourses that identify scapegoats deemed as responsible of the challenges facing the national community. In particular, in the last decade they developed criticisms against EU institutions allegedly incapable to respond to the real necessities of the people and, more recently, to efficiently tackle the refugee crisis of 2015. We will find examples of such populist forces in all the three countries, even in Sweden which together with the other Scandinavian countries has always been seen as a 'sanctuary' of liberal democracy and for the protection of people's fundamental rights, besides a welcoming country to aliens. Even for this reason it is interesting to analyse the case of Sweden whose stance towards immigration is changing importantly in these last years. Related to the development of populist parties, another commonality was relevant in choosing these countries, that is the adoption of increasingly strict policies on immigration and asylum by their respective governments, in particular since 2015. This trend, as we will see, is really correlated to the rise of the radical right populism and the increase of its influence on domestic legislation and policies in this field.

In the next section we will focus on the factors that distinguish most the jurisdictions of these three countries, that are, the judicial families to which they belong and the division of competence, especially in the asylum matter, between the administrative and judicial systems.

2. Italy, the UK and Sweden: different judicial families and organization of administrative and judicial power

The three countries concerned have very different legal systems and each of them belongs to a different legal tradition: Italy to civil law, the UK to common law, while Sweden is categorised as a mixed jurisdiction.

Civil law originated from Roman law and its main feature is that its norms are contained in civil codes, so that the courts are expected just to apply and interpret the law. The assumption, indeed, is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some general principles (Pejovic 2001, p.9). On the contrary, common law originated in England since the XI century and its key characteristic is that it is mainly based on case law. According to the *stare decisis* principle, indeed, higher courts decisions create precedents that must be respected, that is, they are binding for the lower courts and for all the subsequent cases which are similar. Common law is mainly created by case law but not only: even common law judges are supposed to apply and interpret the statutes which are at the basis of their countries' legal systems. Thus, the main difference between the two legal families is the authority given to precedents: while in common law they are binding, in civil law they constitute only secondary source of law, since the codes and statutes prevail. This difference is based on the different role given to the legislator: the civil law is based on the theory of separation of powers, so that the role of legislator is to legislate and that of the courts is to apply the law. On the other hand, common law courts are given the main task in creating the law (Tatley 2000, p.683).

The different application of the principle of separation of powers and the law-making is reflected also in the role and organization of the judiciary. While the courts in civil law systems have as their main task to decide particular cases by applying and interpreting legal norms, in the common law the courts are supposed not only to decide disputes between particular parties but also to provide guidance as to how similar disputes should be settled in the future. However, we should

consider that in civil law systems, even though the case law formally has no binding force, the higher court decisions certainly have a certain influence on lower courts and judges of these courts will usually take into account prior decisions, especially when a line of cases has developed.

As said before, Italy belongs to the civil law tradition and the UK to the common law, while Sweden – similarly to the other Scandinavian states – can be contained in a third legal family, often called 'Nordic law' or 'mixed jurisdictions', identifying the Nordic legal systems which are characterised by elements of both the classical legal families of common law and civil law (Scala 2018, p.268).Nordic legal systems, indeed, are considered as *sui generis,* as affected by Roman law but at the same time presenting features of common law as well. The Swedish system, in particular, finds its roots in the Roman/German civil law tradition – as is evident from the presence of a comprehensive civil code and a strongly independent Parliament – but it was also subject to some influences from aspects of the common law tradition (Ortwein II 2003, p.412).

Italy and Sweden present a typical feature of most civil law countries, which is the principle of separation of powers: the three main branches of state are separate and have different roles and functions as defined by a written constitution. On the opposite, Britain does not have a written constitutional instrument, nor the functions and powers of the three different branches of the state, the executive, the legislature and the judiciary are clearly divided among its institutions. For example, the government is made up of MPs and peers who are also members of the legislature - the House of Commons and the House of Lords. Furthermore, one of the oldest offices in the UK, the Lord Chancellor, mixed the three branches of the state: he was a senior Cabinet minister and therefore a member of the executive, a judge and the head of the judiciary of England and Wales with the duty to appoint judges, and a member of the legislature, the Speaker of the House of Lords.

Evidently, in the UK a clear division between the judiciary and the executive did not exist for a long time but such situation changed in the 2000s. The Constitutional Reform Act 2005 changed the office of the Lord Chancellor, transferring its judicial

functions to the Lord Chief Justice and introduced many reforms very relevant for the independence of the judiciary, such as the creation of a United Kingdom Supreme Court which is independent of the House of Lords, and of an independent Judicial Appointments Commission. Importantly, it contained an explicit statutory duty on government ministers to uphold the independence of the judiciary[5].

The UK has three separate legal systems, one each for England and Wales, Scotland and Northern Ireland, except the Supreme Court which has jurisdiction over the entire United Kingdom since 2009. The courts system covering England and Wales is quite complicated since there are different 'paths' according to the matter of the case, for example most criminal cases start from the Magistrates' Courts, and most civil cases from the County Courts.

While these cases of ordinary jurisdiction are decided by courts, the judicial system includes also tribunals which copes with administrative matters, such as immigration, tax, social security, pensions and education. The tribunals system has its own structure for dealing with cases and appeals and is independent from the courts system: some jurisdictions handled by tribunals are UK-wide, such as immigration and asylum, but others cover only some parts of the UK[6]. Administrative tribunals have been created by the Parliament, increasingly during the past century, to examine the legality of the exercise of governmental power in defined fields. With the reform of the system introduced by the Tribunals, Courts and Enforcement Act 2007 there was the unequivocal recognition that tribunals must be entirely separate from the administration of government and the relevant 'sponsoring' government department, since they are an integral part of the judicial system (McCloskey 2010).

Quite differently from the British system which saw an increase in the division of the three powers of the state only in the last few decades, in Italy, the division of powers was codified in the 1948 Constitution which foresees very balanced

[5] Courts and Tribunals Judiciary, *The justice system and the constitution*, https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/(accessed 20/09/19)

[6] Courts and Tribunals Judiciary, *Introduction to Tribunals*, https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/tribunals/(accessed 21/09/19)

relations among state authorities. The organization and the fundamental principle of the independence of the judiciary – including also the administrative jurisdiction –are included in the constitutional document: "The judiciary constitutes an autonomous order independent from any other power"[7]. The Constitution foresees also the division between the ordinary jurisdiction and the special ones which include also the administrative jurisdiction (Article 103). The latter, indeed, is responsible to decide on controversies between the citizens and the public administration (government agencies), judging on the legitimacy of the administrative acts. The administrative jurisdiction is exercised by a number of organs that are distinct from the ordinary courts: they include regional administrative tribunals (TAR – *Tribunali amministrativi regionali*) as courts of first instance, and the Council of State (*Consiglio di Stato*) as a court of second instance (Cerulli Irelli 2009, p.2).

In Sweden, the independence of the judiciary from all the other state powers is protected by some provisions contained in the constitution, which consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. After the establishment of the first administrative authorities in the XVII century, for long time there was not a clear division between these government agencies and courts. Prior to the creation of the Supreme Administrative Court in 1909, it was the government that was responsible for resolving disputes of administrative nature, but during the past century, the hearing of appealed administrative matters was gradually transferred to the administrative courts.

The 1974 reform established a three-tiered system of administrative courts, composed of Administrative Courts at first instance, Administrative Courts of Appeal at second instance and the Supreme Administrative Court at last instance, but only for some cases. This development was related partly to the willingness to relieve the Government of the administrative burden of having to decide individual matters and, partly, to the requirements of judicial review under Article 6(1) of the

[7] Article 104 Constitution states: *"La magistratura costituisce un ordine autonomo e indipendente da ogni altro potere."*

European Convention of Human Rights and EU Law (Wenander 2017, p.4). Moreover, the division of powers is particularly important in a country like Sweden with a substantial public welfare and social service structure and a large administrative bureaucracy organized in three levels – central, regional and local/municipal. An elaborate specialized administrative court structure was necessary to handle public law disputes in order to assure citizens of effective protection in this administrative hierarchy (Ortwein II 2003, p.417).

The current Swedish courts system, thus, is a dual system where administrative courts are separate from the general court structure that is designed to accommodate matters of a criminal and private law nature, each organized on a three-tier structure. The courts of general jurisdiction handle criminal cases and civil disputes, while the administrative courts resolve cases typically involving individuals or companies' appeals against decisions by public agencies in areas such as taxation, social security insurance, social welfare, compulsory care and licensing (Wennerström and Brickman 2007, p.2). Within the administrative courts system there are also specialised courts dealing with asylum appeals. A reform in 2006, indeed, meant that decisions in migration matters (concerning residence permits, asylum, and citizenship) were no longer appealed to a special administrative authority and to the Government, as last instance, but to Migration Courts (Wenander2018, p.24). They are part of the four main County Administrative Courts of the country, whose decisions can be appealed to the Migration Court of Appeal, which is part of the Supreme Administrative Court of Appeal in Stockholm.

As we will see more in detail in chapter IV, in all the three countries analysed the asylum procedure is structured with a first administrative phase where a government agency makes first examinations and decisions on asylum cases, and a second phase which is judicial, as the applicants have the rights to appeal such administrative decisions to a court. The appeal body is different according to the organization of the judicial system of the country and of the division of jurisdiction among the different kinds of judges: the constitutional document usually states

whether asylum and related matters fall under the jurisdiction of ordinary courts or administrative judges.

In Italy, the asylum procedure starts with the administrative phase where first instance decisions are taken by the Territorial commissions, government agencies whose members are appointed by the Ministry of Interior. Then, the judicial phase is attributed to ordinary courts' specialized sections on immigration, which were established by the 2017 reform in all Courts of Appeal throughout Italian territory. As regards the judicial phase, Italy is different from both the UK and Sweden, as the jurisdiction on cases regarding entry and staying of aliens, right to asylum and citizenship is divided in a dual system where some controversies are attributed to ordinary judges (as judges of subjective rights), while others to administrative ones (as judges of legitimate interests)[8]. In particular, the ordinary judge in the courts' specialized sections is responsible to evaluate the legitimacy and correctness of the power exercised by government agencies as regards appeals on residence permits for family reasons, condition of refugees and asylum seekers, expulsions and refusals of entry and all the measures limiting the personal freedoms of aliens. The reason of the attribution of such jurisdiction to ordinary judges instead of administrative ones is that the measures taken in these matters impact directly on the individual freedom, thus, regarding his subjective rights (Noccelli 2018).

The main legal instruments on immigration and asylum have progressively defined such division of competence between the two types of judge: already the so-called 'Consolidated Act on Immigration' (*Testo Unico sull'Immigrazione – TUI*) of 1998 attributed to the administrative judge jurisdiction on the disputes regarding the issuing of visas and residence permits, and to the ordinary judge the controversies regarding refusals of entry, expulsions and related executive measures, such as detention in expulsion centres (Id., p.6). The 2017 reform devolved to the ordinary judge also the jurisdiction on appeals regarding refusal of residence permits for family reasons and those regarding the Dublin procedure (establishing the country responsible for examining the asylum application). Such division of jurisdiction is

[8] CSM – Consiglio superiore della magistratura, *Il sistema giudiziario italiano*, available in Italian at: https://www.csm.it/web/csm-internet/magistratura/il-sistema-giudiziario (accessed 22/09/19)

based, as said above, on the distinction between subjective rights and legitimate interests, which is not considered in asylum cases in the UK and Sweden, but neither in most European states which attribute jurisdiction on immigration and asylum matters only to administrative courts without any distinction.

The situation regarding the judicial phase of the asylum procedure is very different in the UK and Sweden, where – after the administrative phase of first instance occurring in government agencies – the appeal is lodged to administrative tribunals. Specifically, in Sweden, immigration and asylum and other related matters, after the first administrative phase occurring at the Swedish Migration Agency, go under the jurisdiction of the administrative courts in the appeal phase. This judicial review of administrative decisions is carried out under a judicial-administrative appeal, where the Migration courts have the same decision-making competence as the deciding administrative authority, as they can quash, change in substance or replace the appealed decision (Wenander 2017, p.5).

Similarly to the Swedish situation, in the UK the judicial phase to appeal decisions taken by the UK Visas and Immigration Office is under the jurisdiction of the tribunals – which is the administrative 'part' of the judicial system. In particular, applicants lodge their appeal to the First-Tier Tribunal at first instance and to the Upper Tribunal at second instance. Each tier of the tribunals is divided into chambers – seven in the First-Tier tribunal and four in the Upper – dealing with different matters: asylum and related matters are competence of the Immigration and Asylum Chambers which have jurisdiction on the whole United Kingdom.

As we have seen, each of the three countries concerned has different features regarding the organization and the level of independence of the judicial power, which is only partly related to the different judicial family to which they belong. At present, all these three countries have a dual judicial system separating ordinary – civil/criminal – jurisdiction and administrative jurisdiction, with different kinds of judges dealing with the two categories of disputes. However, such clear separation of state powers, which usually is identified as a key characteristic of the civil law

tradition, has been significantly implemented only recently in the case of the UK, while in Italy and Sweden it was already effective since the past century.

Despite belonging to different judicial families and having a different structure of the judicial system, the UK and Sweden are similar as regards the organization of the judicial phase in the asylum procedure. The competence of the appeals in asylum and related matters, indeed, is attributed to the administrative judges within specific 'sections' of the administrative tribunals – which in both cases work as a separate system from the ordinary courts. Very peculiar is on the other side the case of Italy, where jurisdiction over matters related to aliens (asylum, citizenship, residence permits, etc.) are divided between ordinary judges and administrative judges by law.

3. Italy, the UK and Sweden relationship with EU and implementation of Union law

The main commonality among Italy, Sweden and the UK, at the moment of writing at least, is their membership of the European Union. However, they do not have the same kind of relationship with the EU, neither they joined it in the same moment: while Italy was one of the six founders of the European Economic Community (EEC) in 1957, the UK entered the Union in 1973 and Sweden only in 1995. There are many further differences among these three countries' membership to the EU, the degree of their participation and the influence received by and exercised on the Union policies.

Looking at the interaction between EU law and member states' legal orders, we cannot consider it comparable to that between national legislation and general international law, neither we can clearly categorise the Union legal order as monist or dualist. The former refers to those systems where international law does not need to be translated into national law since it is directly applicable in the domestic legal order. Dualist systems, on the contrary, consider international law separate

from domestic law, so that the former, to be applied domestically, needs first to be translated into national legislation (Schütze 2018). In the case of the EU, it can be considered a new legal order *sui generis*, as also clarified by the Court of Justice case law since its first case regarding the direct applicability of community law, the *Van Gend & Loos* case of 1963.In this judgment the Court ruled that the provisions of Union law were in all cases directly applicable: individuals may be directly subject to all the provisions of the Union treaties; thus, individual rights and obligations could consequently derive directly from European law[9]. The CJEU continued to apply this reasoning also to other provisions of EU law in subsequent judgments, inter alia, concerning the direct applicability of freedom of movement (Article 45 TFEU), freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU). The Court's rulings established not only the principle of direct applicability but also that of supremacy of EU law on national law. Differently from the relationship with international law which is decided on the basis of national law, Union law does not enter to become part of any national legal order, so that any conflict between it and national law may only be settled on the basis of the EU legal order. As established by the Court for the first time in the case Costa v ENEL of 1964, Union law has primacy over any conflicting law of the member states, and not only over ordinary national law but also over national constitutional law (Borchardt 2017, p.140).

European law, thus, is to be enforced in national courts as directly applicable law, but this direct applicability does not mean that all EU law is immediately enforceable in domestic legal orders: this because not all European norms are self-executing (Schütze 2018).Primary Union law – which includes the founding treaties and the Charter of Fundamental Rights – due to the transfer of sovereignty, prevails

[9] In judgment of the Court of 5 February 1963, Case 26-62, EU:C:1963:1, the Court stated: "Independently of the legislation of member states, community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community".

over the national constitutional norms and has legal binding effect after member states have been notified (Venice Commission 2015, p.4).

It is different as to secondary sources of EU law, which include legislative acts (regulations, directives and decisions), non-legislative acts, non-binding instruments and other acts that are not legal acts. The execution of this secondary EU legislation is delegated to member states by Article 291(1) TFUE: "Member States shall adopt all measures of national law necessary to implement legally binding Union acts". Regulations are automatically and uniformly self-applying to all EU countries as soon as they enter into force, without needing to be transposed into national law. Differently, directives set only objectives leaving member states to decide the means to reach them (La Pergola 1994, p.274). This means that member states are required to adopt measures to incorporate (transpose) them into national law by the deadline set when the directive is adopted: if a country does not transpose a directive by the deadline the Commission may initiate an infringement proceeding[10].

After this general overview of the relationship of member states' national legal orders with the EU legal order, we now consider the relation between Italy, the UK and Sweden with the Union from a more 'political' point of view, in particular considering their participation in the EU policies and legislation, and a focus also on the changed level of Euroscepticism existing among the three countries' general public.

Italy was one of the founding members of the European Union: from the 1950s until the mid-1990s, indeed, the country's support for the integration process and its participation was almost unfaltering. In the first two decades of European integration there was the so-called 'Europeanisation' of Italian public opinion which saw the 80% of the population supporting the European integration by the end of the 1970s. Some of the reasons were a transformation in the east-west conflict and in the attitude toward the USSR during the Cold war, a more independent stance

[10] European Commission, *Types of EU law*, https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 17/10/19)

vis-à-vis the US on European integration and increased confidence in other European countries (Lucarelli 2015, p.43). Then, since the early 1990s, the Italian attitude towards European integration changed and became characterised by increasing contestation. However, between 1995 and 1997 most Italians strongly supported the establishment of the European Monetary Union (EMU) and the adoption of the single currency.

Since the 1990s some internal factors, such as the transformation of the Italian party system and the rise of new parties, contributed to the rise of sentiments of disenchantment towards the EU which continued during the 2000s. One of the most relevant factors contributing to this stance, was the economic crisis started in 2008 which threatened European economies, but also European solidarity. During the years of the crisis, indeed, Europe's credibility has been questioned especially because of the weak stance of its foreign policy and by friction among the member states on relevant policy areas such as the control of illegal migration (Id., p.51).The lack of EU solidarity on migration is one of the biggest complaints of Italians, stronger than an alleged rise in anti-immigrant sentiment (Balfour and Robustelli 2019, p.5). The migration management and the governance of Eurozone were important issues that in the perspective of Italy were left unaddressed by the EU: in particular, the austerity reform packages demanded by Brussels to tackle the Italian debt and deficit problems fuelled anti-European criticisms in the years following the 2008 crisis. But despite the rise of anti-EU sentiments in the last decades, Italy has always been a fundamental actor in the integration process since its beginning in the 1950s: many important steps in this process occurred in Italy.

Italy ratified all EU treaties and introduced them in the Italian legal system by law (‘*ordini di esecuzione’*), while directives through transposition acts (‘*atti di recepimento’*) of the Parliament. The implementation of EU legislation in the Italian internal system occurs through a process of reception reformed in 2012 which divided the annual community law into two distinct measures – the European delegation law (‘*legge di delegazione europea*’) and the European law (‘*legge*

europea')[11]. The bill of these two annual laws is presented by the responsible Ministries to the Parliament for approval before becoming effective laws. The former contains legislative delegations for the reception of European directives and other acts, while the latter contains directly-applicable norms aimed at remedying cases of incorrect reception of EU laws. These phases of check and approval of European laws become also an occasion for the Parliament to verify the general fulfilment of all the duties coming from EU membership (Camera dei Deputati 2018).

The 2012 reform was necessary to improve the process of adjustment to the European system that through the former community law often used to be slowed down: through the new measures, the process lasts about 5-6 months for the examination and approval of the European laws so that the implementation of European annual obligations in the last years occurs on time. This, in turn, meant the number of infringement proceedings brought against Italy decreased from 97 in 2013 to 59 in 2018 (Id., p.4).

On the opposite from the Italian case is the UK that since the beginning had a sceptic stance towards EU integration: the extent of its Europeanization, consequently, has always been at the lowest level compared to the other member states. The argument of 'British exceptionalism' is regularly used to describe its relationship with EU, but also the influence of the Union on UK policies and politics. Britain refused to participate in the European Coal and Steel Community and the Treaty of Rome - the predecessors of the European Communities and the EU. Membership was acquired only in 1973, after unsuccessful applications in 1961-63 and 1967. But even after formally becoming a member of European Community, Britain has remained a 'semidetached' participant in Europe and an uncertain member (Ette and Gerdes 2007, p.94).

This approach is reflected in the fact that the UK negotiated some exceptions –opt-outs – from parts of EU legislation since it joined the European Economic

[11] Dipartimento per le Politiche Europee – Presidenza del Consiglio dei Ministri, *Legge di delegazione europea*, http://www.politicheeuropee.gov.it/it/normativa/legge-di-delegazione-europea/ (accessed 27/09/19)

Community. This means that the country is not bound by the norms or has other special arrangements in the areas covered by the opt-outs. The UK is the European state with the most opt-outs: it has exceptions in the four key areas of Justice and Home Affairs (JHA), Economic Monetary Union (EMU), Schengen system and Charter of Fundamental Rights of the EU.As regards the EMU, the UK is not part of the Eurozone and has a special status retaining control over its own economic and monetary policy. As regards the JHA area, the UK's participation in EU legislation is principally governed by Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

With the JHA opt-in Protocol 21, the UK may choose, within three months of a proposal being presented to the Council pursuant to the part of the Treaty governing JHA matters (Title V), whether it wishes to participate in the adoption and application of any proposed measure (Miller 2011, p.3). A sceptical stance on legal harmonization of JHA area led to a selective use of the opt-in possibility by the UK: it mainly opted into most civil law measures, into the seven texts concerning asylum (the CEAS instruments of 2001-2005), return policy measures and those tackling irregular migration, but has practically remained outside of all protective measures concerning legal migration, visas and border controls (Adler and Nissen 2009, p.69).Britain's trend was to participate in coercive measures that curtail the ability of migrants to enter the EU – and the UK itself –,and to pay less attention to the more protective measures that give rights to migrants and third-country nationals (Guild 2004 in Ette and Gerdes 2007, p.99).

The UK, moreover, is not part of the border-free Schengen area: it did not take part in the negotiations neither did it sign the following Schengen Agreement in the 1980s, and fundamentally opposed the initiatives during the 1990s to develop a supranational European immigration policy. The Schengen acquis was incorporated in EU law with the Treaty of Amsterdam of 1999, but Protocol 19 Article 4 of the Treaty of Lisbon introduced a 'Schengen opt-out' which provides that the UK (and Ireland) may request to take part in some or all provisions of the Schengen acquis. Article 5 of the Protocol provides that the UK is deemed to opt in to measures

building on parts of the acquis in which it participates unless, within three months of the publication of the proposal, it notifies the Council that it does not wish to take part in the measure (Home Office and Ministry of Justice 2015, p.1).The UK participates in some parts of Schengen, such as in police and judicial cooperation, but does not participate in the border control elements (Miller 2011, p.3).

All EU proposals on JHA area are subject to scrutiny by both Houses of Parliament before the Government can agree them in the Council. In the House of Commons this scrutiny takes place in the European Scrutiny Committee and in the House of Lords by the European Union Committee. The JHA opt-in and Schengen opt-out are now subject to some of the most rigorous Parliamentary scrutiny of all EU business (Home Office and Ministry of Justice 2015, p.3).

As regards the UK opt-out from the Charter of Fundamental Rights, there is a debate about whether Protocol 30 to the Charter can be considered actually an opt-out or a mere 'clarification'. During the negotiations on the Treaty of Lisbon for the adaptation of the Charter, the UK and Poland signed the Protocol on the application of the Charter that was often referred to as an opt-out. Protocol 30at Article 1(1) affirms the inability of the ECJ and of British and Polish courts to find their national laws "inconsistent with the fundamental rights, freedoms and principles that the Charter reaffirms". Furthermore, Article 1(2) specifies that the provisions contained in Title IV of the Charter ('Solidarity') do not create justiciable rights applicable to the two countries "except in so far as Poland or the United Kingdom has provided for such rights in its national law". This exemption was obtained mainly because of fears the Charter would challenge UK labour law (Briggs 2015) as Title IV of the Charter contains also provisions about workers' rights. Article 28, the 'right to collective bargaining and action', was particularly controversial as seemed to include a right to strike action: thus, the UK government was concerned about the EU introducing such a right in its legal system which did not exist until then (Barnard 2008, p.11).

Although many – especially Eurosceptics – refer to the Protocol as a full opt-out from the Charter, many academics and political circles recognise it as just an

interpretative instrument. First, because in the Preamble – in recitals 8 and 9 – it is said that the contracting parties are "desirous of *clarifying the application of the Charter* in relation to the laws and administrative action of Poland and of the United Kingdom and of *its justiciability*". Second, because the use of the words '*does not extend*' in Article 1(1) implies that the CJEU and national courts' competence to find member states' laws inconsistent with the Charter's fundamental rights follows from current EU law, excluding the possibility of the Charter widening that competence (Zrno 2010, p.297).

The UK Government itself viewed the Protocol as an interpretation guide rather than an opt-out, and the House of Lords' Select Committee on European Union recognised that "The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol" (Select Committee on EU tenth report 2008).The effect of Protocol 30 was considered also by the Court of Justice in a 2011 judgement for two joined cases[12],where it confirmed that the Protocol is not really an opt-out at all and that it merely clarifies the provision already made by the Charter itself in Article 51[13]concerning its scope of application (Elliott 2013).

To summarise, the UK, since its entry in the EU in 1973, has been a 'semidetached member' unwilling to accept all the commitments deriving from a full membership and to bind itself in certain policy areas like the Economic Monetary Union and some parts of the Justice and Home Affairs and Schengen acquis. As regards the field of immigration and asylum policies, the main characteristic of the Europeanization of Britain's policy of immigration is its selectiveness - with British participation in coercive measures but opting out of protective measures. The UK,

[12]The Court affirmed that "*Article 1(1) of Protocol No 30 explains article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions*." In Joined Cases C-411/10 and C-493/10, R (NS) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0411(accessed 30/09/19)

[13] In Article 51(1), we find that the provisions of the Charter are addressed to EU institutions and to member states "only when they are implementing Union law". Paragraph 2 further clarifies that "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

indeed, participated in the development of a European immigration policy only as long as this allowed reinforcing rather than overturning its established policy approaches (Ette and Gerdes 2007, p.111). Finally, the fourth field with an 'exceptional' participation of the UK, the Charter of Fundamental Freedoms of the EU, as analysed below, cannot be considered as regulated by an opt-out, so that the country is actually obliged to comply with the Charter provisions, as clarified by the Court of Justice jurisprudence.

Finally, looking at Swedish relationship with the EU, we can consider it in the middle between the 'full membership' of Italy and the 'uncertain' one of the UK. Sweden joined the Union only in 1995, following a membership referendum in 1994 where there was a very high voter turnout (at more than 83%), but where the 'yes-position' won with a narrow margin: 52.3% against 46.8% of those voting for non-membership (Hultén 2011, p.227). The official reason for the 'delay' in joining the EU was mainly due to Swedish neutrality in the framework of the Cold War and the division of Europe which made membership in the Union impossible. Moreover, Swedes have always been among the most Eurosceptic peoples still following the entry of the country in the Union. However, as pointed out by Miles (2005), Swedish Euroscepticism can be described rather as '*federo-scepticism'*, that is, the opposition to the final goal of 'a federal Europe' due to the fear of losing national sovereignty and becoming subject to other countries' decisions (Id., p.229).Thus, like in Britain and Denmark, membership has been justified primarily by the political elites on economic grounds.

Sweden's approach to EU affairs during the first years of membership can be seen as largely reactive rather than pro-active: Swedish membership in the EU was based on a 'nation state logic' which resulted in a method of organisation that was basically intergovernmental rather than supranational (Johansson 2018, p.382). The EU was primarily seen as something 'outside', beyond national borders and spatially separated from the national territory. The Northern countries, after all, have often considered themselves at the periphery of Europe, and Scandinavians perceive

Nordic culture, social structure and mentality as fundamentally different from that of the rest of the continent (Hultén 2011, p.233).

The prevailing intergovernmental approach on the supranational one towards the EU is visible in the prominent role maintained by the Swedish Ministry of Foreign Affairs in dealing with EU matters. Moreover, the trend followed by the Swedish government was to focus on the basically intergovernmental Council rather than the supranational institutions of the Commission and the European Parliament (Johansson 2018, p.383). Thus, it might be argued that Sweden is another 'awkward partner' in the Union or a 'reluctant European', similarly to the UK. Paradoxically, however, Swedish compliance with EU legislation is among the highest of all the Member States. Unlike Britain and Denmark, Sweden has no formal 'opt-out' from the third wave of the Economic and Monetary Union (EMU). The reticent government position on this field reflects the divisions in the Social Democratic Party and also an overall anti-federalist attitude (Id., p.372).As regards the EMU, in early 1990s Sweden implemented the First Stage – the abolition of foreign exchange controls — and later the Second Stage including the implementation of domestic reforms increasing the independence of Sweden's central bank. But during the EU accession negotiations, the Swedish delegation presented a unilateral declaration for a separate decision on participation in the EMU Third Stage to be taken by the Swedish Parliament (Lindahl and Naurin 2005, p.68). After a period of intense public and parliamentary debate, in 1997 the Parliament decided to put the question of participating in the EMU Third Stage to voters in a referendum. This was held in September 2003 and resulted in a clear 'no' to the introduction of the euro as official currency in Sweden.

The 2003 referendum further demonstrated the significant cleavage in opinion on EMU and on EU membership in general between the political and business elite and the general public. The former, indeed, pushed for an early entry of Sweden in the EU and to participate in the Third Stage of the EMU, while the latter remained sceptical towards the Union and opposed the adoption of the common currency. This strong division of political elite and public opinion gave, as suggested by Lindahl

and Naurin (2005), a 'twin face' to Sweden as regards its relations with the Union. The Swedish internal political arena has been characterised by strong scepticism of public opinion, but at the same time, Swedish government's external attitude tried to be that of a proactive 'insider' in the EU, able to take part and influence the Union decision making. Thus, the Swedish position has been that of a "*conscious outsidership*" as regards the euro, combined with a proactive strategy to sustain political influence in the EU (Id., p.66). This contributed to create the image of Sweden as "an outsider, yet also on the inside", as defined by Johansson in 2002 (Miles 2011).

The Swedish stance gradually evolved in the recent years: since 2006, the country has been governed by a centre-right non-socialist Alliance for Sweden coalition which has mainly followed a pro-EU position and successfully held the Presidency of EU Council in 2009. Over time, Swedish public opinion and most mainstream political parties have come to accept the premises and the obligations of Swedish full membership status (Miles 2011, p.268). Many Swedes, indeed, are now in favour of the country's full membership, but strong opposition remains as regards questions of further European integration and of future participation of Sweden to the euro. Thus, the position of balance reached by Sweden seems that of 'twin faces' in exerting influence in the EU as an active EU member state, while remaining outside the euro (Id., p.271).

To summarise, these three countries concerned, despite being all EU member states, until the moment of writing at least, have quite different relationships and attitudes towards the Union. Italy is an example of full membership, without exceptions through opt-outs to the treaties. It was a founding member and characterised by great enthusiasm about the project of European integration, which has gradually decreased leaving space to Eurosceptic stances especially as regards the management of the Economic and Monetary Union and of immigration. The UK, on the opposite, has always been a sceptical member of the EU and of European integration, so that its membership has been characterised by several opt-outs in critical policy areas, like Justice and Home Affairs. Its 'uncertain' participation was

reflected also in an increasingly strong Euroscepticism among the public, so that the membership referendum held in 2016 established the exit of the country from the EU, which should occur at the end of October. Finally, the case of Sweden is very interesting because it has been, especially in the first years of its membership, a country divided between the scepticism of the public towards European integration and a political elite playing a proactive and relevant role in the decision-making process within the EU.

In any case membership in the EU has significantly influenced all member states not only in the policy making but also in political and legislative activity in most policy areas, including that of asylum and immigration. As we will see in the next chapters, EU law in this field has bound member states to implement certain measures aimed at harmonising their national asylum procedures and protecting refugees and asylum seekers' rights. The Court of Justice of the EU as well, has contributed to influence legislation and practices in the member states, intervening importantly also in the area of asylum.

CHAPTER II – International standards on asylum and refugees' human rights protection

In international law today individuals have no right to asylum vis-à-vis the state of refuge, since no international treaty recognises a right to be granted asylum in case of persecution; instead, all international instruments leave the right of asylum in the realm of state sovereignty: it is the state that decides who is eligible for asylum, still in respect of international law provisions. As identified by Boed (1994), the right of asylum includes three components: the right of the state to grant asylum, the right of the individual to seek asylum and the right of the individual to be granted asylum. The first two rights are well established in international law: the first derives from the state sovereignty and its control over the territory and the persons present within it; while the second is the right that an individual has vis-à-vis his country of origin, which is that "everyone has the right to leave any country, including his own", recognised in Article 13(2) of the 1948 Universal Declaration of Human Rights and become binding when introduced in the 1966 Covenant on Civil and Political Rights (Article 12(2))[14]. The same provision is recognised also in some regional legal instruments, such as Protocol 4, Article 2(2) to the European Convention of Human Rights and the American Convention on Human Rights.

The third aspect of the right of asylum, the right to be granted asylum, on the contrary is not recognised in any international instrument: Article 14(1) of the Universal Declaration of Human Rights proclaims "Everyone has the right to seek and to enjoy in other countries asylum from persecution", but scholars agree that this provision merely affords the individual a right to seek asylum, not a right to receive it (Boed 1994, p.9). The original draft of this article, actually, stated "the right to seek and to be granted, in other countries, asylum from persecution", but was then changed because of the disagreement of some state delegations that did not want to bind the states to grant asylum to individuals. Neither in the text of the

[14] *"Everyone shall be free to leave any country, including his own."*, Article 12(2) International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Covenant on Civil and Political Rights there is any provision on the individual right to asylum, after the failed proposal by Yugoslavia, nor in the Covenant on Economic, Social and Cultural Rights (ICESCR). The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as well do not provide a right to be granted asylum, and most regional instruments leave discretion to state legislation to determine the application of an individual right to be granted asylum, such as in the American Convention on Human Rights that states: "Every person has the right to seek and be granted asylum in a foreign territory, *in accordance with the legislation of the state* and international conventions, in the event he is being pursued for political offenses or related common crimes"[15].

1. *Non-refoulement* and procedural guarantees for asylum seekers

Even though there is no right for individuals to receive asylum, in international law we can find provisions binding the states to provide protection under some circumstances, in particular when a person faces a real risk of persecution in his or her country of origin. This is related to the principle of *non-refoulement* which provides that states should not eject a refugee from their territories or borders and return them to a place where they would be exposed to torture or persecution (Duffy 2008). This principle is now considered as a fundamental component of the prohibition of torture or ill-treatment which is a customary law provision, recognised, and theoretically applied, by all the states around the world. *Non-refoulement* is contained in Article 33 of the Geneva Convention Relating to the Status of Refugees of 1951. This means that – although a right to asylum has not been codified in international law yet – states are still expected not to violate the principle of non-refoulement by not expelling persons without assessing their individual cases first.

[15] Article 22(7) American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969

The principle of *non-refoulement* practically expands the categories of persons entitled to benefit from protection: a further type of protection other than that granted to the classically defined refugees (Hathaway 2012). This principle is included explicitly in the Geneva Refugee Convention, but also in implicit way in other international treaties under human rights law, included in provisions on the prohibition of torture and ill-treatment, which are present in the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT), in the 1966 UN Covenant on Civil and Political Rights (ICCPR) and in the European Convention on Human Rights (ECHR). Furthermore, the principle of *non-refoulement* has become part of international customary law, together with the prohibition of torture and ill-treatment, as it is included also in other documents like UN General Assembly declarations and resolutions. Being recognised as customary law means that it is binding for all the states, even those which are not part of international conventions like the Refugee Convention.

Besides the right to non-expulsion, refugees are entitled to a wide series of rights deriving mainly from the 1951 Geneva Convention on Refugees and from general standards of international human rights law. The 1951 Convention and 1967 Protocol were designed to assure refugees the widest possible enjoyment of their rights. However, in order to respond to regional specificities, states in different parts of the world have developed regional laws and standards that complement the international refugee protection regime. In the context of the Organization of African Unity, there is the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa; in Latin America in 1984 the Cartagena Declaration on Refugees, even if non-binding; while there are no binding regional instruments addressing refugee law in the Middle East or Asia: the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries, adopted by the League of Arab States (LAS), never entered into force, and in 2001 Asian and African countries adopted the revised Bangkok Principles on the status and treatment of refugees (Nicholson and Kumin 2017, p.21). The most far-reaching regional developments have come from the European Union, whose member states in 1999 agreed to

create a common European asylum system based on the "full and inclusive application of the Geneva Convention". The legislative instruments adopted in early 2000s and later revised add content to refugee law in an area not addressed by the 1951 Convention. Furthermore, the European regional courts – the Court of Justice of the EU and the European Court of Human Rights – often addressed asylum issues in their judgments, so that they exercise significant influence on the wider development of international refugee law.

The 1951 Convention, as we will see in the next paragraph, establishes fundamental guarantees as to the protection of refugees but leaves to each state to establish the procedure it considers most appropriate for determining refugee status and other international protection needs. However, at the moment of adopting procedures for the recognition of refugee status, states should ensure that these are in line with international refugee law and human rights obligations. Accordingly, there are some minimum procedural guarantees and principles of due process, as identified by the UNHCR, that should be put in place in every state administrative law and asylum systems in order to provide an efficient and fair asylum procedure.

Thus, even though the procedures for refugee status determination (RSD) vary around the world, reflecting the peculiarities of each national context, minimum procedural or due process standards and safeguards still need to be guaranteed for all applications. There are two main procedural guarantees for asylum seekers that states must provide: first, the right to be heard with due process guarantees and within a reasonable time, by a single and specialized authority established by law at first instance, and by an authority or tribunal independent of the first instance at appeal. The other fundamental guarantee is the right to an effective judicial remedy for protection against acts that violate the asylum seeker fundamental rights (Nicholson and Kumin 2017, p.157-58). Besides these two main principles, the Executive Committee[16] of the UNHCR, building on international human rights

[16]In view of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that state procedures should satisfy certain basic requirements.

standards, identified some minimum guarantees that all states party to the 1951 Convention must reflect in their procedures. These basic requirements reflect, indeed, the special situation of the asylum seeker and would ensure that the applicant is provided with certain essential guarantees, which are the following (UNHCR 2019, p.43):

- the competent state official, either at the border or in the territory, should have clear instructions and act in accordance with the principle of non-refoulement;
- the asylum seeker should receive the necessary information and guidance as to the procedure in an understandable manner for him/her;
- there should be a clearly identified authority with qualified personnel responsible for examining the applications and taking decisions in first instance;
- the procedure should respect data protection and confidentiality principles at all stages;
- the asylum seeker should be given the necessary facilities, including a competent interpreter, access to legal advice and representation and the possibility to contact a UNHCR representative;
- the applicant should be given access to the report of the personal interview and confirm its content;
- although the burden of proof in principle rest on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the asylum seeker and the examiner;
- the applicant should be noticed of the decision on the grant of asylum and issued with relative documentation, or whether not recognised, he should be informed of the reasons for the decision and given a reasonable time to appeal, either to the same or to a different administrative or judicial authority;

- the remedy must provide an examination of both facts and law based on up-to-date information, and the possibility for the applicant to remain on the territory pending the decision.

In the European asylum context, as we will see in the following paragraphs, there are the same basic procedural guarantees and safeguards addressing the legal rights of applicants for international protection: these are outlined, in particular, in Chapter II of the Recast Asylum Procedures Directive (2013/32/EU) and in Article 6 of the Charter of Fundamental Rights of the EU[17].

Before going deeper in the analysis of the asylum system in the European context with its legal instruments protecting asylum seekers' rights, we will take a look of the international treaties, notably the Geneva Refugee Convention of 1951 and some human rights treaties, which provide the basis for the protection of refugees, from the prohibition of expulsion (*refoulement*) to all the rights enshrined in international law applying to every person, thus, including refugees.

2. Refugee law: the 1951 Geneva Refugee Convention

The primary international standard for refugee protection until today is the Geneva Convention Relating to the Status of Refugees adopted in 1951, with its 1967 Protocol Relating to the Status of Refugees which removed the geographical and temporal limits of the Convention, that is, the option for states to restrict protection to pre-1951 refugees and to only European refugees. There are currently 148 states that are parties of one or both the instruments. The 1951 Convention is particularly important as it endorses a single definition of the term 'refugee' and provides the most comprehensive codification of the rights of refugees, including not only critical rights like non-penalisation for illegal entry or non-expulsion, but also wide guarantees of socio-economic rights. The Convention is both a status and rights-

[17]European Commission - Migration and Home Affairs, *European Migration Network (EMN)*, procedural guarantees, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/procedural-guarantees_en (accessed 20/10/19)

based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement (UNHCR 2010).

The 1951 Convention contains also a provision prohibiting the expulsion or *refoulement* of refugees (Article 33) to territories where their life or freedom would be at risk. In this case the principle cannot be subject to derogations and applies only to those meeting the refugee definition, but the same article provides also for a criminality exception, so that a refugee deemed as a threat to the security of that country or convicted of a particularly serious crime cannot benefit from the principle of *non-refoulement.*

The Convention definition of refugee is individualistic, forward-looking and limited to persons who already fled their own country for a risk of persecution deriving from civil or political discrimination. Article 1 states that the term 'refugee' applies to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it[18].

Article 1 – in paragraphs D, E and F – establishes also some exceptions to the application of the refugee definition and the Convention: this is because refugee law is designed to provide a surrogate international protection to those who really need it. Article 1D excludes persons who already are receiving protection or assistance by other UN agencies or organs other than the UNHCR, referring mainly to Palestinians who are supported by the UN Relief and Works Agency for Palestinians Refugees in the Near East (UNRWA). Article 1E excludes persons who have acquired the nationality, and therefore the protection, of another country. Finally, Article 1F excludes any person reasonably suspected of being an international criminal and in particular: if he has committed crimes against peace,

[18] Article 1(A)(2) Convention Relating to the Status of Refugees, 1951

war crimes or crimes against humanity (Article 1F(a)); if he has committed serious non-political crimes outside the country of refuge prior to his arrival (Article 1F(b)); or if has been guilty of acts contrary to the principles and purposes of the United Nations (Article 1F(c)), referring to violations of human rights by persons state authorities or acts of terrorism.

As the UNHCR Standing Committee (1997) specified, "the primary purposes of these exclusion clauses are to deprive the perpetrators of heinous acts and serious common crimes, of such protection, and to safeguard the receiving country from criminals who present a danger to that country's security". Indeed, if the protection provided by refugee law were granted also to the perpetrators of grave offences, the practice of international protection would be in direct conflict with national and international law. The application of these exclusion clauses of Article 1F can be invoked by the states only after a full and careful examination of the asylum claim and a fair hearing: then, the decision must be based on demonstrable grounds (UNHCR Standing Committee 1997).

Refugee protection exists in relation to the existence of a risk of persecution and for this reason, it lasts for the duration of such risk. Paragraph C of Article 1 lays out the categories of persons deemed no longer to need international protection – these are the so-called 'cessation clauses' and include persons who voluntarily re-avail themselves of the protection of their nationality (Article 1C (1)), those who acquired a new nationality (Article 1C (3)), etc. As established by the refugee definition in Article 1A, there are six main criteria to meet for the recognition of refugee status. The first is that the person "*is outside the country of his nationality*" and come under the jurisdiction of the state where he applies for asylum. The Convention establishes that States parties cannot impose penalties on refugees in case of illegal entry or presence in the country or without authorization, if they present themselves to the authorities without delay (Article 31(1)). In assessing the refugee definition, the state authorities should consider the circumstances in the applicant's country of nationality (in the case of a person with more than one nationalities, the 'state of nationality' is considered each of the countries of which he is a national),

while in the case of stateless persons, they may qualify as refugees if they show evidence of a real risk of persecution in the country of former habitual residence (Article 1A(2)). Furthermore, as the Refugee Convention in concerned with forward-looking risks of persecution, it protects also the so-called '*refugees sur place*', that is, persons who were not refugees when they left their country, but who became refugees at a later date because of circumstances arising in their country of origin during their absence (UNHCR 2019, p.26).

The second condition of refugee definition is the "*well-founded fear*" which contains both a subjective element, the fear, and an objective one, well-founded, meaning that the determination of refugee status requires the evaluation of the applicant's statements (his state of mind and subjective condition), but also considering the objective situation of the country of origin. The third element of refugee definition is the risk "*of being persecuted*", requiring the demonstration of a risk of serious harm. There is no universally accepted definition of persecution, but from Article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution, as well as serious violations of human rights (UNHCR 2019, p.21).

The fourth element of refugee definition is the failure of state protection: the person "*is unable or, owing to such fear, is unwilling to avail himself of the protection of that country",* that requires evidence that the applicant's own state cannot or will not respond to the risk of persecution. Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned, like a state of war or civil war which prevent the country from exercising an effective protection. But there can be also a refusal of protection when the state denied protection to the applicant. On the opposite, the term 'unwilling' refers to refugees who refuse to accept the protection of the Government of the country of their nationality and is qualified by the phrase "owing to such fear", highlighting that the applicant has a valid reason to refuse his country's protection.

Finally, the Refugee Convention requires a nexus between the claimant's civil or political status and beliefs and the risk of persecution: the person has to show that his fear is grounded on one of the five grounds foreseen by the Convention – race, religion, nationality, membership of a particular social group, or political opinion. It is for the examiner, when investigating the facts of the case, and not for the claimant, to ascertain the reason(s) for the persecution feared and to decide whether the refugee definition is met. The Convention grounds often overlap in one case and the fear is due to a combination of them; furthermore, it is not required a ground to be the sole or predominant cause of risk of persecution, but it must be a contributing factor to it (Hathaway 2012).

"*Race*" must be understood in its widest sense to include all kinds of ethnic groups; frequently it also entails membership of a specific social group of common descent forming a minority within a larger population. The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status: there should be particular circumstances affecting the group, such that this membership will be a sufficient ground to fear persecution.

The Convention ground of "*religion*" includes not only freedom of religion, but also freedom of thought, conscience and belief as proclaimed by the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. It includes also the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance, so that persecution for reasons of religion may assume the form of prohibition of membership of a religious community, of worship in private or in public, of religious instruction, etc. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status, unless there are some specific circumstances.

The term "*nationality*" in this context is not to be understood only as "citizenship": it refers also to membership of an ethnic or linguistic group and may occasionally overlap with the ground 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic)

minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution. Nationality can be often connected to the other Convention ground of political opinion, especially when a conflict between national groups is combined with political movements, and where a political movement is identified with a specific "nationality" (UNHCR 2019, p.24).

Regarding the ground of "*membership of a particular social group*", there is no clear definition of the term 'social group', but it can be considered a group of persons with similar backgrounds, habits or social status that cannot be changed, with a distinct identity as perceived by the surrounding society and authorities. A claim to fear of persecution under this heading is frequently connected with other Convention grounds, such as race, religion or nationality.

Finally, for the ground of "*political opinion*", the applicant must show that he has a fear of persecution for holding such opinions, since holding political opinions different from those of the Government is not in itself a ground for claiming refugee status. This presupposes that the applicant holds opinions not tolerated by the authorities, and that they have come to the notice of the authorities or are attributed by them to the applicant. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country, he can just fear the consequences in cases of return. Furthermore, it is necessary to distinguish between persecution for political opinion and persecution for politically-motivated acts: only in presence of excessive or arbitrary punishment for acts committed out of political motives, this can be claimed as ground of persecution and therefore for refugee status.

The 1951 Convention is particularly important also for the rights regime that it establishes in protection of refugees. Although refugee's rights are protected even by other human rights law instruments, the Convention remains critical since it includes norms addressing many refugee-specific concerns, also in the realm of civil rights, and more extensive economic rights defined as absolute and immediately binding for states. All this rights regime is built over the fundamental principle of

non-discrimination, contained in Article 3 of the Convention: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.

The Refugee Convention explicitly acknowledges the importance of socio-economic rights for refugees. The primary goal of the Convention’s drafters was to ensure the integration of refugees in the economic system of the countries of asylum so that they could provide for their own needs and their families (UN Ad Hoc Committee on Refugees and Stateless Persons 1950). In particular, socio-economic rights are included between Chapter II, Chapter III about gainful employment and Chapter IV about social welfare. Regarding employment, there are four provisions on access to work and rights at work: the right to wage-earning employment (Article 17), the right to self-employment (Article 18), the right to practise a liberal profession (Article 19), and the right to benefit from labour regulations (Article 24). The main rights to social welfare are the right to housing (Article 21), the right to public education (Article 22) and public relief (Article 23). This means that refugees have a right to social assistance and social security: Article 24 (labour legislation and social security) together with Article 23 (public relief) provide a framework for refugees who are lawfully staying in the country to benefit from social insurance and social assistance (Nicholson and Kumin 2017, p.213).

A fundamental feature of the Convention rights is that they mandate compliance at a significantly high level: some provisions - like as regards education, welfare and social security - require states to accord to refugees legally staying in their territory the same treatment as to their nationals; others – like non-political right of association – must be provided at the level granted to most-favoured foreign nationals (Hathaway 2012). As regards the right to education, Article 22 of the 1951 Convention, claims that states should accord to refugees the same treatment as accorded to nationals with respect to elementary education, and a treatment as favourable as possible “with respect to education other than elementary education”. Non-discriminatory access to education is recognised in most human rights instruments as a fundamental right, essential for the realization of other

rights. It is critical especially in helping protect refugee children from illiteracy, abuse, exploitation, child labour, early marriage, and recruitment by armed groups.

As regards civil and political rights, these are usually more effectively protected under the 1966 Covenant on Civil and Political Rights than in the concise list of guarantees of the 1951 Convention, but in some cases the opposite is true. Generic civil rights are usually afforded to non-nationals only on the basis of a guarantee of non-discrimination, meaning that states still can grant refugees lesser rights than nationals if this differentiation is deemed 'reasonable and objective'. Furthermore, civil rights in the Refugee Convention are not subject to the broad-ranging derogation for national emergencies that is provided for in the ICCPR: Article 9 of the Convention authorises only provisional measures for suspension of rights, and not general derogation (Hathaway 2012).

As regards political rights, refugees are generally not permitted to vote in elections or to stand for office in their country of asylum, until and unless they acquire citizenship there. According to Article 15 (right of association), they should nevertheless be granted the most favourable treatment accorded to foreign nationals as regards membership of and activities in non-political and non-profitmaking associations and trade unions (Nicholson and Kumin 2017, p.214).

3. International human rights law: the 1966 ICCPR and the Convention against Torture

As discussed at the beginning of the chapter, although no right to asylum exists today in international law instruments, the principle of *non-refoulement* is generally recognised as providing an additional form of protection to that of asylum, provided in refugee law. In human rights law, the principle of *non-refoulement* is codified in the International Covenant on Civil and Political Rights of 1966 and in the Convention Against Torture of 1984, but also in the European Convention of Human

Rights of 1950. As included in binding treaties, the prohibition of *refoulement* offers another opportunity of being protected for those persons risking torture or ill-treatment.

Article 3(1) of the Convention Against Torture reads: "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"[19]. We can see that the protection from *refoulement* provided by this article can be applied to everyone, regardless of their past conduct, but at the same time it is limited to the risk of torture, not including the risk of cruel, inhuman and degrading treatment. But the Committee Against Torture extends protection also to prohibit the expulsion of persons to any state from which they may be subsequently expelled to a third state where they may face torture (Duffy 2008). In practice it clarified that even the so-called 'indirect *refoulement'* must be prohibited as people should not be returned nor to territories where they would face torture neither to those countries which would in turn expel them.

Furthermore, in Article 3 we find also an obligation for states to investigate the existing situation in the country concerned and in particular whether there is "a consistent pattern of gross, flagrant or mass violations of human rights"[20]. While this Convention offers those who are at risk of experiencing torture upon *refoulement* another avenue to avail of treaty protection, it is quite limited because it takes into account only potential dangers emanating from state actors. In the definition of 'torture' in Article 1, indeed, the reference is to "a public official or other person acting in an official capacity"[21], excluding other forms of torture

[19] Article 3(1) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27(1)

[20] Article 3(2) Convention Against Torture, 1984

[21] Article 1(1) CAT 1984 states: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. […]."

committed or instigated by other non-state actors. To summarise, the Convention Against Torture provides an additional form of international protection other than asylum through the prohibition of *refoulement,* but the access to this protection is limited for two main reasons: because it links to the principle of *non-refoulement* only the risk of torture and not even that of cruel, inhuman and degrading treatment; secondly, because it protects only from offences originating from state actors.

The protection deriving from the *non-refoulement* principle is wider in the International Covenant on Civil and Political Rights (ICCPR) of 1966, since its Article 7 incorporates also cruel, inhuman and degrading treatment into its non-derogable provisions. Article 7 of the ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"[22]. The Human Rights Committee (1992) affirmed that such article does not allow any derogation even in case of public emergency; furthermore, it requires states not to "expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"[23]. This interpretation was evident in the case of *Kindler v. Canada* of 1991 regarding extradition, where the Committee stated that extradition may lead to a violation of the Covenant where there is the risk that the person's rights would be violated in the other jurisdiction upon return[24]. So, even though the standard of proof expected by the HRC is particularly high, making an application to it could be very effective for the protection of a person's rights under the 1966 Covenant, since the Committee can take into consideration additional rights, such as the right to life, the right to freedom of movement, the right to an effective remedy, etc. (Duffy 2008).

States' non-refoulement obligations are also found in other human rights law instruments, such as the International Convention for the Protection of All Persons

[22] Article 7 International Covenant on Civil and Political Rights 1966

[23] UN Human Rights Committee para 9, General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)

[24] Human Rights Committee, case *Kindler v. Canada*, Communication No.470/1991, para 13.2

from Enforced Disappearance (ICPPED), and in some regional treaties, like the Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, and the Charter of Fundamental Rights of the European Union, and implicitly also in the European Convention of Human Rights.

The prohibition of *refoulement* has been interpreted by some courts and international human rights mechanisms to apply to a range of serious human rights violations, including flagrant denial of access to a fair trial, risks of violations to the right to life, etc. In particular, some courts and some international human rights bodies have further interpreted severe violations of economic, social and cultural rights to fall within the scope of the prohibition of *non-refoulement* because they would represent a severe violation of the right to life or freedom from torture or other cruel, inhuman or degrading treatment or punishment. For example, degrading living conditions, lack of medical treatment, or mental illness have been found to prevent return of persons (UN OHCHR 2018, p.1).

4. Europe: common asylum policy and 'dual' system of human rights protection

4.1. The right to asylum in EU law: the Common European Asylum System and the 'Europeanization' of domestic asylum procedures

The legal basis for the right to asylum at the European level is Article 78 of the Treaty on the Functioning of the European Union (TFUE), which gives EU the task of developing a "common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement". Such policy, according to the same article, must be in accordance with the 1951 Geneva Convention and its Protocol and other relevant

treaties. The Treaty of Lisbon is particularly important as regards the development of asylum at communitarian level since the aim of its Title V is to build an 'Area of freedom, security and justice'. In order to do that, it touches three main areas: management of external borders, asylum and immigration. According to Article 77 of the Treaty, the European Parliament and the Council are responsible for establishing measures for a common policy on visas and the conditions for third-country nationals to travel within the Union, besides those measures necessary to create an integrated management system to monitor external borders and carry out checks on persons crossing them without internal controls.

Article 78, as cited above, regards international protection and gives EU competence on the creation of a common asylum system with established rules on the qualification and reception of persons eligible of refugee status or subsidiary protection, and on the procedures to grant or withdraw such protection. EU is also competent on cooperating and creating partnerships with third countries in order to manage inflows of asylum seekers. Finally, Article 79 establishes that the EU should develop a common immigration policy for the efficient management of migration flows, fair treatment of third-country nationals and measures to combat human trafficking and illegal immigration. For this aim, the European Parliament and the Council have competence in establishing the conditions of entry and residence, and standards on long-term visas and residence permits, in defining the rights of third-country nationals residing legally in a member state, and measures for the removal and repatriation of persons residing without authorisation.

Article 78 TFUE, thus, is the legal basis for the development of the European Common Asylum System (CEAS) initiated with the first phase between 2000 and 2005, which deeply influenced the organization of member states' national asylum systems. Regulating asylum and immigration within the EU, indeed, was a fundamental part in the process of European integration and creation of the common market. Since the Schengen Agreement of 1985, indeed, the European governments aimed to create the so-called Area of Freedom, Security and Justice by abolishing the border controls among member states. Therefore, during the process

to build the EU, the security issue of controlling effectively the persons travelling around this border-free zone also emerged: the abolition of internal borders led to accrued controls on the external borders. Following this necessity, the states started to cooperate to create a common asylum system so that all of them would apply common rules and standards in order to limit freedom of movement of asylum seekers, especially preventing secondary movements to other member states (Chetail 2015). In the recitals of both the Qualification and Procedures Directives, we find that one of the reasons for the approximation of the rules on the recognition and content of international protection is "to limit the secondary movements of applicants for international protection between Member States"[25].

In implementing Article 78 with the purpose of creating a common asylum system, EU member states adopted, and later revised, directives and regulations which define common standards to regulate the grant of international protection at member states' national level. Except for the Eurodac and Dublin III Regulations, the adoption of directives still leaves much discretion to single states to decide autonomously how to implement these legal documents in their domestic legal systems. The wide margin for discretion, as well as the extensive exceptions to the directives' basic safeguards, especially in the CEAS' first phase, arose questions among many observers – inter alia the UNHCR – about the level of harmonization that these instruments would achieve in practice. Further concerns were expressed about the scope for divergence in national approaches in the implementation of the directives, notably the Procedures Directive, and in some cases, about the lack of clarity with respect to their interpretation (UNHCR 2010, p.3).

The Eurodac Regulation (Regulation (EU) No. 603/2013 recast) establishes an EU asylum fingerprint database and is fundamental for the implementation of the Dublin III Regulation (Regulation (EU) No. 604/20133) which determines what is the member state responsible for examining an asylum application made in EU according to an hierarchical set of criteria (family considerations, recent visa or resident permits, first country of entry, etc.). Its aim is to register and identify all

[25]Recital 13, Directive 2011/95/EU (Qualification Directive) and Directive 2013/32/EU (Procedures Directive)

persons crossing EU external borders, not only to start the asylum procedures but also to support the member states' law enforcement authorities to prevent and investigate criminal activities. Due to the large-scale arrivals since the start of the refugee crisis in 2015, some member states became overwhelmed with fingerprinting all those arriving irregularly to the EU external borders. As part of the first reform package of May 2016, the Commission presented a proposal to reinforce EURODAC and reflect such changes in the Dublin Regulation proposal, still under discussion.

The Qualification Directive (Directive 2011/95/EU recast) includes the criteria the national authorities should apply in the assessment of asylum applications: it establishes who can be granted refugee status or subsidiary protection following the definitions of persecution and actors of persecution, as well as the grounds for exclusion or cessation of the status contained in its articles. In the second part, the content of international protection is more deeply defined, with all rights which refugees and beneficiaries of subsidiary protection are entitled to (protection from *refoulement*, family unity, access to employment etc.).

The Reception Conditions Directive (Directive 2013/33/EU recast) establishes some standards relating to the material conditions of reception of asylum seekers that member states should apply in order to ensure adequate standards of living and respect for their dignity. These standards concern the access to housing, schooling for the children, health care and to employment; but there are also the standards and conditions about the detention of applicants and provisions for vulnerable persons, like unaccompanied minors. These measures should be guaranteed for all the duration of the asylum procedure, until the final decision is issued by the determining authority.

As regards the organization of the asylum procedures, according to EU law, it is for each member state to decide its own procedural rules for safeguarding the rights of individuals, except where EU rules regulate the matter ('principle of national procedural autonomy').With regard to national asylum procedures, the two main instruments of EU secondary law that lay down rules limiting the national

procedural autonomy of the member states are the Dublin III Regulation and the Asylum Procedures Directive. Additionally, the EU Charter and general principles of EU law in and of themselves establish rules limiting national procedural autonomy in asylum procedures (UNHCR 2015, p.84).These rules help secure the effective implementation of the provisions on refugee status and subsidiary protection contained in the Qualification Directive, including inter alia the right to be heard and the right to an effective remedy.

The Asylum Procedures Directive (Directive 2013/32/EU recast) establishes common rules to harmonise the procedures for granting and withdrawing international protection in all member states. The negotiations for this directive were not easy since it affects some aspects of the states' sovereignty as regards the structure of the procedures at national level and therefore the organization of the determining authorities. Article 4, for example, requires from the member states the designation of a determining authority responsible for the examination of asylum applications disposing of appropriate resources and competent personnel with specific training and knowledge. Furthermore, Chapter II includes all the basic principles and guarantees that member states should ensure to the applicants during the whole process. These relate, for example, to the access to the procedure (Article 6), the right to remain in the member state while pending the examination of the application at first instance (Article 9), but also the requirements and guarantees the states should respect in examining the applications and taking the decisions.

In Chapter III, the Directive defines how the different kinds of procedures at first instance should be conducted and within what time limits, establishing the cases in which the member states can use a prioritised, accelerated or border procedure (Article 31(7) and (8)). After the definitions of concepts like 'safe country of origin', or 'safe third country', in Chapter V, there are provisions regarding the appeals procedures which should guarantee the access to an effective remedy. Article 46 includes a list of the possible types of decisions that a court or tribunal can take on the application for international protection; furthermore, affirms the right of

applicants to remain in the state territory pending the outcome of the remedy. The same article, on the other hand, allows the states to provide for "*reasonable time limits*" and the necessary rules for the applicant to exercise the right to an effective remedy. Member states, indeed, remain responsible to define in their national legislation time limits for the courts to examine the cases (Article 46(10)).

Member states are expected to provide respect of the guarantees and rights contained in the various directives: consequently, many aspects and phases of the national asylum procedures are defined indirectly by EU law, or rather, by the duty to respect EU standards.

The Procedures Directive, in particular, requires member states to include in their national asylum procedures certain measures and guarantees: for example, Article 14 foresees that applicants should be given the opportunity of a personal interview before the determining authority takes a decision on their applications. The following articles define also the conditions under which such interviews should take place (without the presence of family members, with an appropriate interpreter, etc.) and the necessity to make audio or audio-visual recording or a transcript of each interview, to which the applicant should have access. The same directive requires states to provide applicants free legal information (Article 19) and free legal assistance and representation in the appeals procedures (Article 20). These should be granted in particular to those who lack sufficient resources and through specifically designated legal advisers or counsellors (Article 21). Furthermore, the Procedures Directive asks member states to identify 'within reasonable period of time' the applicants in need of special procedural guarantees and give them proper support during the procedure (Article 24). Particular guarantees during the phases of the asylum procedure are also needed for unaccompanied children, such as the need to provide them a representative.

The examination of CEAS directives and regulations, and in particular of the Procedures Directive, clearly shows that EU has a wide competence on asylum matter and on establishing the rules and the standards that member states should adopt in their national systems for granting international protection. This is

because, with the Treaty of Amsterdam of 1997 shifting asylum from the third pillar (inter-governmental cooperation) to the first pillar (Community integration), member states agreed to devolve most competence on asylum to the then European Community in order to harmonise their asylum procedures on the basis of common standards (Chetail 2015, p.9-10).

The legal instruments constituting the CEAS, even improved following the 2007 Treaty of Lisbon and their recasting, establish common standards to be implemented by member states, thus, binding the organization of their domestic asylum procedures. The adoption of directives instead of regulations, however, leaves member states quite large discretion in the application of such standards. For example, it is states' responsibility to establish the national authorities responsible for examining and deciding on asylum applications, but also to lay down the relevant rules in domestic legislation to organise the phases and the duration of the procedures, while respecting EU standards. National governments, thus, can intervene in these limited 'spaces' left to states' competence by EU law in order to give a certain direction to their domestic policies on asylum and immigration according to the political majorities in national parliaments. EU asylum policy imposes genuine obligations upon states that previously had more stringent acceptance standards, slow procedures or offered limited financial support. Governance has been impacted in terms of the number and level of obligations that have been introduced in the area of asylum, even though the impact was not uniform among member states (Caviedes 2015, p.651).

The division of competence between the EU and member states in the asylum and immigration area has become object of criticisms by many political forces especially in the last decade. They often criticise the limited decision-making power left to national states and the wide competence given to the EU to take decisions on the measures and standards that member states have to apply in the asylum field. The main reason for these criticisms is the perception that national authorities no longer have the power to decide about border management and who can enter their territory. Since it has always been one of the main prerogatives of the modern

state, such obligation to abide by EU rules is seen by Eurosceptics as a loss of national sovereignty.

Such attacks to the process of European integration and the centralised competence on asylum policy are obviously related to the increased flows of third-country immigrants seeking asylum in Europe in the last years. As we will see more in detail in chapter V, some national political forces often use EU institutions as scapegoats to justify the bad functioning of the asylum system which appeared inadequate to manage large flows of immigrants since 2015. These populist Eurosceptic forces claim to give most competence back to member states not only in the asylum field but also in the monetary and economic one, as to regain 'full sovereignty' and independence in tackling the issues affecting their country, including importantly the asylum issue.

Asylum in the European Union is based on Article 78 of the Treaty on the Functioning of EU, but its other legal basis is found in Article 18 of the EU Charter of Fundamental Freedoms. Furthermore, as regards the protection of asylum seekers and refugees' rights, two 'protection systems' coexist at European level: the Charter of Fundamental Freedoms of the EU of 2000, and the 1950 European Convention of Human Rights in the Council of Europe's framework.

4.2. The Charter of Fundamental Rights of the EU of 2000

The 2000 Charter of Fundamental Freedoms of the European Union became a legally binding bill of rights for the European Union with the entry into force of the Lisbon Treaty in 2009. The Charter acquired the same legal status as the other EU treaties through Article 6 TEU (Treaty on European Union), but has a higher normative status than all EU legislation adopted under the Treaties and all national laws implementing Union law: this means that a provision of EU legislation or national law is invalid if it breaches the Charter (Ecre 2014). Article 51(1) of the Charter provides that the Charter applies to the institutions and bodies of the Union and to Member States only when they are implementing EU law. In particular, it

applies to national laws in those areas of law within the scope of the powers conferred on the EU in the EU Treaties. Since most of asylum law is an area of EU competence, national asylum legislation is commonly regarded as implementing Union law, and the Charter consequently applies.

The Charter includes the rights which were already expressly guaranteed in the Treaty establishing the European Community and now found in EU Treaties, but also rights contained in the European Convention of Human Rights. As explained in the *Explanations Relating to the Charter of Fundamental Rights* (2007)[26], Article 52(3) of the Charter is intended to ensure consistency between the Charter and the European Convention of Human Rights, including also the caselaw of the European Court of Human Rights.

In the EU Charter, the articles related to the protection of asylum seekers' rights are mainly Article 4 on prohibition of torture and inhuman or degrading treatment or punishment, Article 18 on right to asylum and Article 19 on protection in the event of removal, expulsion or extradition. Article 18, in its 'right to asylum', includes the principle of *non-refoulement,* but it is also wider that this: the Charter Explanations, indeed, affirm that the article is based on Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Member states, thus, have to respect the prohibition of *refoulement,* but also ensure the right to the assessment of an asylum claim in efficient asylum processes and the right to an effective remedy (Ecre 2014, p.37).

Similarly related to the principle of *non-refoulement*, Article 4 and Article 19(2) essentially prohibit Member States from returning an individual to a situation where he would be at risk of torture, inhuman or degrading treatment or punishment. This includes rejection at the frontier, interception and indirect refoulement, so that member states have the obligation to assess the existing risks of refoulement for the persons intercepted, regardless of whether they have explicitly applied for asylum. Article 19(1) on prohibition of collective expulsions has

[26]*Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02), Official Journal of the European Union, 14 December 2007, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29(accessed 16/08/19)

the same meaning and scope of Article 4 of Protocol 4 to the ECHR, while the second paragraph incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (Charter Explanations 2007). Similarly, Article 4 of the Charter, prohibition of torture and inhuman treatment, is the same right guaranteed in Article 3 of the European Convention of Human Rights.

Based on the articles of the Charter of Fundamental Rights of the EU is the European asylum system and in particular the Qualification Directive (2011/95/EU)[27] which establishes the rules for granting asylum and subsidiary protection. Articles 4, 18 and 19 of the Charter, prohibiting *refoulement* and the exposure of individuals to the risk of torture and ill-treatment together with the right to asylum, provide a form of international protection other to asylum, that is, subsidiary protection. According to the definition of 'person eligible for subsidiary protection' contained in the directive, this kind of protection is granted to third-country nationals or stateless persons who do not qualify as refugees but, if returned, would face a real risk of serious harm.

4.3. The European Convention of Human Rights of 1950

In the wider context of the Council of Europe, we find another human rights instrument codifying individuals' fundamental freedoms and including also provisions protecting the rights of asylum seekers and refugees.

The European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted by the Council of Europe's member states and came into force in 1950. Even though the Convention does not include an article explicitly claiming the principle of *non-refoulement,* anyway it provides for some rights that may constitute barriers to the removal of asylum seekers, first of all Article 2 on right to life and Article 3 on prohibition of torture. The latter, in particular, by

[27] Recital 16 of the 2011 Qualification Directive states: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members […]".

prohibiting torture and ill-treatment, implicitly includes the prohibition of *refoulement*. Such principle, indeed, is considered a fundamental component of the customary law prohibition on torture and cruel, inhuman and degrading treatment, so that in practice *non-refoulement* is deemed as an integral part of international customary law, which was also confirmed over the years by the UNHCR Executive Committee and the Office of the High Commissioner for Human Rights (OHCHR).

In the European Convention, Article 3 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". We can notice that the protection provided by this article is very wide since there are no exceptions and applies to everyone, regardless of their past conduct, including not only the risk of torture - as in the Convention Against Torture – but also any kind of ill-treatment. As affirmed by the Parliamentary Assembly of the Council of Europe (1965), by prohibiting torture and inhuman treatment this article binds the states not to return refugees to countries where their life or freedom would be threatened. Even the caselaw of the European Court of Human Rights emphasised the unconditional character of the article, affirming the impossibility to put derogations even in the event of public emergencies (cases *Ireland v. United Kingdom* 1978; Chahal v. United Kingdom 1996; Soering v. United Kingdom 1989; Saadi v. Italy 2008).

Furthermore, Articles 2 and 3 also prohibit 'indirect *refoulement',* that is an expulsion to a state from where migrants may face farther deportation without a proper assessment of their situation. This principle applies also in the context of the Dublin Regulation of the European Union, thus, not only in consideration of expulsion towards third countries, but also to other EU member states. This means that if the asylum procedure in a particular member state does not offer guarantees against arbitrary removal, the other EU member states must refrain from returning asylum seekers to that country on the basis of the Dublin Regulation (Council of Europe and European Court of Human Rights 2016).

The caselaw of the Court has established that Articles 2 and 3 may come into play also in cases of persons intercepted at sea[28] or refused entry at a land border. When

[28] Case Hirsi Jamaa and Others v. Italy, ECHR 2012

making an application for a breach of Article 3, the European Court of Human Rights will assess whether the risk of ill-treatment in the country of destination is 'real', 'foreseeable' and 'personal': it is duty of the applicants to show the specific circumstances that make them personally vulnerable to such ill-treatment. At the same time, Article 3 requires that receiving states provide adequate accommodation and decent reception conditions to the asylum-seekers: critical in this sense has been the case *M.S.S. v. Belgium and Greece* of 2011, where the Court condemned both Belgium and Greece for violation of Article 3, since the former returned the asylum seekers to Greece where reception and living conditions were inadequate and where they would risk expulsion to Afghanistan without effective examination of their asylum applications.

Finally, we find additional safeguards regarding collective expulsions in Article 4 of Protocol No. 4 to the Convention on the prohibition of collective expulsion of aliens. As established by the Court, an identification procedure must be carried out and the individual circumstances of each asylum seeker in a group must be properly assessed, otherwise the expulsion will be considered collective. In the mentioned 2012 case *Hirsi Jamaa and Others v. Italy*, the Court found a violation of Article 4 of Protocol No. 4 since this applies also to the removal of third country nationals carried outside the national territory of a member state.

Both the European Convention of Human Rights and the Charter of Fundamental Rights of the EU provide asylum seekers and refugees with a form of protection deriving from the principle of *non-refoulement* that is often more inclusive than that provided by the Geneva Convention which applies only to those meeting the refugee definition of its Article 1.

4.4. CJEU case law on asylum limiting member states' margin of discretion in the implementation of the CEAS

The Court of Justice of the European Union (CJEU) exercises the judicial functions of the EU, whose primary aim is to favour a greater political and economic integration

among EU member states. The Court, thus, constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the member states, it ensures the uniform application and interpretation of EU law by the Union institutions and its member states. This institution was established in 1952 in Luxembourg and currently encompasses two bodies: the Court of Justice and the General Court (created in 1988), while the Civil Service Tribunal ceased to exist in 2016 and its jurisdiction was transferred to the General Court. The Court of Justice is composed of 28 Judges – one for each EU state – and 11 Advocates General, appointed by common accord of the governments of the member states.

The Court has been given clearly defined jurisdiction (Article 263 TFUE), which it exercises on references for preliminary rulings and in various categories of proceedings. The former function occurs when national courts refer to the CJEU and ask it to clarify a point concerning the interpretation of EU law. The Court's reply is not merely an opinion but takes the form of a judgment: the interpretation given binds not only the national court to which it is addressed in deciding the dispute before it, but also all the other national courts before which the same problem is raised. This function is often used by national courts and effectively ensures a uniform application of EU legislation, preventing divergent interpretations. The other categories of proceedings include: the actions for failure to fulfil obligations - usually brought by the Commission only after a preliminary procedure, which enable the Court to determine whether a member state has fulfilled its obligations under EU law; the actions for annulment - brought by a member state against the European Parliament and/or against the Council or by one EU institution against another, seeking the annulment of a measure (in particular a regulation, directive or decision) adopted by the other body; actions for failure to act - which aim to review the lawfulness of the failure to act of the institutions, bodies, offices or agencies of the EU; and finally, appeals - on points of law only brought before the Court against judgments and orders of the General Court[29].

[29] Court of Justice of the EU, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/(accessed 07/10/19)

The most common role of the Court is the mechanism for preliminary rulings in interpretation: in the field of immigration and asylum law, in particular, the CJEU rulings have been fundamental to clarify the interpretation of Union law, thus indirectly influencing the asylum systems of the member states and favouring a further harmonisation of this policy field among European countries. Furthermore, as most EU legal instruments on asylum have the form of directives, the role of the Court is particularly relevant in limiting the margin of appreciation of national governments as to the ways of implementing Union law at domestic level. This is particularly the case in the last years, where many EU governments introduced new and stricter measures on immigration and asylum to tackle the 'emergency' situation due to the increased flows of immigrants in Europe. As we will see in the next chapters, in parallel to the increase of immigration towards Europe, there has been a rise of populist and radical right parties which claim the closure of borders to asylum seekers and changes of the asylum procedures as to limit the numbers of third country nationals arriving and staying in their territories.

The Court of Justice in these last years has often intervened through sentences and preliminary rulings about the correct interpretation of EU law that risks being breached by new legislation and those 'emergency' measures introduced by European governments since 2015 as a response to the increased arrivals of immigrants and asylum seekers. The Court is currently demonstrating a really active role in interpreting EU directives and regulations on asylum so that all European member states are obliged to check the compatibility of the reforms they introduce with the guarantees contained in EU law. National courts of the member states increasingly resort to the Court of Justice to receive clarifications on how interpreting and applying EU law. Especially through requests for preliminary rulings lodged by national judges, the CJEU has clarified the interpretation of many articles of the Qualification Directive (2011/95/EU), of the Procedures Directive (2013/32/EU), but also of the implementation of provisions regarding the Dublin system and the transfer or return of asylum seekers and the rules national authorities must respect in cases of family reunification.

To cite some examples about the important impact that the Court's judgments have on the implementation of EU law on asylum and thus, indirectly, on the functioning of member states' asylum systems, we can consider some cases focused on the interpretation of relevant articles of the CEAS instruments. In Sacko case (Case C-348/16), decided in July 2017, regarding the implementation of the Procedures Directive, the Court clarified that in appeal proceedings, national courts may dismiss the appeal against a decision rejecting a manifestly unfounded application without hearing the applicant, but on two conditions: first, that during the first instance proceedings the applicant had the opportunity to be heard in a personal interview, and, second, that the court can decide whether to conduct a hearing if it considers it necessary for a full and *ex nunc* examination of facts and points of law.

The Ahmed case (Case C-369/17), decided in September 2018, was relevant to clarify the possibility for member states to withdraw or exclude applicants from international protection. In particular, the question referred to the Court regarded the interpretation of Article 17(1) of the Qualification Directive establishing the grounds for excluding someone from eligibility for subsidiary protection, with a focus on the concept of 'serious crime' (Article 17(1)(b)). The Court affirmed that such article precludes legislation of a member state from excluding from subsidiary protection an applicant deemed to have 'committed a serious crime' on the basis of the sole criterion of the penalty provided for a specific crime under the law of that member state.

The CJEU's view is that, even though the criterion of the penalty provided under national criminal law can be useful to assess the seriousness of the crime, the competent authority should undertake a full assessment of the specific facts before applying that ground for exclusion (CJEU Press Release 13 September 2018). The ruling of the Court, thus, clarified that it cannot be the criminal legislation of a country to establish *a priori* the 'automatic' exclusion of an applicant from international protection, but it is for the competent authority to apply the grounds

for exclusion provided by law, only after carrying out a full investigation of the circumstances of each individual case[30].

The case law of the Court of Justice supplements EU law as to limit the discretion of member states in the organisation of their national asylum systems, by defining more clearly the procedural guarantees that member states should provide in practice to applicants during the various stages of the asylum process. For example, as regards the examination procedures, and in particular the accelerated and border ones, the Court has intervened more than once to clarify the relative provisions contained in Directive 2013/32/EU at Article 31(8). It provides a list of cases where an accelerated or border procedure can be used, including also that of the safe country of origin (Article 31(8)(b)). Article 36 and 37 of the Directive are focused on this concept and clearly provide that it is for the member states to introduce national legislation designating a list of safe countries of origin according to the criteria laid down in the Directive (Annex I).

The CJEU case law is fundamental in guiding member states in the correct implementation of these provisions. In a judgment of 2018[31], for example, the Court clarified that a member state – without first fully implementing the rules under the Directive relating to the designation of safe countries of origin – cannot rely on the presumption under Articles 36 and 37 in respect of the safe country of origin concept and subsequently find an application to be manifestly unfounded[32]. In the

[30] In this specific case, Hungarian law on the right to asylum used to exclude or revoke the granting of refugee status or subsidiary protection to the applicants who committed "a serious crime for which Hungarian law provides a custodial sentence of five years or more". But according to the CJEU judgement, it is responsibility of the authority or the competent national court examining that application to assess the seriousness of the crime at issue, through a full investigation of the circumstances of the case concerned. This interpretation is confirmed also by the report of the European Asylum Support Office (EASO) of January 2016, stating that the seriousness of a crime that could result in the exclusion from subsidiary protection must be assessed in the light of some criteria, such as, inter alia, the nature of the act at issue.

[31] Case C-404/17, A. v Migrationsverket (Swedish Migration Agency), Judgment of the Court (First Chamber) of 25 July 2018, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=204386&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3709961(accessed 14/10/19)

[32] EDAL – European Database of Asylum Law, CJEU - C 404/17, A v Migrationsverket, 25 July 2018, in *asylumlawdatabase.eu*, https://www.asylumlawdatabase.eu/en/content/cjeu-c-40417-v-migrationsverket-25-july-2018(accessed 14/10/19)

same case the Court clarified also that an application cannot be considered manifestly unfounded because the applicant did not provide sufficient information.

Particularly relevant in our analysis as to the asylum procedures and the role of the populist parties intervening to modify them, is the Torubarov case[33] on which the Court of Justice has very recently given an important judgment. It was the response to a request for preliminary ruling lodged by the Administrative and Labour Court of Pécs (Hungary) as regards the interpretation of Article 46(3) of the Procedures Directive, read in the light of Article 47 of the Charter of Fundamental Rights of the EU (right to effective remedy). The case under concern regarded Mr Torubarov, a Russian national, who made a first application for international protection in Hungary at the end of 2013. For two times the Immigration Office rejected the application and the applicant lodged an appeal to the referral court which twice annulled the administrative decisions of first instance as unfounded, due to inconsistencies and manifestly incorrect assessment of the facts. In its decisions, the Court ordered the Immigration Office to conduct a new procedure and take a new decision with its guidance as to the factors to examine. The court recognised that the applicant had the reasons to fear persecution and serious harm in Russia on account of his political opinions, thus having the right to be granted international protection. In May 2017 the Office rejected for the third time the application for asylum by Mr Torubarov and for the third time he appealed the decision to the referring court, seeking for a variation of that decision.

Such a deadlock, made of a succession of annulments of administrative decisions and appeals, is due to the Hungarian 'Law on the management of mass immigration'[34] entered into force in September 2015 amending some provisions of the Act on asylum. Inter alia, Article 68(5) of the Act was changed providing that "The court may not overturn the decision of the authority competent in matters of asylum".

[33] Case C-556/17, Judgment of the Court (Grand Chamber) of 29 July 2019, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=216550&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3728211(accessed 14/10/19)

[34]The *Egyestörvényeknek a tömegesbevándorláskezelésévelösszefüggőmódosításárólszóló2015. éviCXL. törvény* (Law No CXL of 2015 amendingcertain laws in the context of managing mass immigration)

The only power left to the courts, thus, was to annul unlawful administrative decisions, with the possibility to order the administrative authority to conduct a new procedure. In practice, through the 2015 amendment to the Act on asylum, the Government withdrew the power of Hungarian administrative courts to vary administrative decisions taken by the Immigration Office at first instance, leaving them only the possibility to annul such decisions and order a new examination of the cases.

The referring court in the Torubarov case considered that such legislation deprived asylum seekers of an effective judicial remedy, violating Article 46(3)[35] of the Procedures Directive and Article 47 of the Charter of Fundamental Rights. The question referred to the CJEU was, thus, whether these provisions of EU law allow administrative courts to vary an administrative decision refusing international protection, through the disapplication, as in this case, of the national legislation that denies them that power. In the considerations leading to the judgment of 29 July 2019, the Court affirmed that in order to guarantee that an applicant has an effective judicial remedy, as foreseen in EU law, a national court or tribunal seised of an appeal is required to vary a decision of the administrative body (in the present case the Immigration Office) that does not comply with its previous judgment and to substitute its decision on the grant of international protection by disapplying, if necessary, the national law that prohibits the court from proceeding in that way (judgment of 29 July 2019, Torubarov, C-556/17, EU:C:2019:626, paragraph 74). The CJEU, in practice, ruled that whether a court finds – after "making a full and *ex nunc* examination of all the relevant elements of fact and law" – that the applicant must be granted international protection according to the criteria set out in the Qualification Directive (2011/95/EU), but the determining administrative authority adopts a contrary decision without considering the new elements relevant for assessing the protection needs of the applicant, the court must vary that decision which does not comply with its previous judgment.

[35] Article 46 para 3 states: "In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance."

Already in previous case law, the Court had intervened on the interpretation of Article 46 of the Procedures Directive regarding the effective remedy in asylum procedures and on the role of the national judicial body responsible for that. In the judgment of 25 July 2018, Alheto (C-585/16), it clarified that Article 46(3) means that members states must ensure that the court before which the appeals are lodged carries out 'a full and *ex nunc* examination of both facts and points of law', including, where applicable, an examination of the international protection needs pursuant to the Qualification Directive (paragraph 106[36]). The Court further clarified that 'a full and *ex nunc* examination' means that national law should be ordered in such a way that the processing of the appeals by the courts includes an "an up-to-date assessment of the case at hand" (paragraph 110).

In the considerations of the judgment of July (paragraph 55), by referring other past judgments, the Court importantly recognises that member states are left some discretion by the Procedures Directive, inter alia in the determination of rules for dealing with an application where the administrative decision is annulled by a court. However, when implementing this directive, "the characteristics of the remedy provided for in Article 46 must be determined in a manner that is consistent with Article 47 of the Charter" (judgment of 26 July 2017, Sacko, C-348/16, EU:C:2017:591, paragraph 31, and of 25 July 2018, Alheto, C-585/16, EU:C:2018:584, paragraph 114). This means in few words that EU member states can decide on the procedural rules which make their national asylum systems work, but these must be in compliance with the guarantees provided by Union law.

The sentence on Torubarov case goes further in the analysis of the provision ensuring an effective remedy as the Court shows a clear position to 'defend' the fundamental role of the judicial body in the process for the grant of international protection. Courts appear to be absolutely necessary in the actual implementation of the principle of effective judicial remedy, which cannot be undermined by government interventions in domestic legislation on procedures. This last ruling of the Court on this issue is particularly significant in the current historical moment as

[36] Judgment of 25 July 2018, Alheto, C-585/16, EU:C:2018:584, paragraphs 105 and 106, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2018:584 (accessed 15/10/19)

it constitutes, together with the rest of its case law, a restraint to the 'race to the bottom' occurring in many European countries through changes in national asylum systems which negatively affect especially the procedural guarantees in the reception, treatment and qualification of asylum seekers. The activity of the Court of Justice is, thus, particularly fundamental in the current context characterised by the rise of nationalist and xenophobic discourses by populist forces around Europe. It ensures that all European states apply correctly EU law and that the asylum procedures at national level are consistent with the guarantees for asylum seekers and refugees as enshrined in the CEAS instruments.

5. Non-binding instruments: the 2016 New York Declaration and the UN Global Compact on Refugees

While there are few universal legal instruments regarding the protection and the rights of refugees and legally binding states, over time many other human rights instruments have been adopted, but most of them are limited to regional jurisdiction or non-compelling sources. These are for example the *OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa* of 1969, whose application is limited to member states of the Organization of the African Union; or *UN Declaration on Territorial Asylum,* adopted by the General Assembly in 1967, which lays down a series of fundamental principles in regard to territorial asylum. It states that the granting of territorial asylum "is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State." The Declaration upholds the basic humanitarian principle of *non-refoulement* in Article 3: "No person […] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution"[37]. Among the other principles, it recalls articles 13 and 14 of the Universal Declaration

[37] Article 3(1)UN General Assembly Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), available at: https://www.refworld.org/docid/3b00f05a2c.html (accessed 17/08/19)

of Human Rights, which are, respectively, the right to leave any country and to return to one's country and the right to seek and enjoy asylum (OHCHR 1993).

An example of regional instrument dealing with refugees' protection is the *Cartagena Declaration on Refugees* of 1984, adopted by Latin American countries and approved by the Organization of the American States (OAS). It laid down the legal foundations for the treatment of Central American refugees, including the principle of non-refoulement, the importance of integrating refugees and undertaking efforts to eradicate the causes of the refugee problem. Importantly, its refugee definition encompasses a broader category of persons in need of international protection who may not meet the 1951 Convention definition: "[…] includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order"[38].

One of the most recent international developments of refugee protection is the *New York Declaration on Migrants and Refugees* adopted in 2016 by the UN General Assembly. As a response especially to the last years refugee crises around the world, it reaffirms the importance of the international refugee regime and contains a wide range of commitments by member states to strengthen and enhance mechanisms to protect people on the move. Importantly, it has paved the way for the adoption of two new global compacts in 2018: a global compact on refugees and a global compact for safe, orderly and regular migration. The former is grounded in the international refugee protection regime, centred on the cardinal principle of *non-refoulement* and the 1951 Convention with its 1967 Protocol. It is also guided by relevant international human rights instruments, international humanitarian law, as well as other international instruments as applicable (UNGA 2018). In particular, paragraph 67 states: "We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to

[38] Conclusion III (3), Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984

the fundamental principle of *non-refoulement* in accordance with international refugee law"[39].

The primary aim of the Global compact – affirmed in December 2019 by the General Assembly, after two years of consultations led by UNHCR with member states, international organizations, refugees, civil society, the private sector, and experts – is to prompt states to cooperate in hosting refugees and invest resources to create an added value to the society of each receiving country. The Global compact on refugees, thus, is a framework for more predictable and equitable responsibility-sharing among states which should recognize that only international cooperation can lead to sustainable solutions to refugee situations. The four main objectives of the global compact are to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity (UNGA 2018, p.2). Integral part of the global compact is the implementation of the *Comprehensive refugee response framework* (CRRF) as adopted by the United Nations General Assembly in the Annex I to the 2016 New York Declaration.

In line with the 2016 Declaration, the programme of action of the global compact is aimed at providing a comprehensive response in support of refugees and countries particularly affected by large refugee movements. In part III.A, it foresees effective arrangements for burden- and responsibility-sharing, including the institution of a periodic Global Refugee Forum to be convened by all UN member states with relevant stakeholders every four years, the activation of a Support Platform in host countries which require support in mobilizing material and technical assistance and in facilitating coherent humanitarian and development responses. Other identified key tools for an effective burden- and responsibility-sharing are: (a) funding and effective and efficient use of resources, (b) a multi-stakeholder and partnership approach, with the involvement of refugees and host community members, UNHCR, humanitarian and development actors, local authorities and actors, etc., and (c)

[39] Section IV, Para 67, New York Declaration for Refugees and Migrants, 2016

collection and assessment of data and evidence that can support the efforts to achieve solutions.

In part III.B, we find the 'areas in need of support' which highlight where the international community may usefully channel support for a comprehensive and people centred response to large refugee situations. The identified key areas of intervention are: efficient mechanisms of reception and admission, meeting the needs and supporting host communities especially in the areas of education, work and livelihoods, health, empowerment of women, etc., and planning durable solutions for refugee situations.

The Global compact foresees also a process of follow-up and review over time, in particular through the Global Refugee Forum, high-level officials' meetings, and annual reporting by the UNHCR to the General Assembly. From these forms of follow-up, it will be possible to analyse the ongoing process of the global compact in achieving its four objectives and, thus, the level of burden- and responsibility-sharing among states (UNGA 2018, p.20). Even though this initiative of the Global compact on refugees does not establish principles with binding status, by involving as many UN member states, humanitarian actors and stakeholders as possible, there is the possibility to create a really effective and well-organized response in every large refugee situation and crisis occurring somewhere in the world. Importantly, the UNHCR will play a catalytic and supportive role as to increase international cooperation and responsibility-sharing in dealing with refugees.

CHAPTER III – Comparison of three cases of asylum procedures in the EU: Italy, the UK and Sweden

In 2018, EU+ countries[40] recorded some 634.700 applications for international protection: this is a decrease by 10% compared to 2017.Overall asylum figures returned to approximately pre-crisis levels of 2014, when EU+ countries processed some 641.000 applications for international protection. With a lower and relatively stable number of applications lodged in 2018, the situation of asylum in the EU+ seems to have stabilised. For the sixth consecutive year Syrians lodged more applications for asylum than any other citizenship: one in 10 applicants in the EU+ was a Syrian national. At the same time some citizenships applied for international protection in higher numbers than in 2017: for instance, Colombians (+210%), Venezuelans (+88%), Georgians (+72%), Palestinians (+61%), Turkish (+48%) and Iranians (+37%). While applicants from Western Africa continued to lodge fewer applications for asylum: including citizens of The Gambia (- 62%), Senegal (- 46%), Nigeria, Côte d'Ivoire (-41% each), Mali (-38%) and Guinea (-26%). This is related to much reduced irregular migration across the Central Mediterranean, the route typically travelled by nationals of Western Africa countries (EASO 2019).The EU+ recognition rate fell six percentage points to 34**%** of all first instance decisions, granting either refugee status or subsidiary protection: in particular, nearly two thirds of the positive decisions granted refugee status.

1. The Italian asylum procedure

In Italy, the system for asking international protection is regulated by legislative acts and administrative regulations and implementing decrees. The main legislative act is the *Legislative Decree no. 286/1998 "Consolidated Act on provisions concerning*

[40] The EU+ is composed of 28 EU Member States plus Norway and Switzerland

the Immigration regulations and foreign national conditions norms"[41] which regulates the entry and residence of aliens on Italian territory, including also the norms applicable for their expulsion, their access to healthcare, work, education, the right to family reunification and the protection of minors. The other fundamental legal sources defining the Italian asylum system are the *Qualification Decree* (Legislative Decree 251/2007[42]), the *Procedure Decree* (Legislative Decree 25/2008[43]) and the *Reception Decree* (Legislative Decree 142/2015[44]), all implementing the Directives of the European Community on asylum. The most recent legal source is the *Decree Law 113/2018*[45] (implemented by Law 132/2018) which has introduced many significant changes to the asylum procedure.

The procedure starts with the registration of the asylum application that can occur at the border to the Border Police or within the territory at the provincial Immigration Office of the Police (*Questura*) or in the hotspot: the first step is an identification and registration process (*fotosegnalamento*) where the asylum seekers are fingerprinted and photographed. Although there is no formal timeframe for making an asylum application, they should make it as soon as possible. Police authorities do not examine the merits of the asylum application but following the 2018 Decree Law the *Questura* can automatically declare a subsequent application inadmissible in certain cases. The second step is the formal registration of the asylum application (*verbalizzazione*), which is carried out exclusively at the *Questura*

[41] Decreto legislativo 25 luglio 1998, n. 286 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" - TUI (modified by Decree Law 13/2017 and Decree Law 113/2018)

[42]Decreto legislativo 19 novembre 2007, n. 251 "Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta"

[43]Decreto legislativo 28 gennaio 2008, n.25 "Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato"

[44]Decreto legislativo 18 agosto 2015, n. 142 "Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale"

[45] Decreto-legge 4 ottobre 2018, n. 113 "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata"

within the national territory. The applicants fill in the C3 form (*modulo C3*) with the information about their personal history, the journey to reach Italy and the reasons for fleeing their country of origin: this document will be sent to the Territorial Commission for the Recognition of International Protection which is competent to interview the applicant and examine the application.

During the registration phase, the applicant is asked to provide also information related to the Dublin Regulation, such as the presence of relatives who applied for international protection in other European countries, a particular link with another member state and the personal health conditions. The *Questura* then contacts the Dublin Unit of the Ministry of the Interior which verifies whether Italy is the member state responsible for the examination of the asylum application. After the Dublin Unit verified that Italy is the country responsible, the applicant receives a residence permit for "asylum application" (*permesso di soggiorno per richiesta asilo*). After the lodging of the application, the *Questura* sends the formal registration form and the documents concerning the asylum application to the Territorial Commissions or sub-Commissions for International Protection located throughout the national territory. Currently there are 20 Territorial Commissions and 28 sub-Commissions; each of them is composed of at least six members[46]:

- 1 President with prefectural experience, appointed by the Ministry of Interior;
- 1 expert in international protection and human rights, designated by UNHCR;
- 4 or more highly qualified administrative officials of the Ministry of Interior, appointed by public tender.

The Territorial Commissions are coordinated by the National Commission for the Right to Asylum (*Commissione Nazionale per il Diritto di Asilo*) which is part of the Ministry of the Interior – Department of Civil Freedoms and Immigration – and the authority of reference for the Italian asylum system. Among its duties there are the

[46] Article 4(3) Procedure Decree, as amended by Legislative Decree 220/2017

creation of guidelines for the examination of asylum applications, the organization of training courses for the members of the Territorial Commissions, the collection of statistical data and the update of the information about the countries of origin (COI) of the asylum seekers[47].

Following the 2017 reform, interviews are conducted by officials of the Ministry of Interior and no longer UNHCR. The interview takes place within 30 days after the Commission receives the application and the decision in the 3 following days. The decision is taken following a panel discussion between all members of the Commission by at least a simple majority of the Territorial Commission which must be at least 3 members; in the case of a tie, the President's vote prevails[48]. Under some circumstances, the Territorial Commission can extend the time limit for the decision, but the asylum procedure may last for a maximum period of 18 months.

After the changes of the Decree Law 113/2018, the outcomes to the regular procedure are:

- Granting refugee status
- Granting subsidiary protection
- One-year 'special protection' residence permit which substitutes the previous status of humanitarian protection, abolished by Decree Law 113/2018. Special protection permits are granted to persons who, according to the law, cannot be expelled or refouled[49]
- Rejection of the asylum application as unfounded
- Rejection of the asylum application as manifestly unfounded[50]
- Rejection of the application on the basis that an internal protection alternative is available[51].

[47]Ministero dell'Interno, Commissione nazionale per il diritto di asilo, http://www.interno.gov.it/it/ministero/dipartimenti/dipartimento-liberta-civili-e-limmigrazione/commissione-nazionale-diritto-asilo

[48] Article 4(4) Procedure Decree

[49] Article 32(3) Procedure Decree, as amended by Art. 1(2)(a)Decree Law 113/2018

[50] Article 28-ter Procedure Decree, inserted by Decree Law 113/2018 (Art. 7-bis(1)(f))

[51] Article 32(1)(b-ter) Procedure Decree, inserted by Decree Law 113/2018 and L 132/2018

Under some circumstances – as established by Article 28 of the Procedure Decree amended by Decree Law 113/2018 - the President of the Territorial Commission identifies the cases to be processed under the prioritised or accelerated procedure. This is applied mainly to applicants detained in a detention centre for return (CPR - *Centro di Permanenza per il Rimpatrio*) or a hotspot, but also to vulnerable applicants or those who come from designated safe countries of origin.

A third type of procedure is the border procedure which – after the 2018 reform – is applied in case the applicant makes an asylum application directly at the border or in transit areas after having been apprehended for evaded or attempting to evade controls. It applies also to asylum seekers coming from designated safe countries of origin; the entire procedure can take place directly at the border or in the transit area[52].

Applicants have the possibility to appeal before the competent Civil Court against a decision issued by the Territorial Commission rejecting the application or granting a lower level of protection of that requested by the applicant. The appeal must be submitted by a lawyer within 30 days from the notification of the first instance decision, while the time limit is of 15 days for the applicants placed in detention facilities (CPR) and in case of accelerated procedures.

The 2017 reform established specialised court sections competent for examining asylum appeals and removed the possibility of onward appeal before the Court of Appeal if the first one has been dismissed[53]. A decision of the Civil Court can only be challenged by a final appeal before the Court of Cassation within 30 days. The competence of the Court is established on the basis of the place of the Territorial Commission, but also on the basis of the facility where the applicant is placed (governmental reception centres, CAS, SIPROIMI and CPR[54]).The appeal has usually automatic suspensive effect, except in some cases[55] – for example if the applicant is

[52] Article 28-bis(1-ter) Procedure Decree, as amended by Article 9(1) Decree Law 113/2018

[53] Article 3-bis Procedure Decree, as amended by Decree Law 13/2017

[54] CAS- Centri di Accoglienza Straordinaria (Temporary Reception Centres), SIPROIMI – Sistema di protezione per i titolari di protezione internazionale e per i minori stranieri non accompagnati, CPR – Centri di Permanenza per il Rimpatrio (Centres of Detention for Return)

[55] prescribed by Article 35-bis(3) Procedure Decree, inserted by Article 6 Decree Law 13/2017, as amended by Article 3 Decree Law 113/2018

detained in a CPR or hotspot -, where the appellant should individually request the suspension of the return order from the competent judge. Then, the court takes a non-appealable decision granting or refusing suspensive effect within 5 days of the submission of observations of the parties (ASGI 2019, p.42).

Following the 2017 reform, oral hearings before the court sections in the phase of the appeal are a residual option. The general rule is that judges should decide the cases by consulting the videotaped interview before the Territorial Commission and use oral hearings only if the videotaping is not available or if it essential to clarify some aspects of the case. Insofar Territorial Commission did not record the interviews throughout 2017 and 2018, most of the court sections have held oral hearings with the asylum seekers[56]. The decision whether to reject the appeal or grant international protection is taken by the honorary judges of the specialized court sections after collegial discussion in closed sessions, considered the information about the socio-political and economic situation of the country of origin of the asylum seekers[57].

Decree Law 13/2017, implemented by Law 46/2017, abolished the possibility to appeal a negative Civil Court decision before the Court of Appeal (for appeals lodged after 17 August 2017). In case of negative decisions, the asylum seekers can lodge an appeal before the Court of Cassation within 30 days. The onward appeal has no automatic suspensive effect, so the lawyer of the applicant should submit the request for suspensive effect within 5 days from the notification of the intention to appeal in cassation[58]. The 2017 reform had a visible impact on the caseload before the Court of Cassation: the number of applications for onward appeal in the immigration matter[59] have exponentially grown since October 2017, rising from 1.089 in 2017 to 6.026 in 2018 (Corte di Cassazione 2019, p.7).

[56] CSM – Consiglio Superiore della Magistratura, *Monitoraggio Sezioni Specializzate in Materia di Immigrazione. Modalità organizzative. Analisi dei dati*, October 2018, pp.27-28

[57] Article 35-bis(9) and (13) Procedure Decree, inserted by Decree Law 13/2017

[58] Article 35-bis(13) Procedure Decree, inserted by Decree Law 13/2017

[59] The term 'immigration' includes appeals about citizenship rights, status and personality rights and immigration (*diritti cittadinanza, diritti personalità status, immigrazione*)

2. The British asylum procedure

The asylum system in UK is based on some legislative acts and administrative guidelines and regulations relevant to asylum procedures, reception conditions, detention and content of protection. The main legal sources are the 1971 *Immigration Act* (IA), the 1999 *Immigration and Asylum Act* (IAA), the 2002 *Nationality Immigration and Asylum Act* (NIAA), the 2004 *Asylum and Immigration (Treatment of Claimants etc.) Act* (AITOCA), the 2009 *Borders, Citizenship and Immigration Act* (BCIA), and the *Immigration Act* of 2014 and 2016. Furthermore, there are the Immigration Rules that are some of the most important pieces of legislation that make up the UK's immigration law: they are divided into different documents – Part 11 deals in particular with asylum.

The Secretary of State for the Home Department is the government ministry with lead responsibility for immigration, asylum, nationality and border control laws, policies and processes. It includes various directorates: the UK Visas and Immigration (UKVI), the Immigration Enforcement, the Border Force and the HM Passport Office (Gower and Wilkins 2018, p.4). So, the Home Office is responsible for all aspects of immigration and asylum: entry, in-country applications for leave to remain, monitoring compliance with immigration conditions, and enforcement including detention and removal (Refugee Council 2019, p.15); the asylum decision-making in particular is allocated to the UKVI directorate.

A first application for asylum can be made either on entry to the country at the UK Border Force (UKBF) - an executive agency of the Home Office which combines immigration, policing and customs functions - or within the country to the Asylum Intake Unit (AIU)[60] of the UK Visas and Immigration in Croydon (South of London) or from the detention centre when the person is detained. The first part of the application is the screening process for registering the asylum claim through a screening interview and taking biometric data - fingerprints and facial image - and

[60]formerly Asylum Screening Unit (ASU)

information about health and family, details on the travel towards UK and an outline of the reasons for claiming asylum.

Most of the asylum applications are registered within the territory at the AIU or from detention, not at the port of entry. There is no rule laying down a maximum period within which an asylum claim must be registered after the authority has first been notified of the claim. It's the asylum seekers who have to call the AIU to take an appointment for the screening interview, usually waiting for about two weeks. On the basis of the screening interview, the National Asylum Allocation Unit (NAAU) of the Home Office decides which route the application will follow, the alternatives are: unaccompanied children - who follow a different procedure-, accelerated procedure, safe third country procedure or regular procedure.

The cases of persons coming from safe third countries are referred to the Third Country Unit of the Home Office, which decides whether to initiate the return, which can be also to other EU member states in the context of the Dublin Regulation. In these cases, the claim is not substantively considered in the UK, but the decision of return can be challenged by judicial review through an application before the Upper Tribunal after they have obtained leave to appeal[61]. These proceedings do not consider the merits of a case but only whether the decision maker has approached correctly the matter.

After the initial screening interview, applicants are entitled to a personal interview to explain more in detail their case: these interviews are conducted by the Home Office caseworkers who are then responsible for taking the decisions. Asylum seekers are also entitled to have a legal representative with them at the personal interview, but there is no public funding for this for adult claimants – except in the case of lack of mental capacity – so very few applicants can afford to do so. Increasingly, substantive interviews take place through video conferencing facilities, to accommodate an interviewing officer or interpreter located in a different area from the applicant. At the interview also an interpreter is present: they are provided by the Home Office; otherwise asylum seekers are allowed to take an

[61] Section 16 Tribunals, Court and Enforcement Act 2007

interpreter of their own choosing to the interview, but there is no public funding for this in most adult cases, so it's quite unusual (Refugee Council 2019, p.22). Furthermore, normal good practice is that asylum seekers are asked at the screening interview whether they wish to be interviewed by a man or a woman.

There is no enforceable time limit for deciding asylum applications, but according to the Immigration Rules the decision should be taken as soon as possible[62]. The previous target of dealing with 'straightforward' applications of six months has been abandoned in early 2019; when exceeding the six-month period for taking the decision, the caseworkers should inform the applicant of the delay.

Against a refusal decision by the UKVI, the applicant can appeal before the Immigration and Asylum Chamber of the First Tier Tribunal (FTTIAC), an independent judicial body which is part of the unified court system – the HM Courts and Tribunal Service, an executive agency of the Ministry of Justice – composed of judges with expertise in immigration matter and non-legal members with specific areas of expertise. The First Tier Tribunal hears first instance appeals, primarily (but not exclusively) against certain decisions made by Government departments or other public bodies (Ministry of Justice UK 2016, p.22). The appeal must be lodged within 14 days from the notification of the asylum refusal: it has suspensive effect on removal decisions except when the case is certified as clearly unfounded. Before making a decision the First Tier Tribunal must hold a hearing with both the parties except under some circumstances as listed in Rule 25 of the 2014 Tribunal Procedure Rules[63]. According to the same statutory instrument, "*the Tribunal may give a decision orally at a hearing*" (Rule 29(1)) and then provide to each party notice of the decision and notification of the right to appeal against it "*as soon as reasonably practicable*" (Rule 29(2)).

Over the years, rights to appeal have been reduced and also recently with the measures contained in the *Immigration Act 2014*. Many application categories no longer have right to appeal in case of rejection of the application, but some of them may request a reconsideration or 'administrative review' of UKVI decision.

[62]Paragraph 333A *Immigration Rules* Part 11

[63]*Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules2014*

Onward appeal can be lodged to the Immigration and Asylum Chamber of the Upper Tribunal (UTIAC) only with permission of one of the two tiers. The Upper Tribunal generally hears appeals from the First Tier Tribunal on points of law - specifically, an appeal made over the interpretation of a legal principle or statute. UTIAC is a superior court of record whose purpose is to hear and decide appeals against decisions made by the First-tier Tribunal in matters of immigration, asylum and nationality. Appeals are heard by one or more Senior or Designated Immigration Judges who are sometimes accompanied by non-legal members. Immigration Judges and the other members of the Tribunal are appointed by the Lord Chancellor and together they form an independent judicial body.

The appeal is permitted only on point of law – when the claim raises important points of principle or practice - and must be made within 14 days of receiving the refusal. If permission is granted to appeal to the Upper Tribunal, the UTIAC's decision may be appealed again with permission on the same limited grounds on a point of law only to the Court of Appeal. In rare cases permission may be given for a final appeal to the Supreme Court where the Court of Appeal or Supreme Court certifies that the case concerns a question of law which is of public importance (Refugee Council 2019, p.24).

There are, at the same time, many decisions affecting asylum seekers against which there is no right of appeal, such as the decision to detain or to remove to a safe third country. In these cases, the only possible recourse is to judicial review, a procedure where not the merits of the complaint are examined, but only whether the decision-maker has acted correctly. Judicial review is now in the Upper Tribunal's jurisdiction and it is available only after receiving its permission.

3. The Swedish asylum procedure

The Swedish asylum system is based on three main legal documents, which are the *Aliens Act (2015:716)*, where the refugee definition contained in the 1951 Refugee Convention has been transposed, the *Reception of Asylum Seekers and Others Act*

(1994:137), and the *Law on temporary limitations to the possibility of being granted a residence permit in Sweden, (2016:752).* In addition to these, there are two main implementing decrees – the *Aliens Act Ordinance (2006:97)* and the *Ordinance on the Reception of Asylum Seekers and Others Act (1994:361).*

The Migration Agency (*Migrationsverket*) is the central administrative authority responsible for the area of asylum; it is subordinate to the Government but fully independent from it and from the Parliament. The Migration Agency is responsible for the processing of applications, for the coordination and division of tasks between the divisions of Asylum, Managed Migration and Citizenship: it should ensure an effective management of asylum and citizenship cases in accordance with the Swedish Aliens Act.

Asylum seekers can make their application at airports and ports or within the Swedish territory to the designated offices of the Migration Agency in Stockholm. There are no specific time limits laid down in law within which a claim must be registered, but in reality, if a claim is made late, the applicant must put forward reasons for the delay during the asylum interview (FARR 2019, p.20).

The Migration Agency is responsible for processing all asylum claims at first instance, but also for assessing subsequent applications. The protection process is composed of three main parts: (1) initial, (2) appeal, and (3) enforcement processes. In the initial phase, asylum seekers are fingerprinted, screened and channelled to a specific procedure depending on the circumstances of their case. Since 2016, indeed, the Migration Agency has implemented a new way of organising the flow of cases through a "tracks policy" - updated in 2018 - in order to shorten processing times. Sweden has transposed the recast Asylum Procedures Directive, but its tracks do not follow fully the structure of the Directive in terms of regular procedure, prioritised procedure and accelerated procedure. The applicable tracks are eight: beyond the regular asylum procedure, the policy foresees specific tracks for manifestly unfounded cases or cases coming from low-recognition-rate countries, Dublin cases and inadmissibility cases. In particular:

Track 1 → for cases that are presumed to be successful;

Track 2 → for cases with an unclear outcome, where there is no presumption of approval;

Track 3 → for cases with delayed processing, where the handling time exceeds 6 months because of the complexities of the case;

Track 4 → accelerated procedure for:

a) cases which are presumed to be rejected, manifestly unfounded claims (track 4A)
b) cases from nationalities with a recognition rate lower than 20% (track 4B)

Track 5A → cases to be dealt with under the Dublin Regulation;

Track 5B and 5C → admissibility procedure for:

a) cases where the applicants have been granted protection by another EU member state or in Norway, Switzerland, Iceland or Liechtenstein (track 5B)
b) cases where the applicants have been granted protection in another non-EU member state (nor Norway, Switzerland, Iceland or Liechtenstein) or comes from a safe third country (track 5C).

For all types of cases, a personal interview to the asylum seeker is carried out by the authority that is responsible to take the decision on the application – the officers of the Migration Agency. The interviews are divided into two main phases: in the first one, a reception officer interviews the applicant regarding personal details, health, family and general background and can also request any supporting documents. In the second phase the asylum case officer carries out an interview to establish the basis of the claim in the presence of a legal representative, an interpreter and the asylum seeker. The decision is taken by two persons: the case officer and a decision maker. Free legal aid is granted in all asylum cases in the regular procedure; it is usually the Migration Agency that designates legal counsel unless the applicant requests a specific lawyer on the list administered by the agency (FARR 2019, p.15).
In case of negative decisions by the Migration Agency, there is the possibility to access two levels of appeal: the first appeal should be lodged to the Migration Court (*Migrationsdomstolen*) within three weeks of having received a negative first-instance decision. The migration courts are located at four of Sweden's

administrative courts in Malmö, Göteborg, Stockholm and Luleå. Before the Migration Court considers an appeal request, the Migration Agency reviews the decision: it has the possibility to change its former decision or confirm the rejection. In the latter case the appeal is forwarded to the court that can either change or confirm the agency's first-instance decision (Parusel 2016, p. 13). The appeal before the Migration Court has suspensive effect, except for appeals lodged against decisions rejecting a 'manifestly unfounded' application in the accelerated procedure under "Track 4". The appeal process is usually a written procedure, but the applicant has the right to request an oral hearing, which is granted only if it is deemed beneficial for the investigation.

Leave to onward appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*) in Stockholm can be requested within three weeks from the date of the Migration Court's decision. As the highest court in such matters, leave to appeal to the Migration Court of Appeal is granted only if there are exceptional grounds for the appeal[64]. This is related to the fact that the Migration Court of Appeal is the main national source of precedents in the Swedish asylum system, so that its decisions have to be followed by the Migration Agency and the lower courts when reviewing similar cases in the future. There are no lay judges at the Migration Appeal Court; it only comprises qualified judges. At the Court there can exceptionally be an oral hearing but in most cases, there is only a written procedure. Decisions of the Migration Court of Appeal are final and non-appealable – unlike in other cases under the general administrative courts where the last instance is to the Supreme Administrative Court - for aliens and citizenship cases, there is no other instance after the Migration Court of Appeal. When this hands down its decision, the expulsion order is enforceable and the person is expected to leave Sweden voluntarily within two weeks in a manifestly unfounded case or four weeks in regular procedure cases.

[64] Chapter 16, Section 12 Aliens Act 2005 states: "*Leave to appeal to the Migration Court of Appeal is issued if*

1) *it is of importance for the guidance of the application of the law that the appeal is examined by the Migration Court of Appeal or*
2) *there are other exceptional grounds for examining the appeal."*

In October 2015, after the peak of asylum applications registered during the summer, all the political parties in the Swedish Parliament but the Swedish Democrats and the Left Party agreed that actions were needed to halt the influx of refugees, while still maintaining official commitment to international refugee law, the so-called 'October agreement'. In June 2016, the Parliament approved a new Act (2016:752), commonly known as the 'Temporary Act' which would be in force for three years, according to which the previous practice of granting successful asylum seekers permanent residence permits was changed by making temporary residence permits the norm. Furthermore, the possibility to family reunification was limited by increasing the requirements for financial self-support to be demonstrated by the applicants. The introduction of such act met great criticism by consultative bodies, NGOs in the human rights sector, refugee activists and wider civil society (Salmonsson and Hedlund 2018, p.526).

4. Comparing the organization and functioning of the judicial body dealing with asylum appeals

In all the three case studies concerned, the phase of the appeal during the asylum procedure foresees at least two levels of review and is assigned to judicial bodies which are more or less independent from the Government depending on the system of government and how the judiciary is structured in the country. In Italy, for example, the judiciary is completely independent from the Government and the Parliament, as it is administered and coordinated by a superior judicial council (*Consiglio superior della magistratura - CSM*) which further checks the correct and impartial functioning of the courts and deals with the professional career of the judges. This is valid also for the appeal bodies dealing with asylum cases since they are sections within the general Civil Courts (*Tribunali Civili*).

In Italy, after the administrative phase of the procedure which is dealt with by the Territorial Commissions under the control of the Ministry of Interior, the asylum appeal phase is attributed to the judiciary as part of the ordinary jurisdiction of the

Civil Courts' *Sections specialized in matter of immigration, international protection and free movement of EU citizens*[65]. Law 46/2017 intended to accelerate the procedures for the recognition of international protection and for this reason required the reorganization of the activity of the judges with expertise in asylum and international protection. The law defined three possible organisational models: (a) new specialized sections overlapping with those which already used to examine the appeals on the matter of international protection, (b) the creation *ex novo* of specialized sections through division or union of pre-existing sections, or (c) the institution of two coordinated sections through division or union of pre-existing court sections (CSM 2017a, p.4 ff). Whatever the adopted organizational model, the courts are required to assign the proper number of specialized judges to the sections so that asylum appeals are examined as a priority and the processing time for the decisions and the total length of the procedure are reduced. According to the 2017 reform, there should be a specialized section in each ordinary tribunal where the Court of Appeal is located. In 2018, thirteen new sections have been created *ex novo* with exclusive competence on the matter of international protection, while other thirteen courts did not create new sections since they already had ordinary ones dealing with asylum appeals with non-exclusive competence (CSM 2018, pp.3-6). In both cases the judges assigned to the specialized sections have not been hired for the purpose, but they were appointed on the basis of specific skills acquired through professional experience and training on the matter (ASGI 2019, p.41).

The concrete organization of the sections is responsibility of the Superior judicial council, which since the entry into force of the Decree Law 13/2017 had pointed out the difficulty of accelerating the asylum process without proper investments in resources and personnel (CSM 2017b, p.3). One of the problems of this reform, indeed, is that the specialized sections are not assigned new personnel but rather judges already included in the staff of the office. As of September 2018, the 13 Civil Courts with new specialized sections counted 75 ordinary judges and 82 honorary

[65]*Sezioni specializzate in materia di immigrazione, protezione internazionale e libera circolazione dei cittadini dell'Unione Europea,* established by Decree Law 13/2017, implemented by Law 46/2017

judges; while to the courts with non-specialized sections dealing with international protection 113 ordinary judges and 97 honorary judges were assigned (CSM 2018, p.4-8). The high number of applications for international protection and claims for appeal since 2015 made difficult to organize the sections with the only existing personnel in such way to face the pending caseload in a quicker and efficient way, accelerating the whole procedure. In the following table we can see a comparison of the number of appeals registered, decided and pending in all Civil Courts at national level in the last years:

Year	Registered	Decided	Final pending
2015	13.965	13.965	15.230
2016	47.078	14.290	48.198
2017	41.818	35.679	54.715
2018*	48.952	41.938	61.616

Table 1 - Data exported by the website of the Italian Ministry of Justice[66]

*definitive data of 2018 will be published in December 2019

The reform instituting the specialized court sections and eliminating the appeal to the Court of Appeal has entered into force in April 2017 with the aim to accelerate the asylum procedure and decreasing the caseload of the Civil Courts. But the data in the table show that the number of appeals registered to the tribunals has continued to increase and this is especially due to the backlog that the specialized sections inherited and still have to clear up. Another reason for the accumulation of outstanding caseload is that half of the Civil Courts do not deal with the matter of international protection in exclusive way, so that the judges in the dedicated section have to coordinate their work among the different matters they follow. The processing time for the courts to make a decision is on average of almost 5 months - with many courts arriving at more than 200 days, like Brescia, Florence or Bologna

[66] DWGC system (*datawarehouse della giustizia civile*), availableat:https://webstat.giustizia.it/SitePages/StatisticheGiudiziarie/civile/Procedimenti%20Civili%20-%20flussi.aspx (accessed 01/08/2019)

(ASGI 2019, pp.43-44) - while the law states that the decision should be made within 4 months from the registration of the appeal to the Court[67].

Quite different from the Italian case is that of the United Kingdom: the judicial bodies dealing with asylum appeals are not part of the ordinary civil jurisdiction but belong to a separated system – the Tribunals - dealing with several matters including also immigration and asylum. After a first instance refusal decision in the administrative phase managed by governmental officers of the Home Office UK Visas and Immigration, the appeal phase is dealt with by the *Immigration and Asylum Chamber* of the First Tier Tribunal (FTTIAC). This Tribunal was created in 2008 as part of a programme set out in the *Tribunals, Courts and Enforcement Act 2007* to rationalise the tribunal system and has since taken on the functions of twenty previously existing tribunals. It is administered by Her Majesty's Courts and Tribunals Service – which is an executive agency of the Ministry of Justice - but remains an independent judicial body with a two-tier structure divided into First Tier Tribunal and Upper Tribunal with jurisdiction over England, Wales, Northern Ireland and Scotland depending on the subject matter of the claims (for immigration and asylum cases the jurisdiction is over the whole UK).

The Tribunals remains a separated and parallel system from the rest of the Courts: it has its own structure which includes the chambers in the First Tier and the Upper Tribunals, but also the Employment Tribunal and the Employment Appeals Tribunal. Another key difference between the two systems is that the Courts structure covers England and Wales, while the Tribunals system covers England, Wales, and in some cases Northern Ireland and Scotland. They 'enter into contact' only in cases where decisions from the chambers of the Upper Tribunal or from the Employment Appeals Tribunal go to the Court of Appeal (after permission on limited grounds on a point of law) and farther to the Supreme Court (only for questions of law of public importance).[68]

[67] Article 35-bis(13) Legislative Decree 25/2008, inserted by Decree Law 13/2017

[68] Courts and Tribunals Judiciary, *Structure of the courts and tribunals system*, https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-structure/(accessed 05/08/2019)

The First Tier Tribunal is divided into seven chambers with jurisdiction on different areas of law: the War Pensions and Armed Forces Compensation Chamber, the Social Entitlement Chamber, the Health, Education and Social Care Chamber, the General Regulatory Chamber, the Tax Chamber, the Immigration and Asylum Chamber, and the Property Chamber. Each of them has a Chamber President who may be appointed by the Lord Chancellor or the Senior President of Tribunals who have also the power to make provisions on the allocation of the tribunals' functions between their chambers. In the First Tier Tribunal there are judges with legal expertise and non-legal members with other areas expertise – while in the Upper Tribunal there are only judges. Some of the judges have been transferred from the tribunals whose jurisdiction was absorbed by the new FTT in 2008, others are appointed by the Judicial Appointments Commission (JAC) or by the Lord Chancellor, on the basis of the statutory or non-statutory requirements for the specific post[69]. Tribunal members are specialist non-legal members of the panel and include doctors, chartered surveyors, ex-service personnel or accountants (Ministry of Justice UK 2016a, p.23-24). Tribunals often sit as a panel comprising a judge and non-legal members but, in some jurisdictions, cases may be heard by a judge or member sitting alone.

The Immigration and Asylum Chamber has exclusive competence on asylum matter: in particular it is responsible for handling appeals against some decisions made by the Home Office relating to permission to stay in the UK, deportation from and entry clearance to the UK; it also handles applications for immigration bail from people being held by the Home Office on immigration matters. In the table below we can see the trend in the numbers of cases received, disposed and remained outstanding at the First Tier Tribunal Immigration and Asylum Chamber considering the same period (the fourth quarter - from October to December) every year

[69] Chapter 2, Sections 4 and 5 and Schedule 2,*Tribunals, Courts and Enforcement Act 2007,* available at: http://www.legislation.gov.uk/ukpga/2007/15(accessed 03/08/2019)

between 2015 and 2018. The data are extracted by the Official Statistics of the Ministry of Justice published quarterly[70]:

Period	Receipts	Disposals[71]	Caseload outstanding	Average time of clearance
Oct-Dec 2015	18.368	14.534	57.951	36 weeks
Oct-Dec 2016	12.300	17.800	57.000	48 weeks
Oct-Dec 2017	14.900	14.800	35.100	50 weeks
Oct-Dec 2018	10.400	14.763	27.900	39 weeks
Jan-Mar 2019[72]	10.000	14.000	25.000	40 weeks

Table 2 - Data extracted from the official quarterly statistics of the Ministry of Justice

As highlighted by Table 2, the number of appeals received by the FTT Immigration and Asylum Chamber has decreased every year following the introduction of the Immigration Act in 2014. In the meanwhile, the average time taken to clear appeals increased until the end of 2017 - when a peak of 50 weeks was reached - and began to decrease from 2018 on, when the average processing time for the FTTIAC to make a decision has been of 42 weeks. These increasing processing times between 2015 and 2017 were related to the high amount of cases pending accumulated until then, but also due to the phasing in of the new appeal rights under the 2014 Act and the additional steps introduced in some cases, which made the receipt of Post Act cases slower than anticipated (Ministry of Justice 2016b, p.10).The appeals to the First-Tier Tribunal are recorded under some categories depending on the matter of the claim: these categories have been changed in 2014: following the *Immigration Act* 2014 (IA 2014), Asylum appeals in the FTTIAC and UTIAC are recorded under the Protection and Revocation of Protection categories (Ministry of Justice UK 2016b). The post Act tribunal categories of Human Rights (HR), EEA Free Movement (EEA) and Asylum/Protection (AP) make up the growing majority of the

[70]The Tribunals statistics quarterly are published on UK Government website, at: https://www.gov.uk/government/collections/tribunals-statistics(accessed 04/08/2019)

[71]The voice "disposals" includes the cases which have been determined, those withdrawn and those deemed invalid or out of time.

[72] Data for the period January to March 2019 are provisional: the final version will be available from September 2019

FTTIAC receipts and disposals since 2015. These three categories refer to the types of claims deemed legitimate according to the Immigration Act of 2014, which deeply reformed the asylum system of the UK.

One of the main changes introduced by the Act was the wide reduction of appeal rights against the first instance decisions by the Home Office: the number of immigration decisions that can be appealed have been cut from the previous 17 to 4, preserving appeals for those asserting fundamental rights, which are Protection, Human Rights, Removal of Refugee Status and EEA Free Movement. For all other cases of refused applicants asserting that the Home Office has made some errors in its decision, there is the right to an administrative review by the Home Office itself (Ministry of Justice UK 2016b, p.10). Following the *Immigration Act 2014*, indeed, while those who submitted a human rights or protection claim can resort to a judicial review, those refused applicants who applied for leave to remain in the UK under Tiers 1,2,4 and 5 of the Points-Based System[73], can only apply for this kind of review by an official acting on behalf of the Secretary of State. As stated in the Immigration Rules (Appendix AR, para AR2.1), "*administrative review is the review of an eligible decision to decide whether it is wrong due to a case working error*": if the decision is eligible to administrative review – i.e. included in the cases listed in para AR3.2 of the Appendix AR – it will be reviewed to establish whether there is a case working error either as identified by the applicant or identified by the Reviewer in the course of conducting the administrative review. The case working errors which can be considered during the review can be found in the same Appendix AR to the Immigration Rules (paras AR2.11-2.12).

One of the main problems that the appellate body is facing in the last year is the shortage of judges in the Immigration and Asylum Chamber due to the lack of competitions for salaried and fee-paid judges for some years, as evidenced by the

[73] The UK "points-based system" is an immigration system for selecting non-EEA migrants on the basis of some valued attributes, such as qualifications, occupation and language skills. Work and study visas are granted to those satisfying a set of mandatory criteria, to which a fixed number of symbolic points are attached. The UK points-based system was launched in 2008 and includes 5 tiers of migrants - high skill/high value migrants; sponsored skilled workers; low-skilled workers; students; and temporary workers – each containing different visa categories and associated conditions (Gower 2018, p.3).

Chamber President in the 2018 Annual Report. The number of the judges was not sufficient to meet the increasing demands faced by the FTTIAC, so that the Chamber receives the support from judges of the Employment Tribunal and the Social Entitlement Chamber (Senior President of Tribunals 2018). The same Report makes reference to the current modernisation programme for the Tribunals system, which includes among other provisions a pilot digital service for Immigration and Asylum appeals and the testing use of tribunals case workers in asylum appeals to reduce delays. The new digital appeals service has been launched in January 2019 in two hearing centres, Taylor House and Manchester, and foresees the electronic submission of protection appeals, which then progress digitally via the online service from initial application, through to online hearing to judicial decision[74].

The Swedish system for asylum appeals has some peculiarities which make it different from both the Italian and the British cases. The appellate bodies - the Migration Courts and the Migration Court of Appeal - are administrative sections respectively of the County Administrative Courts and the Administrative Court of Appeal. This is also a centralized system since there are only four Migration Courts - in four different cities, Stockholm, Luleå, Malmö and Gothenburg - and one Migration Court of Appeal in Stockholm. It is quite different from the Italian system where at the moment there are 26 Courts with sections dealing with asylum appeals throughout the Italian territory, as well as UK Immigration and asylum chambers which are located in several tribunals and hearing centres throughout the country. Another peculiarity of the Swedish asylum appeal procedure is that when the appeal is lodged to the Migration Court, it is first sent to the Migration Agency which has to review the case and consider whether to change its decision – which happens in very few cases - or forward the appeal to the Courts: in 2018, 23.296 decisions were forwarded within 10 days.

The appeal procedure is usually in writing, but an oral hearing should be held if requested by the applicant, as affirmed in the 1971 *Administrative Court Procedure*

[74]HM Courts and Tribunals Service, *Guidance. HMCTS reform update– Tribunals*, 11 July 2019, https://www.gov.uk/guidance/hmcts-reform-update-tribunals#immigration-and-asylum(accessed 05/08/2019)

Act (Section 9), also with the support of interpreters engaged by the court if the applicant does not speak Swedish. Despite this possibility, few applicants usually require to be heard in the Court - in 2018, in a total of 23.347 cases, only 4.768 hearings were held, most of which occur in Stockholm and Malmö Migration Courts (FARR 2019, p.25).

The Migration Court usually sits with only one judge in simpler cases but for other cases the judge is joined by three lay judges selected from among their members by the parliamentary parties sitting in the county council of the region where the court is located. These lay judges have no legal training and come from backgrounds of different sectors as they represent the general public and sit for four years. Unlike in the Migration Courts, there are no lay judges at the Migration Appeal Court, it only comprises qualified judges. Leave to appeal – which is necessary in order to appeal against a decision by the Migration Court – is decided by one or, in in exceptional cases, three judges of the Migration Court of Appeal. If leave to appeal is granted, at the end of the procedure – which is usually only written - a decision is taken by three judges, while exceptionally important cases are decided by a panel of seven judges.

In national security cases, where the asylum seeker is considered as a potential threat to national security, the Migration Agency is the first instance and the Migration Court of Appeal provides views on the appeal, but the Government is legally responsible for the final decision (FARR 2019, p.26).

In 2018, 16.897 decisions have been made in appeal – a short amount compared to the 35.512 decisions taken at first instance by the Migration Agency. In the first appeal phase the percentage of refusal is very high - more than 76% - which is higher compared to the first instance percentage (68%)[75]. As to the Migration Court of Appeal, by the end of December 2018, 12.403 appeals were made, out of which 12.291 were decided upon. Only 35 cases were given leave to appeal, 5 were approved, 16 rejected and 14 referred back to the lower instances (FARR 2019, p.26).In the last year criticisms have been made about the excessively long

[75]Aida-Ecre, *Statistics – Sweden*, https://www.asylumineurope.org/reports/country/sweden/statistics (accessed 06/08/2019)

processing times taken by some Migration Courts to take decisions: some persons resorted to the Justice Ombudsman (JO) who has expressed criticism in particular to the Migration Court in Gothenburg for the unacceptably and unreasonably long processing times. In this court, asylum cases currently take around 17 to 21 months for the court to process, and cases regarding permits for visiting or residing in Sweden take 12 to 16 months – both of which the ombudsman said were far too long (The Local 2019).

5. The main challenges for the efficiency of the national asylum system and for the protection of asylum seekers' rights

A common problem found in all the three countries, especially at the appeal phase, is the number of judges and personnel insufficient to deal with the increasingly high amount of asylum applications registered since 2015. The enormous increase of demands for international protection caused inevitably an increase in the processing times for national authorities and the judicial bodies to consider the cases and make decisions – often exceeding the time limits defined by law. Any European country was institutionally and materially prepared to face such large flows of incoming migrants mainly from Africa and Middle East. The last peak of asylum applications had been in 1992, with 672 thousand applications in the EU-15 of people fleeing the conflict in the former Yugoslavia. But the number reached in 2015 was almost double of that recorded in 1992, with more than 1.3 million total applications[76]. Since then, the number of applications decreased every year - especially because of the new restrictive immigration policies introduced by most European countries to limit the arrivals and the possibilities to apply for asylum – so that in 2018 there have been 638 thousand applications.

Italy was, together with Greece, the main country of arrival of migrants on EU soil mainly from North Africa and had to deal with first assistance, identification and

[76] Eurostat, *Asylum statistics - Asylum applications (non-EU) in the EU-28 Member States, 2008–2018,* available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Number_of_asylum_applicants:_drop_in_2018 (accessed 07/08/2019)

reception of rescued persons, but also the redistribution of asylum seekers to the second reception facilities often inadequate to host so many persons at a time. According to the Dublin Regulation, the first country of entry is responsible for examining the application of the asylum seeker, but between 2015 and 2016 an emergency relocation mechanism was adopted at EU level so that many asylum seekers were relocated from Italy and Greece to other member states. The trend of the asylum applications in Italy is quite peculiar since it had a gradual increase since 2013, and the highest amount was not reached in 2015 but in 2017, unlike most other European countries[77].

Sweden was a primary destination and recipient country for asylum seekers during the 'refugee crisis', registering the third highest number of asylum seekers of all EU Member States in 2015 (after Germany and Hungary), a number doubled from the previous year, and was the eighth largest recipient country in 2016 (EMN Sweden 2017, p.6). This was mainly due to its continuous adhesion to relocation agreements so that asylum seekers could access the country legally. They were mainly Syrians fleeing the civil war, followed by Afghani and Iraqi nationals and the recognition rate was quite high compared to the following years. This huge number of applications extended the average processing time for the Migration Agency and the appeal bodies to take decisions, creating in the meanwhile a huge backlog of pending applications, which still has not been completely disposed of.

On the contrary, in the last years the UK has not been one of the top recipient countries of asylum seekers - the number of applications remained quite constant, with a little increase in 2015 compared to the previous year, but still remained under the 39 thousand applications.

The high and unexpected influx in the number of applications for asylum and international protection created challenges in many European countries, related to managing the registration of applicants for international protection, lack of reception capacity, overcrowding in existing reception facilities, prolonged

[77] Source of data: UNHCR, Eurostat, *A welcoming Europe?*, https://www.europarl.europa.eu/infographic/welcoming-europe/index_en.html#filter=2015-se(accessed 07/08/2019)

procedures to decide on applications and increased backlog of pending applications (EMN 2016). All these difficulties were reflected in bad conditions and treatment of asylum seekers with situations often violating their human rights, such as inadequate reception conditions, lack of access to EU territory to apply for asylum, challenges during asylum procedures and detention.

Many cases of violence and abuses of asylum seekers' rights were reported throughout 2018 at EU external borders, but also at internal borders since many member states reintroduced border controls since 2015 with police guards using force to push people back and denying them the opportunity to apply for asylum. Asylum seekers are denied entry at the Hungarian border with Serbia, in Poland at land-border crossing points with Belarus and Ukraine, and at Spanish border fence to Morocco in Melilla. But this happens also within EU territory, with reported cases of summary returns of migrants from France to Italian territory or the use of violence by French police in the North of the country to avoid the establishment of informal camps of people intended to move to the UK (FRA 2019). Currently the countries which have temporarily reintroduced border controls are Norway, Sweden, Denmark, Germany, Austria and France, through measures which will cease their effect between October and November 2019[78].

The trend of introducing and implementing increasingly restrictive asylum policies and practices continued in many EU Member States throughout 2018. The main issues centred on hurdles to accessing protection, reduction of rights and benefits for asylum applicants and beneficiaries of international protection, as well as measures to increase detention and returns.

Due to the large backlog of asylum applications, several EU Members States tried to accelerate their asylum procedures, for example by limiting applicants' freedom of movement obliging them to stay in certain areas (like in some Greek islands) or in reception centres (like in Hungary). Accelerated procedures also raise risks regarding the quality of interviews and decision-making, and thus the conformity

[78]European Commission Migration and Home Affairs, *Temporary Reintroduction of Border Controls*, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en(accessed 08/08/19)

with fundamental rights. Furthermore, it may be difficult for asylum applicants to access legal aid and support to adequately prepare for their hearings or to lodge appeals after first instance refusal decisions. For example, in Hungary, legislative amendments have introduced automatic inadmissibility of asylum applications under certain conditions, significantly speeding up the asylum procedure. Moreover, the country continued to admit only one person per day from each of the two transit zones while the others are obliged to stay near the border zone with Serbia for long periods waiting for the possibility to submit their application in Hungary (FRA 2019, p.17). In December 2018, the European Commission referred Hungary to the Court of Justice of the European Union[79] for failure to apply the procedural guarantees under EU asylum law, in particular under the Asylum Procedure Directive[80] and the Reception Conditions Directive[81] (lack of effective access to asylum procedures and indefinite detention of asylum applicants in transit zones).

Since 2015, many Member States went beyond the requirements of the Qualification Directive with regard to the duration of the permit: several countries which used to grant residence permits for more than the minimum three years, changed their laws reducing this duration to meet only the EU minimum standards[82]. In 2018, at least Austria, Denmark, Italy, Hungary and Sweden introduced various restrictions regarding the residence permits granted to beneficiaries of international protection. Italy kept the five-year residence permit but abolished the humanitarian residence permit: instead there are new permits of

[79]Case C-808/18: Action brought on 21 December 2018 — European Commission v Hungary, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CN0808#ntr1-C_2019155EN.01001801-E0001(accessed 08/08/2019)

[80]Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

[81] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

[82] EU law requires member states to provide refugees with residence permits that are valid for no less than three years, and beneficiaries of subsidiary protection with permits valid for at least one year (Qualification Directive 2011/95/EU)

shorter duration and with reduced benefits – such as for special healthcare needs, natural disaster or risk of torture in the country of origin, or for acts of civil merit[83].

Several EU member states have also introduced legal restrictions on family reunification, in particular for beneficiaries of subsidiary protection, such as Germany and Sweden which adopted temporary legislation excluding beneficiaries of subsidiary protection from applying for family reunification. In Sweden this was made through the so called 2016 'Temporary Act'[84] which was initially intended to be in force for three years, until 19 July 2019. Last June it has been prolonged so that it continues to apply for the next two years (until 19 July 2021), but the amendment introduced some changes granting the same family reunification rights to the beneficiaries of subsidiary protection as refugees (FARR 2019). This was a consequence of the Swedish Migration Court of Appeal ruling in a case of November 2018, where it found that the suspension of the right to family reunification for beneficiaries of subsidiary protection violated Sweden's human rights obligations[85].

Family reunification was not made difficult only by legal obstacles, but also by practical challenges, like the long waiting times of the procedures, high costs for fees, translations, travel and DNA tests, etc., lack of valid travel documents and limited access to legal assistance and to adequate information.

As regards challenges in the welfare and reception services, throughout 2018, several Member States introduced further legislative changes with restrictions for asylum applicants and beneficiaries of international protection. A clear example is the Italian 2018 reform[86] which changed the reception system, making the SPRAR – the Central Service for National Asylum Seekers and Refugees Protection System – accessible only to protection-status holders and unaccompanied children, while the other asylum seekers are hosted in the lower quality first-level reception facilities or

[83]Law decree 113/2018, converted into Law 132/2018 (Decreto-legge 4 ottobre 2018, n. 113, coordinato con la legge di conversione 1º dicembre 2018, n. 132)

[84] Act (2016:752) on temporary restrictions on the possibility of obtaining a residence permit in Sweden, amended by Law (2019:481)on partly continued validity of the Act (2016: 752)

[85] Aida – Ecre, *Sweden: suspension of family reunification breaches family unity and best interests of the child,* 15 November 2018, https://www.asylumineurope.org/news/15-11-2018/sweden-suspension-family-reunification-breaches-family-unity-and-best-interests(accessed 09/08/19)

[86] Through the so-called '*Decreto sicurezza'*, Decree Law 113/2018 converted into Law 132/2018

special reception centres. The same reform limits also the rights of asylum applicants to access local public services, such as vocational training. Similarly, several provinces in Austria in recent years introduced rules offering lower levels of social assistance to refugees with a temporary residence permit than to Austrian nationals. The CJEU deemed such rules to be non-compliant with EU law (Article 29 of the Qualification Directive 2011/95/EU)stating that: *"Article 29 of Directive 2011/95/EU […] must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which provides that refugees with a temporary right of residence in a Member State are to be granted social security benefits which are less than those received by nationals of that Member State and refugees who have a permanent right of residence in that Member State"*[87].

Finally, several EU Member States introduced additional laws and policies toughening immigration detention, like in the case of Croatia, France, Hungary, Italy, the Netherlands and Sweden. In some states, immigration detention has been toughened also for children: they are often detained in police stations or pre-removal facilities under poor and inadequate conditions.

These reported problems about asylum seekers' fundamental rights demonstrate that although in the last year there has been a drop in the number of arrivals and asylum applications, it has not led to a decrease in fundamental rights concerns. Many EU countries continue to act as it was still an emergency situation like in 2015, by introducing restrictive laws and policies which adversely affect the human rights of asylum seekers and beneficiaries of international protection, often in violation of the member states' obligations under EU law.

From my direct experience of internship in the immigration section of the Venice Civil Court and the dialogue with some judges dealing every day with the asylum matter, some other challenges have emerged, in particular in the appeal phase, which negatively influence the functioning of the system and the final result of the asylum procedure. As I observed, the audition of the applicant is a very delicate

[87] CJEU, C-713/17, Ayubi v Bezirkshauptmannschaft Linz-Land, 21 November 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0713(accessed 09/08/19)

moment, both at the administrative phase and at the appeal, since it is very relevant in providing those factors which influence the credibility assessment that the judges have to conduct before deciding. In this phase, one of the most problematic aspects is the translation from specific dialects of the applicants to Italian language. The persons chosen to translate during the audition are not professional interpreters but common persons, often asylum seekers themselves or already granted international protection who have acquired a basic knowledge of Italian. This means that they often do not speak exactly the same dialect of the applicant or even a correct Italian, so that problems of understanding between them and with the judge are not rare. On the contrary, it would be useful to resort to professional interpreters prepared and qualified also in the matter of asylum and international protection, so that the interview can be conducted efficiently in such a way that all the elements relevant for the decision maker can emerge. By law, the National commission for the right to asylum (CNDA) should also provide training to interpreters to ensure appropriate communication between the applicant and the official who conducts the substantive interview[88]. However, in practice interpreters do not receive any specialised training- some training courses on asylum issues are organised on ad hoc basis, but not regularly (ASGI 2019).

The judges of the appeal body often face the difficulty to find country of origin information which are sufficiently updated and translated into Italian: on the EASO COI portal there are COI reports of just some countries of the world and on the UNHCR portal (Refworld) it is possible to find documents published by the UNHCR itself or by state agencies which produce annual reports or investigate specific topics and aspects of certain countries. Most of the documents are available in English or other languages, while Italian sources are quite rare: this means that the judges have to spend much time in searching and translating documents and reports which are fundamental for verifying the credibility of the applicants' personal stories and the situation of the countries of origin in order to decide whether there are the grounds for international protection and what type to grant

[88] Article 15 Procedure Decree (Legislative Decree 25/2008)

them. Related to this issue is also the necessity that the decision makers, both at administrative and judicial level, receive not only judicial training, but also in historical, geographical and socio-anthropological fields since these are all useful matters to better understand cultural and social aspects of the applicants' stories and the facts happened in their countries of origin. In addition, it would be very helpful for the whole system if experts with specific competences (African and Asian studies, Anthropology, Cultural mediation, Human Rights, etc.) were included in the decision-making process: they could give advice and share their knowledge relevant for assessing the cases with the judges and the other officials responsible for examining the asylum applications.

Another problematic aspect highlighted by the judge who was my tutor during my internship at the Court, belongs to the introductory stage of the judgement, that is, the lack of indications about what aspects of the case have not been analysed in depth in the administrative phase which is necessary to evaluate in the judicial one. Finally, I observed together with the judges responsible for the interviews of the applicants, that the complaints written by the appellants' defenders in some cases lack completely the reasons for the appeal and just report what the applicant declared to the Territorial commission, without presenting a real and convincing defence. This has been highlighted even by a judge of the Court of Rome, who claims that such complaints do not present the conditions requested by the civil procedure code and should be declared void (Albano 2018). But in this case the rejection would affect negatively the asylum seeker who has no way to choose by himself a good defender. This unfair practise unfortunately happens when cases of asylum seekers are taken up by lawyers who are not really committed or do not consider the asylum matter as important as others. Furthermore, most asylum seekers receive free legal aid[89], so that some lawyers are not particularly interested in 'winning' this kind of cases since they are paid by the State anyway.

[89]In the appeal phase, the free state-funded legal aid (*gratuito patrocinio a spese dello Stato*) is provided by law to asylum seekers who declare an annual taxable income below €11,493.82 (up from €11,369.24) and whose case is not deemed manifestly unfounded (Article 16(2) Procedure Decree).

In this last paragraph, the focus was on the main concerns about asylum seekers' fundamental rights which occur before or during the asylum procedures, as identified by the EU Agency for Fundamental Rights throughout European countries and as I observed during my direct experience in an Italian Civil court dealing with asylum appeals. Evidence shows that, even though the period of emergence is finished, the challenges for asylum seekers and for the functioning of the asylum procedures at national level are still several and not decreased. The actual trend, on the contrary, is towards more restrictive asylum policies and legislation in most European countries.

CHAPTER IV – Italy, the UK and Sweden: the development of populist parties and the impact on asylum seekers' human rights

In the last decade populist parties have garnered increasingly large consensus in many European countries and beyond. The concept of populism has not a generally-agreed definition, but it has been defined by Mudde (2007) as a rhetorical style of political communication, a thin-centred ideology, a form of political behaviour, and a strategy of consensus organisation (Martinelli 2018, p.16). It becomes a full-fledged ideology when the political discourse is built around some features: concepts such as 'people' as the only legitimate source of power, and 'community', used as a criterion for defining the people, and the antagonistic relationship between two groups, '*We*' - the pure, virtuous people - and '*Them*' - the corrupt, and negligent elite or establishment (Id., p.17). The orientation of the populist party depends much on who is part of the 'people' and who is excluded from it, but boundaries are not always so clear, and several elements cross the left/right cleavage, such as the mistrust of any elite, the rejection of institutional intermediation, etc.

The populist parties which developed in European states in the last decade are especially right-wing populist and nationalist parties whose common feature is the anti-immigration discourse that has always been relevant for the populist family of parties (Bulli and Soare 2018, p.129), which even strengthened following the 2015 refugee crisis in Europe. At the supranational level, such parties share a distrust of EU institutions and a desire to return most power to the national ones. This Eurosceptic attitude is the connecting link between populism and nationalism in today's Europe and is evident primarily in the reaffirmation of state sovereignty in opposition to EU supranational integration. Such anti-EU stance gradually increased in the last years, but even more following the large influx of asylum seekers in 2015-16 and the terroristic attacks in some member states which seemed to prove EU inability to face such challenges and adequately protect its territory from external threats (Goksun 2017). EU institutions are often used as a scapegoat and critical

target, but at the same time populists often criticise national elites as well, for being unable to oppose Europe's supranational technocracy or even for being their accomplices (Martinelli 2018, p.19).

Right-wing populist parties in Europe exist since the 1980s-90s, but only in the last decade they have been able to garner relevant amounts of votes and seats in national Parliaments. Across Europe the main European national-populist parties at present are the Hungarian Fidesz with Viktor Orban, the Polish PiS (Law and Justice), the Salvini's Lega in Italy, the *Front National* of Marine Le Pen in France, the UKIP with Nigel Farage, the *Alternative fur Deutschland* in Germany, the Dutch Freedom Party in the Netherlands and the Swedish Democrats of Jimmie Akesson in Sweden. All these parties have in common a national-populist nature and a growing consent they have been collecting in the last few years. This was especially thanks to their ability to intercept the recent people discontent and to present themselves as the only valid alternative to the mainstream parties in crisis, often portrayed as corrupt and inefficient. Scholars, indeed, agree that the rise and persistence of populism in Western European democracies is an indication of a crisis of representation (Lanzone and Woods 2015, p.55). Another key factor in the rise of national populism is the "explosion of digital communication" (Martinelli 2018, p.24), which has amplified the role of mass media in the political space and created new direct channels for citizens to participate.

National populists of contemporary Europe are not anti-democratic and actually claim to be themselves the true interpreters of democracy, but they have an illiberal conception of democracy that stresses the democratic component – the absolute power of the majority – at the expense of the liberal component (division of powers, constitutional guarantees, institutional checks and balances, minority rights). Such a notion of direct democracy attributes absolute power to the majority, with the risk to open the way to what Tocqueville defined the "dictatorship of majority rule" (Id., p.19).

Along with an increasing presence in Parliaments, right-wing populist parties acquired more power of influence on national legislation and garnered more votes

also in the elections of the European Parliament already in 2014 and again in the last ones of May 2019. Therefore, it is our interest to highlight their influence on immigration and asylum matters, and in particular whether they are active in modifying the asylum systems at national level. Looking at our three case studies, it is relevant to notice also whether populists-driven changes in the asylum procedures impacted negatively refugees' human rights. Furthermore, it seems that at present populism is necessarily connected to the refugee issue, but has always been like that? What are the reasons behind this relation apparently essential between populist movements and asylum?

1. Italy: the League and the Five Star Movement

In Italy, populism is not a too recent phenomenon: populist parties, indeed, have turned up since the end of the 1980s and have been also in government in more than one legislature, in particular, for eight years between 2001 and 2011. The rise of Italian populist movements was strictly related to the crisis of mainstream political parties in the 1990s due to the several scandals about corruption emerged in those years (*Tangentopoli* scandal) which led to the collapse of the major parties, namely the Christian Democrats and the Italian Socialist Party. After the advent of the so-called 'Second Republic' in 1994, there have been three main instances of populist parties: Silvio Berlusconi's *Forza Italia*, Umberto Bossi's *Lega Nord*, and Beppe Grillo's Five Star Movement (FSM). In the context of political void left after the fall of traditional parties, a new coalition of centre-right and right-wing forces was created, headed by Berlusconi's *Forza Italia* (FI) which succeeded to win the elections three times between 1994 and 2008 thanks to its anti-political and populist stance (Fella and Ruzza 2013, p.42).

Particularly relevant to this right-wing coalition was another party, the Northern League (*Lega Nord*), born in 1989 and which initially gained prominence as a regionalist movement mainly advocating autonomy for the North Italy from the

corrupt political system based in Rome and the 'burden' of the South. Then, it progressively increased its electoral consent by opposing the establishment and promoting a populist critique of the usual way of doing politics (Bulli and Soare 2018, p.139).

Northern League's ideology initially focused on three 'enemies' – a corrupt elite based in Rome, the unfair distribution of the North's wealth to the Southern part of Italy, and the threat of immigration. The party's leader Bossi succeeded in defining a view with the perception of the 'us' versus 'them', usually referring to the opposition of Northern to Southern Italians. The anti-Southern theme characterized the League's populism in its early period, but declined afterwards: since the end of 1990s, the external threat of 'them' shifted from Southern people to non-European immigrants, perceived as the new threat to the North's identity (Woods 2014, p.37). By the late 1990s, immigration was used as the key issue of the Northern League which became expression of an increasingly radical right and nativist populism. The party became more markedly right-wing and protectionist in character, adopting a xenophobic anti-immigrant and Islamophobic stance, more characteristic of the European populist radical right (Fella and Ruzza 2013, p.42).

In early 2000s, the Northern League, besides launching xenophobic campaigns such as those against the existence and construction of mosques, put forward several measures to limit Muslim religious liberties and against Roma people and illegal immigrants. The party's illiberal approach was particularly evident in the 2009 law contained in the 'security package' sponsored by the Northern League which introduced the 'crime of illegal immigration' and the detention for third-country nationals without valid residence permit. In 2010 the Court of Justice of the EU threw out this measure for breaching EU Return Directive[90] (La Repubblica 2011). As the party in charge of the Interior Ministry between 2008 and 2011, the Northern League also launched a series of initiatives on immigration that were judged to pose threats to fundamental human rights, such as the rejection of boatloads of mainly African migrants, which in 2012 were judged to be in violation of Article 3 of the

[90] Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Directive 2008/115/EC)

European Convention on Human Rights by the European Court of Human Rights (Albertazzi and Mueller 2013, p.354).

While the antielite and anti-Rome elements remained, the League's electoral successes in the 2008 elections – 9% of national vote and about 20% in some regions of Veneto and Lombardy – were due primarily to its continuous strong focus on anti-immigration discourse. This issue, indeed, remained fundamental in the League's rhetoric and identity, even following the change of leadership in 2013: with Salvini, immigrants have increasingly been portrayed as a religious threat, a security menace and an economic burden (Bulli and Soare 2018, p.141). In the last years, through the accentuation of its anti-migrant position, notably with anti-Islam and anti-Roma messages, the party further reinforced radical right traits, abandoning its autonomist stance (Ruzza 2018). Thanks even to this shift, Salvini could transform the regional separatist Northern League into the League, a right-wing nationalist party designed on the model of Marine Le Pen's *Front National*, able to attract many more votes, even from many former supporters of other parties (Martinelli 2018).

The community of reference changed, with the original emphasis on the North abandoned in favour of the concept of a unified national community. At this point, the external threats to the Italian community became the immigrants on one side, and the European Union technocrats on the other side. Especially the latter aspect has been critical to collect more consent at national level, while reinforcing the alliance with the other radical right populist parties in Europe (Bulli and Soare 2018, p.141). In particular, the League built ties with the governments of the Visegrad group that bases its consensus on the security issue, the promise to stop immigration, and the opposition to the European Union. Similarly to the other national right-wing parties, indeed, the League, is nationalist in the sense of "putting the interests of Italians first" both with regard to immigrants and European institutions. The League's Euroscepticism, common element of today's populist parties, is evident in its leaders' discourses where EU should be downsized, in the sense of renationalising policies especially in asylum matter, strengthening national

borders, and even not excluding the option of restoring the national currency and leaving the Union (Martinelli 2018, p.30). Furthermore, over the past year, the party's anti-immigration discourse has increasingly included a denunciation of the connection between organised crime and illegal immigration, and a strong criticism against the negative role of the NGOs acting in this field (Bulli and Soare 2018, p.144). From the 2013 general elections in Italy, where the League garnered the 4% of the votes, it largely increased its public consent arriving at more than 17% in 2018 elections, becoming the third party after the Five Star Movement and the Democratic Party. Such huge vote increase evidently shows the ability of the party to reach more social groups than previously, by focusing its action on general and interclass issues like security.

The last political elections of March 2018 marked the success of two populist parties – the League and the Five Star Movement – which together agreed to form a government of coalition lasted little more than one year (the government crisis has been opened at the time of writing). One first difference between the two parties is the geographical polarisation of their electoral consent since the League is strong in the North of Italy while the FSM in the South.

Unlike the national populism of the League, the Five Star Movement is expression of populist politics, but moderately nationalist, since it is not particularly characterised by explicit xenophobic discourse, despite its Eurosceptic attitudes. The movement was born in 2005 as local civic lists and officially founded in 2009 by an Italian comedian, Beppe Grillo, who used to attack through the internet the corrupt Italian political class, the so-called 'caste', and its privileges at the expenses of the Italian people. The name of the party stands for the most important issues promoted by the movement since its early appearance: the five stars symbolise public water management, sustainable mobility, development, connectivity, and the environment (Bulli and Soare 2018, p.145).

Unlike other European populist parties, the FSM cannot be allocated clearly in the right/left cleavage: it presented itself as staying 'beyond' the party system but is regarded by many as leftist with a rhetoric including also elements of the radical

right thoughts (Mejstrick 2016, p.2). Even though it was initially described as expression of 'left populism' attracting mainly traditional left-wing voters, following the success in 2013 elections (25%) the basis of the party began to be described as composed of protest voters. The populist movement, indeed, seized on the crisis of representation afflicting the electoral and party systems until then dominated by *Forza Italia*, the Northern League and the Democratic Party (PD) to call for a radical overhaul of the political system (Lanzone and Woods 2015, p.57). It was able to mobilize electors from left and right, representing a revolutionary breakdown with the Italian political system. The success of the movement is due to the able mix of different and innovative elements, such as the post-materialist and environmentalist values, and the innovative use of the Internet – both as an organisational and communication tool – which differentiates the FSM from mainstream and populist parties across Europe (Salvati 2016, p.3).

According to Mosca (2014), the evolution of the Movement has gone through four main phases: latency (2005/2007), visibility through mass protests (2007/2008), entry into the electoral arena (2008/2011) and electoral boom and institutionalisation (since 2012). The first phase was focused on increasing the political participation of citizens: on Grillo's blog and the following meet-up groups created in 2005, people held online discussions and made complaints of problems and issues relevant at local level which were not properly tackled by the traditional politics in Rome and needed be brought to public attention. In the second phase such complaints became nationally visible through the organisation of provocative rallies in various Italian cities (the so-called 'V-days'), where the denunciation of the political and communication elites reached its peak.

The third phase was the one of the entry into the electoral arena, which was characterized by the first lists presented in the local election at municipal and regional level in 2012. This was the real turning point in the movement's electoral results as it won in some municipalities and at the regional elections of Sicily. These initial successes at local level signalled the transition to the fourth phase with the electoral boom and institutionalization: the MSF decided to take part to the 2013

national political elections and was able to garner 25% of votes, becoming one of the main political forces in Parliament and "starting the phase of tri-polarization of the Italian political system" (Salvati 2016, p.3).

The electoral success was related also to a change in the movement's communication strategy from 2012 onward, that is, in particular the choice to actively campaign in the squares (Mosca 2014, p.9), besides the use of the web which is useful to include the electorate in consultations and information sharing. The process of institutionalisation saw the election of Luigi Di Maio as political leader of the FSM and Grillo keeping for himself the role of guarantor, while the new party statute gives a key role to the Rousseau platform – the web platform where a large part of the movement's political activity takes place (Martinelli 2018, p.34).

In 2018 general elections the movement confirmed and improved its success of the previous years, garnering a 32% of votes: most of the 2013 voters confirmed their support to the FSM, but the increase came from former centre-left voters (mostly in Central Italy) and former centre-right voters and previously non-voting people (mostly in the South). The resulting key change with regard to 2013 has been the growing 'meridionalisation' of the party (Martinelli 2018, p.35), mainly related to the movement's promise of implementing the basic income guarantee (the so-called "citizenship income"). Unlike the League, indeed, the FSM was able to overcome not only the left-right, but also the North-South divisions.

The position of the Five Star Movement regarding the immigration issue remained unclear for the first period, even because its founder has often avoided tackling such divisive issues which could split his extremely diverse electorate (Mosca 2014, p.15). But the party's attitude on this theme emerged to be more towards the right-wing than the left: for example, in 2012 Grillo had expressed disagreement to the proposal of recognising the citizenship to persons born in Italy from foreign parents, based on the principle of the *ius soli.* Subsequently, the immigration issue became relevant also for the organization of the movement: during the 2013 debate on the abolition of the crime of illegal immigration introduced by the 2009 'security

package', Grillo and Casaleggio (the other founder of the FSM) censored the parliamentary initiative of two FSM Senate members to decriminalise illegal immigration, defined as a private initiative. Such episode started the debate within the movement and its supporters leading to consultations and the first online referendum, where most voted for the depenalisation of the crime (Bulli and Soare 2018, p.147).

In the context of the 2015 refugee crisis, Grillo expressed his position on his blog according to which illegal migrants have become precious sources of income for the mafias and for the national cooperatives (Bulli and Soare 2018, p.148). But the official position on the immigration issue is contained in FSM programme confirmed by an online vote of their supporters, whose two key principles are the implementation of the principle of equal responsibility sharing among all EU member states, and the transparent allocation of state resources for migrant reception (Movimento 5 Stelle 2019).

Since the beginning, Grillo's blog used a strong anti-European rhetoric, typical of most European populist parties, calling for Italy to leave the Euro and reject the austerity dictates of the European Commission. Like in his criticism against the Italian political 'caste', he argued that the European Union is dominated by technocrats and self-interested politicians who care little about the "real people" (Lanzone and Woods 2015, p.62). But the party's attitude towards the EU has been ambivalent: beside the strong condemn of European technocratic elites, it has frequently required "more Europe" in order to overcome the problems affecting its actual functioning (Salvati 2016, p.18).

2. UK: the UK Independent Party (UKIP) and Brexit

The UK Independence Party – a strongly Eurosceptic party with the only goal of withdrawing Britain from the EU – is increasingly considered by academics as part of the European radical right party family, even though until recently it was considered

just a right-wing single-issue party. It was founded in 1993 by a left-wig professor at the London School of Economics, who initially hoped to distance the party from the radical right (the British National Party - BNP) and thus avoided the word “British” in its name. Most of the early recruits to the party, indeed, were former Conservatives suspicious of European integration and its economic project. While during the 1990s the UKIP was overshadowed by the Referendum Party which similarly campaigned on the issue whether UK should remain in the EU or not, from 1999 onward, it became increasingly prominent in the public imagination as the obvious anti-European choice which was becoming relevant in Britain (Goodwin and Dennison 2018, p.11). In particular, in the aftermath of 2010 general elections, the Party was able to increase its political space by attracting also the non-extremist voters from the radical right BNP which was then collapsing.

Unlike other populist radical right parties, the UKIP was not characterised by an ideological core made of nativism, authoritarianism and populist attacks against “the system”. On the contrary, for much of its early history the UKIP was a single-issue party that campaigned almost exclusively for an end to EU membership and showed little interest in nativist or authoritarian rhetoric (Goodwin 2016, p.37).However, by the time new issues were added to the party’s programme: the new UKIP leader Nigel Farage, after taking over in 2006, committed the party to social conservatism, laissez-faire economics, and populist swipes at the British and European political elites. From 2010 onward the party began to modify its ideological offer to voters reflecting changes in the broader society, such as the economic recession started in 2009 and the following fiscal austerity. At the same time, immigration became one of the most relevant issues for the electorate due to the rise of net migration into the country and of the public concerns about its consequences on the society (Id., p.38). By 2016, the UKIP unquestionably held anti-establishment populism at the heart of its rhetoric: according to its leader, UK membership in the EU and the consequent loss of democratic power suffered by British people was evidence that the Britain’s political elite was corrupt and completely far from the common people. UKIP has long campaigned against the

other three main parties as if they were a single bloc of pro-European social democrats who surrendered power to the alien and undemocratic EU institutions (Goodwin and Dennison 2018, p.16). The party, indeed, was able to use such arguments intercepting the public dissatisfaction with the established parties and the way they managed the refugee crisis, which reflected in rising support for the Liberal Democrats and other challenger parties, including the UKIP itself.

The UKIP's electoral evolution is characterised by a large and continuous increase of votes both at local and general elections in UK and at the European Parliament, but with very different quotas. Since 1999, the party was able to garner large consensus at European elections – 7% of votes in 1999, 16% in 2004, 16.5% in 2009 and 27.5% in 2014 – but the results at national level were quite different (BBC 2014). From 2001 general elections, where it won a 1.5% of votes, it arrived to be the third national party in 2015 with 12.6% of the votes. The UKIP reached its electoral peak in 2015, but after that – and in particular following the 2016 referendum on EU membership – the party's vote share declined from 12.6% of 2015 to 1.8% of 2017 elections, losing the only seat in Parliament it had won in 2015 (BBC 2017).

The UKIP shares some similarities regarding anti-immigration and anti-EU rhetoric with the centre-right Conservative Party, and its anti-EU faction in particular. UKIP represents migration as an uncontrolled phenomenon and a security threat, using it to enforce their anti-EU claims: in particular, they used to call for a withdrawal from the UE and a return to nationalistic and restrictive immigration policies. Similarly, Conservatives represent the United Kingdom as a country which has lost control of its borders and is threatened by a huge number of aliens. Former Prime Minister David Cameron, indeed, stressed the need to implement a more effective management of the external borders and of the immigration and asylum system. The Immigration Act, approved in May 2016, implements several policies outlined in the Conservative Party Manifesto, including measures to improve the security and operation of the immigration system (Gianfreda 2018, p.92).

UKIP's positions moved towards the radical right particularly during Pearson's time as leader, who was notable for his criticism of the role of Islam in society,

culminating in a call for "*uniculturalism*" and "*restoring Britishness*" in the party's 2010 manifesto (Goodwin and Dennison 2018, p.12). Similarly to the Italian Northern League, it used to represent the refugee peak as a national threat, which raises criminality and insecurity within host societies (Gianfreda 2018, p.103). After the re-election of Farage as party leader in 2010, the party merged its demands for withdrawal from the EU with calls to "end mass immigration", a message that attracted a large electorate that was preoccupied with the immigration issue (Goodwin 2016, p.39). So, the UKIP manifested its increasingly aspect of populist radical right party through the strong opposition to immigration, free movement of people from Eastern Europe, and a rejection of the pro-European political elite, both in EU institutions and in Westminster. Evidently, it had a prominent role in supporting the referendum in 2016 about UK membership in the EU and campaigning for the Leave vote.

Unlike Britain's first referendum on its membership of the then-European Community of 1975, where about 67% of voters opted to stay in the EC, in 2016 referendum 51.9 per cent of the electorate had voted to leave the European Union. Following the vote that decided for Brexit, many surveys and analyses of the factors influencing the vote have been conducted in order to understand such a result. All these researches have highlighted how immigration and its management were a key issue at the basis of the vote to leave the EU. In particular, they show how, in the period before the 2016 referendum, public hostility towards immigration and anxiety over its perceived effects increased as well as the support for Nigel Farage's UKIP and the populist right (Goodwin and Milazzo 2017, p.2). A survey conducted by Lord Ashcroft in 2016 suggested that nearly half of those who voted for Brexit did so for their desire that 'decisions about the United Kingdom should be taken in the UK', while one-third saw leaving the EU as offering 'best chance for the UK to regain control over immigration and its own borders' (Id., p.456). Indeed, one of the central messages of the Leave campaign was to 'take back control of our borders', with the implicit assumption that this would help reduce migration into Britain (Goodwin and Heath 2016, p.6).

Researches showed that, in the period before the 2016 referendum, public hostility towards immigration and anxiety over its perceived effects were major components of support for Nigel Farage and the populist right (Goodwin and Milazzo 2017, p.451). Thus, the factors explaining the rise of Farage's UKIP in the last years are the same explaining why in 2016 referendum British people voted to leave the EU. Indeed, analyses at local level found that the districts that were the most likely to vote for Brexit were the same ones that had given UKIP its strongest support in elections of 2014 (Goodwin and Heath 2016, p.8).

The strong focus adopted by the Leave campaigns on the immigration issue, particularly during the latter part of the referendum campaign, was critical in driving public support for voting Leave. This because anti-immigration messages clearly had a stronger emotional resonance among voters already concerned about the impact of immigration on the society and about the changes produced in local communities of some areas of the country (Goodwin and Milazzo 2017, p.462).

Evidently, the results of the Brexit referendum portrayed a deeply divided country, not only along class, education and generational lines, but also in terms of geography. Fears of immigration and multiculturalism – and the consequent vote to Leave – are more pronounced among voters with lower levels of education and in a more vulnerable position in the labour market. Moreover, the Remain side generally did better in the larger multicultural cities (especially in London) and where there were more graduates, while the Leave side was strongest in the English countryside and in the post-industrial north-eastern towns (Hobolt 2016, p.1273). The referendum also divided the UK, since both England and Wales voted 53% Leave, while Remain vote won in Northern Ireland (at 56%) and Scotland (at 62%).

Studies and researches following the referendum highlighted that the debates about immigration and sovereignty were very critical subjects employed by the Leave side: for example, Leave campaigners pointed out that the UK government had relatively little control over who from the EU came to live and work in the UK. Furthermore, they reminded people that the UK sometimes had to implement EU directives that the government had opposed in the Council of Ministers and to

accept judgments from the European Court of Justice. Ensuring that decisions were made in London rather than Brussels was a recurrent slogan of the Leave campaign (Curtice 2017, p.27).

As confirmed by many subsequent studies, the 2016 referendum and the decision of British people to leave the EU were deeply rooted in concerns about the economy, following the period of recession and austerity, and the increase of immigration. The right-wing populists have been able to emphasise these issues and use them in their campaigns for political elections and in 2016 for convincing people to vote Leave. They portrayed EU institutions as responsible of making decisions for British people in important matters such as migration control and the economy, while accusing the other mainstream parties of delegating UK's sovereignty and power of decision. In UKIP's rhetoric, EU institutions and incoming migrants became the scapegoats for the main problems and concerns of the British society: people were persuaded that by leaving the EU, the British government would take back the power to decide independently on the laws and, importantly, on who can enter and stay in their territory. Following the 2016 referendum, Farage quitted as leader and the UKIP lost most of its vote share in UK general elections and its seats in the Parliament. While the UKIP practically disappeared from the electoral competition, in November 2018, Nigel Farage founded the Brexit Party which later won most votes – especially from those who voted Leave in 2016 – at the European elections of May 2019.

Evidently, in this period not only in the UK but in many European countries, anti-immigration and correlated anti-EU stances are the right leverage for populist right-wing parties to increase their consent, attacking the other established parties alleged to act in their own interests, as well as EU institutions supposed to have stolen member states' power of decision and control of borders and immigration systems.

3. Sweden: the Sweden Democrats

In contrast to the rest of the Nordic region and Western Europe, Sweden had for many years only minor and short-lived right-wing populist parties, but this situation changed in the 1990s, when the *Ny Demokrati* (NyD, New Democracy), a party with strong anti-immigration rhetoric, entered the Swedish Parliament for some years (between 1991 and 1994). After the NyD case, the only party belonging to the populist radical right party family which developed in the last two decades is the Sweden Democrats (SD - S*verigedemokraterna*). The party, formed in 1988, derives from some nationalist and anti-immigration groups, most notably the extra-parliamentary organization *Bevara Sverige Svenskt* (Keep Sweden Swedish – BSS). Besides former BSS members, the party also attracted many problematic individuals, including people with criminal records and veterans of 1930s and 1940s fascist and Nazi organizations (Widefeldt 2018, p.7). Despite some efforts to get rid of such connotations – like expressing the party's commitment to democracy in their manifesto and the name itself – the ambivalent relations with openly racist groups most probably prevented the party from reaching a legitimate position in Swedish politics through the 1990s and 2000s. In order to get consent, indeed, radical right-wing parties usually cannot be perceived as being too extreme, because people may be reluctant to vote for explicitly racist or non-democratic parties (Jylhä et al. 2019, p.3). For this reason, by the time, the party systematically tried to polish its image in order to achieve a broader electoral appeal, but a significant change was brought only when Jimmie Åkesson became party leader since 2005.In 2011 the party officially changed its designation from nationalist to social conservative, and in 2012 the party introduced what it called 'zero tolerance for racism', resulting in many expulsions of party members deemed too racist. This change transformed the Sweden Democrats from a fringe phenomenon to the third-biggest party since 2014 political elections.

In 2010, the party managed to enter for the first time the Parliament with the 5.7% of the votes, and the consent increasingly grew to 13% in 2014, to 18% in the last 2018 elections, where it won 62 out of 349 seats in the Parliament (BBC 2018a). The

increased consensus goes together with the increase of voters that consider immigration to be an important political issue in Swedish society: in 2010, it was only 19% of the Swedish voters, while in 2014 this proportion had increased to 27% and in 2015 to 53% (Jylhä et al. 2019, p.2).

In its own manifesto, the SD represents itself as a social conservative party based on nationalism, which "considers value conservatism and the maintenance of a solidary welfare as the most important tools for the good society" (Jungar and Jupskås 2014, p.222). The party is first and foremost associated with the issue of migration: its members believe that Sweden's immigration policy has been too generous and that the many migrants coming to Sweden have put huge social and economic strains on the country. The party's policies proposals are based on protecting the 'national identity' as a way of sustaining the Swedish welfare state. The main points of their programme, indeed, regard migration policy, welfare and security [91].

As it is common for the general radical right, the Sweden Democrats use a particular nationalist and conservative rhetoric emphasising the Swedish 'Golden Age' of the past, whose decay started in the 1960s because of corrupt leftist forces which undermined the Swedish welfare state. Such attacks against the other established parties is also one of the typical characteristics of anti-establishment populism. Socialists and liberals are blamed, in particular, for allowing non-European migration from 'ethnically distant or remote places' since the 1970s, while the political elite in general is accused of embracing multicultural values and promoting membership in the European Union with the resulting loss of Swedish sovereignty (Elgenius and Rydgren 2017, p.355).

In SD rhetoric, immigration from non-European countries, together with internationalisation and 'islamification' of Sweden, is represented as the cause of the nation's decay and as especially harmful to its cohesion. Once they entered the Parliament, the Sweden Democrats strongly contributed to the politicization of the immigration issue in Sweden: for many years, instead, questions concerning immigration were of low importance in Swedish politics. In particular, this theme

[91] From the Sweden Democrats website: https://sd.se/english/

became very relevant in the political agenda since 2014 as a result of the influx of asylum seekers coming from war-torn Syria: this situation opened debates on the economic costs of immigration, previously absent from the mainstream agenda (Rydgren and van der Meiden 2018, p.446). In 2015, 93% of the sympathizers of the Sweden Democrats agreed with the statement that it would be a good idea to reduce the number of refugees to Sweden, but this does not reflect the general attitude of Swedes towards immigration and refugees: on the contrary, opposition to immigration was decreasing at the same time as Sweden was receiving more refugees than ever. Many studies have demonstrated this attitude in Swedish society: for example, the proportion of people who think it is a good idea to reduce the number of refugees to Sweden has decreased from 65% in 1992 to 40% in 2015 (Id., p.444).

Evidently, the Sweden Democrats have mobilized support within that minority of voters that wanted a tighter immigration and asylum policy and considered this issue more important than other social issues. The party, indeed, was able to attract voters with anti-immigration sentiments by portraying immigration negatively in two senses. On one hand it depicts immigration as a threat to the ethno-national identity of the majority, and on the other hand, immigrants as a major cause of criminality and other kinds of social insecurity (Elgenius and Rydgren 2017, p.353).

4. The influence of populist parties on national immigration and asylum policies and the risks for asylum seekers' human rights

In the previous paragraphs we have seen some examples of populist parties – mainly of the right wing – that have acquired increasing consensus in the three countries analysed. They share similar characteristics, including anti-EU and anti-immigration stances and attacks to the other mainstream political parties and to the 'corrupt' political elite. As highlighted, the discourse around the migration issue is often the factor that distinguishes a populist radical right party from all the others: using this issue has been strategic to increase the party's vote share and

public consent in the last years. Such parties, indeed, have intercepted and fuelled people discontent and concerns about the effects of an increased influx of migrants in their own countries, gaining their support by criticising the incapacity of other political parties and of the EU institutions to tackle the situation in a proper way. This strong link existing between the populist radical right and the migration issue is based on the ethnonationalist component of their ideology, which identifies the populist radical right party family together with anti-establishment claims. Moreover, the discursive strategy of such parties to link immigration with security concerns and fuel people fears to lose their traditional national identities, is crucial in mobilising voters from many different classes and backgrounds.

The large consensus that these parties have collected throughout Europe means an increased capacity to take part in government coalitions and in the legislative activity of parliaments, thus influencing national legislation and policies about immigration and asylum. Some proposals or laws supported by these parties often result in conflict with European standards on asylum. In this section, I want to focus on the influence that the parties analysed above had – and still have – on national policies and legislation on asylum and immigration, and therefore understand whether their anti-immigrant and often xenophobic rhetoric turns into concrete negative impacts on asylum seekers' human rights.

Considering the questions at the beginning of this chapter about the relation apparently essential between populist parties and the asylum issue, we can say that they are not necessarily interrelated, but in this specific period populists – especially of the radical right – use this theme in order to strengthen their anti-establishment claims. It is quite easy, indeed, to persuade the people that the recent refugee crisis and the bad functioning of the asylum system are because the political elites at the national and European levels were not able to tackle properly the situation and respond to the concerns of their citizens. Moreover, linking immigration and asylum with the theme of security is a common strategy to get the attention and the consensus of most persons, from any social class and political cleavage. This is

crucial to rise fears among people and find a scapegoat for the existing problems of the country, while increasing the party's credibility and voters at the polls.

In Italy, we have seen that the most durable experience of populist party belonging to the radical right is the Northern League, while the Five Star Movement is a relatively recent phenomenon, so that we can find more examples of the former's influence on legislation and policies regarding immigration and asylum.

In the period between 1991 and 2013, the Northern League was part of the government only three times - in 1994, in 2001 and in 2008 – always within right-wing coalitions. During the second participation to government, the party supported the adoption of a new law regulating immigration policies, Law 189/2002 known also as 'Law Bossi-Fini', taking the name from the League's leader Bossi and that of another party. Such law included measures increasing sanctions for illegal immigrants and for those who favour illegal immigration, direct expulsions of foreign nationals found without valid documents (expired residence permit for example), by taking them to the frontier, and detention for those remaining in Italy after receiving an expulsion order. It contains also measures reducing the duration of residence permits and restricting the criteria necessary to stay: it requires the foreign national to provide work certifications in order to enter or remain in Italy. Furthermore, the 'Bossi-Fini law' allowed also for pushbacks of boats with migrants in extraterritorial waters towards country of origin thanks to agreements with neighbouring countries, giving assistance and identifying asylum seekers directly at sea and avoiding the arrival of such boats to the Italian coasts (Internazionale 2013). This law was strongly criticised during the years but not repealed despite several requests especially from third sector actors working with migrants, but not only.

Another example of law supported by the Northern League influencing the immigration and asylum system, was the above-mentioned Law 94/2009, part of the second 'security package' of 2009, promoted by the then Ministry of Interior of the Northern League. It has introduced stricter regulations regarding refusals at the border and, for the first time, it introduced into the Italian law the so-called 'crime of illegal immigration', in addition to the usual administrative expulsion measure,

setting up a criminal offense (EMN 2011, p.33).In April 2011, the European Union Court of Justice quashed the so-called "crime of illegal immigration" as it was considered to be at odds with the European Directive on return (2008/115/EC) for the fact that the provision is providing for a prison sentence for irregular immigrants. In 2010, the Italian Constitutional Court had already declared unconstitutional the aggravating circumstance deriving from the condition of irregularity of foreign nationals, which was introduced by the first 'security package' in 2008 (Decree Law 92/2008, Article 61(11-bis)).

The most recent experience of government of the League has been following the general elections of May 2018, with the agreement to govern with the Five Star Movement (agreement just interrupted in August 2019). The League got some Ministries among which the Ministry of Interior, headed by the party leader Salvini. The party's characteristic anti-immigrant and anti-EU rhetoric has been implemented in the approach that the Ministry of Interior used in dealing with the immigration and refugees issue. As mentioned in chapter III, in October 2018 the so-called 'security decree' proposed by the League was adopted, containing strict measures to reduce the influx of migrants, but also modifying the Italian system of asylum and reception of asylum seekers. The Decree Law 113/2018 implemented by Law 132/2018, has abolished the humanitarian protection status that was the main kind of protection granted until 2018, substituting it with residence permits for some 'special reasons', such as serious health problems, natural disasters, victims of domestic violence or work exploitation, etc.

The 'security decree' also established a border procedure applicable at border areas and in transit zones, to persons apprehended after evading or attempting to evade border controls and to persons coming from a safe country of origin; furthermore, it introduced an "immediate procedure" for persons who are under criminal investigation or convicted of crimes which may trigger exclusion from international protection (ASGI 2019, p.63). It extended the time limit for detention in return centres (*Centri di permanenza per il rimpatrio*) of those waiting for being returned to up to 180 days. Furthermore, asylum seekers can be detained for up to 30 days

for identification and registration procedures in the hotspots and then in return centres. The grounds for the withdrawal and rejection of international protection are extended by the Decree Law, which also foresees the institution of a list of safe countries of origin, useful to apply the accelerated procedure (Camilli 2018). Among the several provisions of this reform of the asylum system, it is relevant also the reduction of the existing reception system (Sprar, renamed Siproimi) accessible only to protection holders while asylum seekers waiting for a decision will be host in first reception centres, where the services provided have been further reduced.

The Decree was strongly criticised by many jurists, experts of migration and NGOs for the alleged unconstitutionality of some parts, like that about the withdrawal of citizenship. Moreover, criticisms regard the reduction of the reception system which makes integration of asylum seekers even more difficult; finally, it is criticised the fact that the provisions of the Decree Law will increase the number of irregular migrants staying in Italy with the risk of engaging in illegal activities (Il Post 2018).

The rise of the UK Independence Party and the increasingly large consensus it acquired in the last years never turned into a relevant majority within the British Parliament or in the Government. Instead, it won large vote shares and thus seats for the elections of the European Parliament as well as it won many seats in local elections throughout the country. Despite the only seat the party had in the Parliament between 2015 and 2017, it was not the only party to push for stricter legislation and policies on immigration and asylum. The Conservative Party, indeed, in the last years developed an increasingly tough position towards these issues, especially following the referendum on Brexit. In its manifesto for 2010 elections, the party already talked about reducing immigration to Britain bringing it to "tens of thousands a year, not hundreds of thousands", limiting access only to skilled migrants who can enrich the British economy (Conservatives 2010, p.21).

In the 2015 manifesto, Conservatives introduced a new focus about changing UK relationship with the EU: they proposed to hold a referendum about EU membership and claimed for a reduction of European Union 'interference' in UK affairs – "It [the EU] interferes too much in our daily lives, and the scale of migration

triggered by new members joining in recent years has had a real impact on local communities" (Conservatives 2015, p.72). It is evident that one of the reasons to 'negotiate a new settlement in the EU', for the Conservatives was the desire to take back control of borders and decisions on who could enter in the UK.

Although the Conservatives initially were not Eurosceptic, the party supported the exit from the EU and a reduction of incoming migrants especially after the change of leadership with Theresa May who replaced Cameron even as Prime Minister since 2016. In the party's manifesto for 2017 elections, they renewed the commitment to "reduce the asylum claims made in Britain" (Conservatives 2017, p.40). This approach towards the immigration issue was reflected in the two Immigration Acts of 2014 and 2016, promoted by Conservative governments, introducing several changes to the British asylum system. The former, among many provisions affecting immigrants and asylum seekers, made removals easier and quicker for those with no right to stay, reduced the decisions that could be appealed and extended the number of non-suspensive appeals. It also prevented illegal immigrants from accessing some services (such as renting a house or opening bank accounts) and the labour market.

The Immigration Act 2016, later, was promoted by the Government to further discourage immigrants to enter UK and to tackle illegal immigration by making it harder to live and work without permission in the country. The Act, indeed, makes changes not only to immigration law and practice but also to areas such as housing, social welfare and employment in order to create a 'hostile environment' for irregular immigrants. It includes new sanctions on illegal workers and rogue employers, new measures to make it easier to enforce immigration laws and remove illegal migrants, and prevents migrants without valid documents from accessing housing, driving licences and bank accounts. The Act was criticised by human rights activists and NGOs because several provisions limited asylum seekers' rights, such as the Government's so-called 'deport first, appeal later' scheme extended to all migrants, which allows the removal of any migrant who has made a human rights or asylum claim while pending the appeal decision.

It is evident that even in the UK in the last years, governments have adopted a tougher approach as regards the immigration issue, in parallel to increasing anti-EU rhetoric, which led to the 2016 referendum establishing the exit of the country from the European Union. Even though populist radical right parties like the UKIP never got sufficient votes to form a majority in the Parliament and be part of the Government, they managed to disseminate and fuel concerns and fears about the influx of immigrants and its consequences on British society and meanwhile attack the EU institutions to be too intrusive in UK affairs, limiting its power to take decisions independently especially as regards immigration and the economy. We can consider the UK as a relevant example of how the populist radical right, even in case of little presence within national institutions, can have a strong influence with their campaigns not only on the general public but also on the other parties' policies, since these have to respond to the voters' expectations and to the most relevant issues of the moment. The UKIP, in particular, managed to increase its consensus throughout the country especially in the local elections between 2010 and 2016, and although not in the government, it was able to realise its primary goal that was the exit of Britain from the EU.

A similar situation is occurring in Sweden, with the Sweden Democrats that largely increased their consensus among voters in the last years but never managed to be at government yet. Since 2000, indeed, the political struggle has been between the left coalition with the Social Democrats and the Green Party, and the centre-right coalition, the Alliance for Sweden, with the Moderate, Christian Democrats, the Centre and Liberal parties. In the last elections held in September 2018, there was a change in the balance of these mainstream parties, with a huge increase of vote share for the Sweden Democrats who won the 17.5% of votes, becoming the third party after the Social Democrats (28.3%) and the Moderate Party (19.8%). After the last elections, neither bloc in parliament had the majority to form a government without involving the radical right Sweden Democrats, so that only after four months a government was established with a coalition formed by the Social Democrats with the Liberal and Centre parties (The Guardian 2019).

The increasing influence of the Sweden Democrats in national politics is now evident in its acquired relevance in the parliament balance and thus for government formation, as highlighted by the recent difficulties that the other establishment parties faced to avoid government alliances with the radical right. The first signs of the Sweden Democrats' influence in parliament occurred when the Social Democratic government restricted its liberal immigration policy ahead of elections. SD built their consensus capitalizing on growing anxiety among the Swedish population regarding immigration and fuelling public discontent on how immigration was tackled by the establishment parties. The Sweden Democrats campaign for the last elections focused on the 'Sweden's struggle' to integrate the 350,000 immigrants the country has accepted since 2015. They managed to mobilize public dissatisfaction and political pressure so much that during the last Social Democrat government had to abide by and ordered a dramatic decrease in the number of refugees and asylees admitted to Sweden (Katz 2018).

In 2016, indeed, border checks were reintroduced, and the already cited Law on temporary limitations to the possibility to be granted residence permits was adopted (TFS 2016:752). This was the government response to the huge influx of asylum seekers throughout 2015: it wanted to temporarily adjust the asylum regulations to the minimum level in the EU so that more people choose to seek asylum in other EU countries. The necessity to deter asylum seekers from coming to Sweden through this law was due, as affirmed by the government, to the situation of great distress of the Swedish refugees reception system (Prime Minister's Office of Sweden 2015). The law, which was renewed in July 2019 for other two years, introduces temporary residence permits, limits the right to family reunification and tightens maintenance requirements. In particular, it reduces to three years the permit for those granted refugee status, and to 13 months for those eligible for subsidiary protection. Furthermore, it increased the maintenance requirements and limited the possibility of family reunifications: asylum seekers who are deemed eligible for subsidiary protection will not have the right to family reunification if they had not applied for asylum by 24 November 2015, but if this would contravene

a Swedish commitment under a convention, the asylum seeker's relative may be granted a residence permit (Ministry of Justice Sweden 2016).

Sweden has always been one of the most open EU countries to receive asylum seekers and so it was also during the increase of immigration to the EU in the last decade, but the refugee crisis of 2015 has created a change of direction both because the refugee reception system was in distress and because the anti-immigration rhetoric of the radical right intensified. Even in the Swedish super-democratic and open society, radical right populism has grown and hugely increased its public support and electoral results.

The Sweden Democrats is very similar to other populist radical right parties developed across Europe, like the Northern League in Italy and for some aspects also to the UKIP. The party's campaigning is almost totally focused on the immigration issue, calling for a drastic decrease in the number of refugees admitted into Sweden and the creation of a citizenship test among other policy reforms. Although to date they did not manage to gain the majority in parliament in the general elections, still they are demonstrating that their support and strength in society have increased. This in turn means that the Sweden Democrats are upending the historic political hierarchy and alliances in parliament, so that it is becoming harder for the establishment parties to find new allies in the left and right wings and form stable governments. Moreover, the SD anti-immigration discourse is influencing an increasing portion of population, spreading fears about the integration of so many refugees arrived since 2015. This is reflected on the recent change of parties' vote share changing the parliament's equilibrium, but the SD influence is evident also in the more restrictive policies on asylum adopted in the last years by the Social Democrats at government, who had to respond to the rising concerns and discontent among the population.

In this chapter we have focused on some examples of the rising populist parties across Europe: they are mainly radical right populist parties, like the Northern League, the UKIP and the Sweden Democrats, but we have analysed also an ambiguous case, the Five Star Movement in Italy, which cannot be easily classified

in the left-right cleavage. However, these parties have many common features, mainly the anti-immigration and xenophobic rhetoric on one hand and the attacks to the mainstream political parties and to EU institutions on the other. Even though to date they have not gained enough support as to get a strong majority in national parliaments – except the case of the Northern League that managed to be at government more than once thanks to coalitions with other parties –, these parties are collecting increasing consensus and power to influence not only the opinions of the voters, but also national policies and legislation especially in the immigration and asylum matter, which is usually among the first points in their political programmes. The stricter policies proposed or supported by such populist radical right parties, as we have seen, aim mainly at limiting access to guarantees and services for asylum seekers, so that their country would appear less attractive for immigrants. These measures often reduce the regulations on the immigration and asylum matter to the lowest level as established by the EU, but in some cases they allow practices found in violation of the fundamental rights of asylum seekers or of EU law.

Conclusion

This thesis' aim was to put a focus on asylum procedures of some EU member states, their structure and organization which are determined on one side by EU law instruments on asylum – the CEAS directives and regulations – and on the other side by national governments. Evidence around Europe shows us that the recent rise and strengthening of radical right populist forces in all EU countries go in parallel to an increase of anti-immigration and Eurosceptic rhetoric in the political arena. This often results in some relevant interventions by national governments on the legislation regulating the asylum process which modify procedures and challenge the procedural guarantees for asylum seekers ensured mainly by EU law.

In the last decade, the refugees issue and the management of immigrants' flows have increasingly become the main themes of struggle between the opposing national political forces. Moreover, at the moment these issues are the favourite battlefield, especially for populist parties, to express opposition and discontent with the European institutions' decisions, even in other policy areas. The insufficient coordination and action at institutional level and the lack of solidarity within the EU during the recent 'refugee crisis' were particularly important to favour Eurosceptic stances' rise and dissemination among the general public all around Europe. This wave of distrust of EU institutions and of other EU member states led many governments to decide to tackle the refugee situation in their own way, trying to limit the arrivals and disincentivize the staying of third country nationals, often circumventing the common standards established by EU law.

Evidently, the delegation of part of state sovereignty to the EU in the field of asylum has established a relevant influence on national legislation and procedures, but the discontent for the management of this and other issues further intensified with the 2015 refugee crisis and favoured the rise of populist anti-EU and anti-immigration stances which, in turn, negatively impacted national policy-making through interventions often challenging asylum seekers' rights. The comparison of the structure of asylum procedures and of the development of populist influence in

Italy, the UK and Sweden has been interesting to notice this trend and the existing linkage between the refugee issue, the populist presence and the relationship with EU law in three different contexts.

These three countries, as analysed, present very different characteristics: first of all, they have a really different geographical position in the European continent and this, importantly, determines the volume of immigrants' arrivals and of asylum applications that the authorities must process, thus impacting the organization and the functioning of the national asylum systems. Evidently, Italy – which is one of the member states on the Southern external border of the EU in the middle of the Mediterranean Sea – is subject to much stronger pressure as to the arrival, the first reception and registering of asylum seekers than Sweden and the UK. The burden of managing such great numbers of arrivals left by other EU member states on border states like Italy, Greece or Hungary, especially in the first years of the refugee crisis, has contributed to an intensification of Eurosceptic stances, giving populist parties the right leverage to attack the institutions of the Union and get increasingly larger consensus built on anti-EU and xenophobic discourses. Refugees have become the scapegoat used by radical right populist parties to attack indirectly the European system and its rules binding states' behaviour.

Another relevant difference between the three countries concerned is that each of them belongs to a different judicial family, which consequently gives rise to differences in the division of powers and competences between the three branches of the state, even in the area of asylum seekers and the grant of international protection. As highlighted in the text, in all the three member states asylum and citizenship matters are processed by administrative authorities at first instance and by judicial bodies at the appeal stage, which can vary in their nature: in Sweden and the UK the appeal is responsibility of administrative judges, while in Italy the competence on this matter is mainly attributed to ordinary judges. The institution of specialised sections within the tribunals or courts to deal with asylum appeals is an adjustment introduced by relatively recent reforms in all the three countries.

A third divergence which differentiates Italy, Sweden and the UK is the role that the populist parties developed in their respective political arenas play in the political and constitutional dynamics. In the Italian case, the populist influence on national policy-making and legislation has been much more evident and direct since the League party became the second larger national force as to electoral consensus in the last political elections. It gained a Parliamentarian majority with the other 'anomalous' populist party, the Five Star Movement, which allowed them to form a government lasted for little more than one year. In the period of the so-called 'yellow-green government', the anti-immigration agenda of the League was implemented through interventions and changes in the legislation regarding asylum and immigration (the 'security decree' of October 2018 and the 'security decree bis' of July 2019), raising concerns of many NGOs and activists about asylum seekers' rights.

Differently, in the case of the UK, the position of the existing populist force has been external from the national parliament: the UK Independence Party, indeed, was able to gain quite large consensus at local and European elections but entered the national legislative body only in 2015 winning just one seat. Its anti-immigration and anti-EU influence was exercised mainly outside the national institutions, however, it was able to spread its stances among the general public and also within the Conservative Party, especially through the strong argument of Brexit. This issue is a clear example of the power of influence that the UKIP had in the British political scene, although it was not a particularly relevant actor in numbers within the Parliament or the Executive. The main objective of the party's agenda was achieved as the issue of EU membership increasingly became fundamental among the British public and also for the other political forces at power. The smart rhetoric that the party developed included arguments such as the right of British authorities and people to take back control on national borders and policy-making and full sovereignty to decide who can enter their territory. Similar discourses were later adopted also by other parties' representatives, such as the former Prime Minister Theresa May who used expressions like "we will take back control of our laws" and

"We will take back control of our borders, by putting an end to the free movement of people once and for all" (BBC 2018b) in her discourses to establish the main points of a subsequent Brexit deal with the EU.

As regards the Sweden Democrats (SD), the main Swedish Eurosceptic and anti-immigration populist party, it is gaining increasingly larger consensus so that following the last national elections it became the third party in the Swedish Parliament. This raised difficulties for the other political parties to reach a majority in the legislative body able to sustain a government excluding the SD from their coalitions. Evidently, the party has become a key presence which is able to modify the balances of power in the Swedish parliament, and consequently its influence on policy-making is accordingly increasing, as is also evident from the more restrictive measures on asylum adopted by the Government since 2016.

Despite these great differences making Italy, the UK and Sweden three very different systems, they share also some commonalities: first, their membership of the EU (at the moment of writing the UK has not practically left the Union yet) and secondly, the presence of populist forces gaining increased consensus and power of influence in domestic political dynamics. Such influence leading to changes in the immigration field and in particular in legislation on asylum procedures, as we have seen, can challenge refugees and asylum seekers' rights, whose protection at the moment seems to be guaranteed only by the judicial activism of the Court of Justice. The judgments of the CJEU, indeed, on the correct implementation of the CEAS instruments and other EU legislation bind member states' courts to correctly interpret and apply EU law, even disapplying, if necessary, national law which is in contrast with the Union law[92]. Moreover, such decisions do not bind only the referring courts of the cases concerned but all member states' courts as the CJEU's case law is a supplementary source of Union law, which has primacy over national law. This means that it can indirectly influence and 'limit' the organizational discretion of member states as to their national asylum procedures.

[92] Judgment of the Court (Grand Chamber) of 29 July 2019, Torubarov, C-556/17, EU:C:2019:626

This is particularly evident in recent sentences, such as the judgment of 14 May 2019 which impact the return policy of member states as the Court ruled that the yardstick for the application of the principle of *non-refoulement* by EU member states is the Charter of Fundamental Freedoms of the EU which, unlike the Refugee Convention, provides no exceptions to this principle regardless of the conduct of the aliens and of their being a danger for the security or public order. Thus, the Court's decision confirms the prohibition to reject or return any asylum seeker or refugee who has been refused or revoked international protection, if there is the risk of persecution or ill treatment in their country of origin. With this sentence, for example, the modifications in the Italian law through the 'security decree' of 2018, increasing the grounds for the exclusion or revocation of international protection, still cannot lead to the expulsion and return of these third-country nationals because of EU rules. The principles reaffirmed by this sentence, indeed, prevent Italy and all the other member states from implementing return and rejection policies which violate the principle of *non-refoulement* as interpreted by the Court (Marchisio 2019).

Evidently, the CJEU's rulings are becoming the only effective means to curb populist parties' interventions which tend to modify national procedural rules to the detriment of asylum seekers' rights and guarantees contained in EU law. The Court is currently the fundamental non-majoritarian authority within the EU which has the possibility to stem the attempts of the current populist wave throughout Europe intervening on national policies. In accordance with their parties' agendas, they mainly aim to close national boundaries and to strongly limit the entry or staying of asylum seekers in their territory, even if in violation of member states' obligations under international and EU law. Of our three case studies, Italy is the one where such dynamics have occurred most evidently, especially in the last year which has seen the populist forces of the League and Five Star Movement ruling together. The primacy gained by these parties in the Italian political arena is greater than in the other two countries: in the UK, the UK Independence Party has always remained a political presence outside the Parliament but still able to impact the

other parties and the public opinion using the Brexit issue to put everyone's attention on the necessity to take back the control on legislation and borders. On the contrary, the Sweden Democrats have gained increasingly wider support by the population in the last years, so much to become the third force in the Swedish Parliament and put great pressure on the other parties unable to form a large majority supporting the government.

These diverging developments show that, even though these three countries are basically all parliamentary systems, there are great differences in the dynamics of their political regimes which determine inter alia the role that populist parties can have in the political and constitutional arena of their countries. The development and strengthening of similar radical right populist forces all around European states is symptomatic of an increased distrust towards EU institutions which at the same time fuels and is fuelled by the concerns about the great immigrants' flows of the last years and the ineffective efforts to tackle such phenomenon by the EU and the member states. This situation, in turn, arises the concerns of human rights activists since the strong anti-immigration rhetoric used by populist parties is disseminating xenophobic sentiments and creating a general sense of anguish and emergency among people.

As we have seen, it is difficult that such rhetoric turns into reality by being translated into evidently xenophobic or discriminating laws and practices, however, they are reflected in governments' policies and have an impact, sometimes indirect or covered, on the asylum systems and on the treatment of third country nationals. At present, it seems that the only effective remedy for the protection of asylum seekers' fundamental rights is the Court of Justice's judicial activism which can limit populist interventions on national asylum rules by promoting the correct interpretation of EU law provisions by which all member states are bound. Most probably the next years will be characterised by many other rulings of the Court on this matter, as it will continue to oversee the correct implementation of EU legislation especially in the light of international and European human rights provisions, hopefully with the same active engagement shown in the last period.

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