

# Migrants' Rights, Populism and Legal Resilience in Europe

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## Criminalising Migrants and Securitising Borders

### *The Italian “No Way” Model in the Age of Populism*

STEFANO ZIRULIA AND GIUSEPPE MARTINICO

#### 10.1 ITALIAN POPULISM IN A COMPARATIVE PERSPECTIVE

Italian populism is interesting to comparative lawyers for many reasons. Not by coincidence, Italy has been defined as a “laboratory”<sup>1</sup> for those who are interested in studying populism. First, the country has a long-lasting tradition of anti-parliamentarism over the course of its history as a unitary state. After the end of World War II (WWII), populism has characterised many of the new parties and movements which have come to the forefront in Italian politics. Indeed, members of *the Common Man’s Front* (*Fronte dell’Uomo Qualunque*), the first populist movement in Italy, also participated in the works of the national Constituent Assembly. Second, after the 2018 general election, Italy has turned into the first European country in which two self-styled populist forces (*MoVimento 5 Stelle* and *Lega*) with very different agendas and voting constituencies have formed a coalition government which then ended in September 2019. That government was the product of a “contract for government” signed between these two political forces. The *MoVimento 5 Stelle* and the *Lega* labelled the first Conte government as the “government of change”. Salvini, former Deputy Prime Minister and Interior Minister at that time, referred to Orbán as a role model and there are similarities with Hungary, especially looking at Italy’s migration policy and the way the EU is blamed for migration flows. The migration crisis has been one of the many reasons for tension between Hungary and the EU and similar tension can be found in Italy especially during the first Conte government in which Salvini served as Interior Minister. Indeed, Salvini’s populism has sadly

Giuseppe Martinico wrote Section 10.1, while Stefano Zirulia authored Sections 10.2–10.7. Section 10.8 was jointly written.

<sup>1</sup> Marco Tarchi, “Italy: The Promised Land of Populism?” [2015] *Contemporary Italian Politics* 273.

found its main focus in the tragic field of migration policies.<sup>2</sup> This shows that Italian populism is just the latest episode in a longer crisis of constitutional democracies in Europe. In the Italian case, restrictions of migrants' rights represent a form of democratic decay in populist time, a phenomenon that was pretty evident during the first Conte government but whose roots should be found even earlier. At the same time, this nativist approach to migrants should not be seen as the only manifestation of democratic decay in Italy, which is broader in nature.<sup>3</sup>

By analysing the developments that occurred in the field of migration law during the last two years, in correspondence with the transition between the first and the second "Conte" Governments, this chapter seeks to explore how the recent populist wave has impacted on the management of borders at different levels (legislature, executive and judiciary). To this purpose, we will focus our attention on the maritime border at the South of Italy. Indeed, this is the area in which the conflict between border protection and fundamental rights reaches the highest level of tension: first of all, in popular discourses, especially Italian ones, the maritime border is permanently exposed to a risk of "invasion" by irregular foreigners sailing from North Africa, a risk on which the populist narrative often builds the support to increasingly restrictive immigration policies; secondly, it is precisely along the Central Mediterranean route that fundamental rights are exposed to the most serious threats, represented by both natural factors and the risk of *refoulement* to Libya (or to other countries that cannot be considered "places of safety" either); thirdly and finally, it is an external border of the European Union, with respect to which the issue of solidarity between Member States is crucial to the definition of long-term migration policies as well as in the management of periodic emergencies. For these reasons, the southern Italian border represents an ideal field of investigation to assess both the impact of populist policies on immigration law and the "resilience" of the legal system with respect to their spreading.

<sup>2</sup> Simone Penasa, "The Italian Way to Migration: Was It 'True' Populism? Populist Policies as Constitutional Antigens", in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti, Fabio Pacini (eds), *Italian Populism and Constitutional Law. Strategies, Conflicts and Dilemmas* (Palgrave 2020) 255.

<sup>3</sup> For a more in-depth discussion see: Giuseppe Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (Cambridge University Press forthcoming) and Giacomo Delledonne, Giuseppe Martinico, Matteo Monti, Fabio Pacini (eds), *Italian Populism and Constitutional Law. Strategies, Conflicts and Dilemmas* (Palgrave 2020).

One might think that the new wave of populism in Italy would have ended after the second Conte government, created by the alliance between the *MoVimento 5 Stelle* and the *Partito democratico*,<sup>4</sup> but this would probably be a mistake. Not even the advent of the Draghi government has killed the populist momentum, as the numerical strength of the populists in Parliament has not changed. At the same time, it is not possible to reduce Italian populism to the success of the *Lega*. Indeed, the former Italian President of the Council of Ministers (i.e., the “Prime Minister” in Italy), Giuseppe Conte, has also repeatedly defined himself as a populist,<sup>5</sup> so it seems that nowadays Italian political leaders do not avoid this label; on the contrary, they are happy to display it as a badge of honour. The Italian case is, in that sense, particularly emblematic of the new (global) populist trend. Contemporary populisms do not emerge completely out of the blue. Rather, they are the consequence of long-standing issues that have characterised the political contexts in which they operate, and migration is one of these. As is the case elsewhere, Italian populism has ancient roots.

The Conte governments are also interesting to study in that Conte tried to find a link between populism and the wording of the Italian Constitution. An example of this is his recent speech at the United Nations, where he said:

The Italian Government has placed these same priorities at the basis of its action. Government action that does not give due consideration to assuring that all of its citizens have equitable and fully dignified living conditions is not action that I can consider morally, much less politically acceptable.

When some accuse us of souverainism or populism, I always enjoy pointing out that Article 1 of the Italian Constitution cites sovereignty and the people, and it is precisely through that provision that I interpret the concept of sovereignty and the exercise of sovereignty by the people.

This approach does not modify the traditional position of Italy within the international community and consequently toward the United Nations. Security, the defense of peace and the values that best preserve it, and the promotion of development and human rights are goals that we share and shall continue to pursue with courage and conviction at the national and international levels.<sup>6</sup>

<sup>4</sup> The second Conte government was also supported by a third party, *Liberi Liberi e Uguali* (“Free and Equal”), LeU.

<sup>5</sup> “Conte: ‘Rivendico natura populista del Governo’” *Il Giornale* (28 December 2018) <[www.ilgiornale.it/video/politica/conte-rivendico-natura-populista-governo-1622063.html](http://www.ilgiornale.it/video/politica/conte-rivendico-natura-populista-governo-1622063.html)> accessed 19 March 2021.

<sup>6</sup> “Remarks by Giuseppe Conte to the 73rd Session of the United Nations General Assembly” <[www.voltairenet.org/article203153.html](http://www.voltairenet.org/article203153.html)> accessed 19 March 2021.

Here, one can discern an attempt at finding a reading consistent with the text of the Italian Constitution by stretching, at the same time, some of its key concepts and – most importantly – exercising a sort of cherry-picking approach to the Constitution. Indeed, when referring to Article 1 of the Italian Constitution, populists tend to mention just a part of the relevant provision (the part recognising the principle of “popular sovereignty”) in order to find a confirmation of their majoritarian approach to the fundamental charter and to reinforce their false dichotomy between themselves (the real people) and the “others”. In so doing, they tactically omit that the same Article 1 of the Italian Constitution immediately clarifies how popular sovereignty should be understood as limited by the Constitution itself, as the provision reads: “Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution”.<sup>7</sup> This is very telling of how populists try to legitimise themselves as political forces consistent with the Constitution. At the same time, when they look for such a literal link with the text of the Constitution, they also advance an alternative reading of two of the constitutional concepts mentioned in that provision, “people” and “popular sovereignty”, by relying on the constitutive ambiguity of these concepts. For populists, democracy can be reduced to the mere majority. Indeed, one could say that the real aim of populist movements is to alter the axiological hierarchies that characterise constitutional democracies, for instance by presenting democracy (understood as the rule of majority) as a kind of “trump card” which should prevail over other constitutional values, including the rule of law and the protection of minorities.<sup>8</sup>

If the majority is “the people”,<sup>9</sup> its will must thus prevail at all costs and immediately. Moreover populists tend to construct a false dichotomy between constitutionalism (especially post-WWII constitutionalism) – which aims to limit political power – and populism, which is based on an extra-majoritarian approach to the constitutional system.

Finally, the Italian case is of the greatest interest because the country is a founding member of the European Communities (now European Union). Therefore, the constitutional implications of populist politics have to be considered not only within the national framework but also in the wider

<sup>7</sup> Article 1 of the Italian Constitution.

<sup>8</sup> Théo Fournier, “From Rhetoric to Action: A Constitutional Analysis of Populism” [2019] *German Law Journal* 362.

<sup>9</sup> In similar terms: “As the only subject that deserves representation is a unified people, which is equated with the majority, there is no need for a higher law that mediates between and integrates different social forces that compete for political power”, Paul Blokker, “Populism as a Constitutional project” [2019] *International Journal of Constitutional Law* 536, 544.



context. Indeed, one of the few elements that *Lega* and *MoVimento 5 Stelle* share is an evident anti-Europeanism that presents itself in different forms. Sovereignism (“sovranoismo”) is one of these forms. The combination between populism and sovereignism<sup>10</sup> has been labelled “PopSovism”:

The populist component of PopSovism [populist sovereignism] puts itself on the side of “the people”, defined as a country’s native ethno-cultural group(s), which must be defended against both national and transnational “elites” and against other “outsiders” such as immigrants. Its sovereigntist component advocates a return to an international order in which the nation-state, guided by the self-identified interests of the native ethno-cultural population, maintains or re-asserts sovereign control over its laws, institutions, and the terms of its international interactions. Supra- or inter-national actors and global market forces are seen as restrictions on the nation-state that should be reduced and/or opposed.<sup>11</sup>

Other scholars have labelled the approach of *Lega* as a form of nativist nationalism,<sup>12</sup> which is based on a constant (but also empty) appeal to national values, needs and interests. Salvini’s motto “Italian first” echoes Trump’s approach and inevitably (at least before his support to the Draghi government) implies, as a consequence, the rejection of the migrant, understood as a potential outlaw. For the purpose of this chapter, however, we will treat *Lega* as a case of PopSovism.

## 10.2 THE POPULIST WAVE FROM THE IMMIGRATION POLICIES STANDPOINT: BETWEEN CONTINUITY AND DISCONTINUITY WITH THE PAST

Since the last decade of the last century, that is when Italy permanently became a country of immigration (as final destination or just as country of transit), the Italian legal system has been endowed with increasingly more restrictive legislation on the conditions of access and stay of third-country

<sup>10</sup> On the broader issue of the relationship between populism and nationalism see: Benjamin de Cleen “Populism and Nationalism”, in, Cristobal Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo, and Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 342.

<sup>11</sup> Tim Sweijts, Stephan De Spiegeleire, Clarissa Skinner, *The Rise of Populist Sovereignism: What It Is, Where It Comes from and What It Means for International Security and Defense*, The Hague Centre for Strategic Studies (HCSS), 2017, ii.

<sup>12</sup> Daniele Albertazzi, Arianna Giovannini, Antonella Seddone “No Regionalism Please, We Are Leghisti! The Transformation of the Italian Lega Nord under the Leadership of Matteo Salvini” [2018] 28 *Regional & Federal Studies* 5, 645.

nationals, backed up with increasingly severe sanctions, including criminal ones.<sup>13</sup> This approach has been constantly pursued, despite the alternation between centre-left and centre-right wing governments. From this perspective, restrictive measures introduced from 2018 onwards, when populist parties came to Government, have done nothing but *continue* an existing migration control strategy, by further curtailing the grounds allowing entry and stay on the territory, as well as by tightening the sanction apparatus.

From another point of view, however, the political season launched by the populist majority of *Lega* and *MoVimento 5 Stelle* has been marked by at least two distinctive features: on the one hand, new types of narrative and arguments have supported anti-immigration policies; on the other hand, for the first time the firm political choice of closing borders, namely maritime ones, was announced and implemented. These two aspects are strictly connected.

As to the narrative, populist parties were able to intercept a sentiment of deep discontent among the middle and lower-middle layers of society, rooted in the economic recession followed by the economic crisis of 2007–2008,<sup>14</sup> and to turn it into adherence to political programmes permeated with nationalist and anti-immigration rhetoric. In this context, the former dichotomy between *regular* and *irregular* migrants (according to which only the latter could be considered as potential threats to public order), was replaced by a much more aggressive narrative targeting *economic migrants* as such, described as potential invaders, job thieves, false refugees or even criminals.<sup>15</sup>

These are the ideological and discursive premises upon which the “closed ports” policy has been based. A fear of invasion was constructed by populists on the massive increase in arrivals from the sea which followed the Arab Springs<sup>16</sup> and even more so with the latest “refugee crisis”.<sup>17</sup> In this context,

<sup>13</sup> Anna Triandafyllidou, Maurizio Ambrosini, “Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-Keeping Serving the Labor Market” [2011] 13 *European Journal of Migration and Law* 251.

<sup>14</sup> The links between the rise of populism and political economy of modern capitalism are highlighted by Bojan Bugarić, “The Two Faces of Populism: Between Authoritarian and Democratic Populism” [2019] 20 *German Law Journal* 390.

<sup>15</sup> This change in popular thinking is well described by Alvise Sbraccia, “Effetti criminogenetici? Il decreto Salvini tra continuità e innovazione”, in Francesca Curi (eds), *Il Decreto Salvini. Immigrazione e sicurezza* (Pacini Giuridica, 2019) 15.

<sup>16</sup> In this period more than 120,000 aliens arrived by sea, see Bruno Nascimbene, Alessia Di Pascale, “The Arab Spring and the Extraordinary Influx of People Who Arrived in Italy from North Africa” [2011] 13 *European Journal of Migration and Law* 341.

<sup>17</sup> Italy had to cope with the arrival of more than 170,000 people in 2014, 150,000 in 2015 and 180,000 in 2016. For a summary chart, see Matteo Villa, “Migrazioni nel Mediterraneo: tutti i numeri” (IPSI-Istituto per gli Studi di Politica Internazionale, 22 February 2020) [www.ispionline.it](http://www.ispionline.it) accessed 19 March 2021.

the promise to “stop landings” was one of the key points of the election campaign that brought to power the “Government of change” in 2018. In practice, however, the number of arrivals had already decreased as a result of the Memorandum of Understanding signed by Italy and Libya in 2017, at the price of complicity with the unspeakable violence suffered by migrants in the Libyan detention centres.<sup>18</sup> Nevertheless, the populist majority attempted to offer the public opinion the image of robust interventions aimed at strengthening the protection of the maritime borders.

### 10.3 ABOVE INTERNATIONAL LAW: THE “CLOSED PORTS” POLICY

The expression “closed ports” policy includes two different sets of initiatives, which will be examined separately below. The common feature of these measures, which makes them resemble the Australian “no way” approach,<sup>19</sup> is that they are aimed at closing maritime borders, at least during the time for the negotiation of migrants’ resettlement to other countries, either by keeping migrants within some sort of legal *limbo*, as long as they are placed outside of the mainland (usually on *boats*); or without taking into account migrants’ personal situation *at all*, denying them access to national waters.

Indeed, that is the strategy adopted by Australia in the infamous *Tampa* case of 2001, where for eight days national authorities refused to disembark a Norwegian container ship that had rescued hundreds of asylum seekers, mainly Afghan Hazaras fleeing the Taliban, who were subsequently diverted to New Zealand and Nauru.<sup>20</sup> In the aftermath of *Tampa*, precisely in order to avoid new deadlocks involving irregular aliens, it was agreed to amend the International Convention on Maritime Search and Rescue (SAR, 1979) and the International Convention for the Safety of Life at Sea (SOLAS, 1974) by specifying that the obligation to assist castaways applies “irrespective of the nationality or status of the person and the circumstances in which he or she is

<sup>18</sup> On the basis of the agreement, Italy engaged itself to provide training and resources (both financial and material ones) to the Libyan Coastguard, while in turn Libya was committed to stopping the migrants’ boats along the Central Mediterranean, as well as to enforce its southern land border control system. At the beginning of 2020, an estimated 40% of migrants leaving Libya had been brought back by the Libyan Coast Guard. See again the charts in Matteo Villa (n 17).

<sup>19</sup> On the Australian “Operation Sovereign Borders”, see Patrick van Berlo, “The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality” [2017] 17 *Human Rights Law Review* 33.

<sup>20</sup> See Cecilia Bailliet, “The Tampa Case and Its Impact on Burden Sharing at Sea” [2003] *Human Rights Quarterly* 25, 741.

found”.<sup>21</sup> The amendments did not remove any doubt as to the specific responsibilities of coastal and flag States, but made it clear that there is an obligation to cooperate on the part of all neighbouring States that have had knowledge of the accident, and that none of them are released from this obligation until castaways are disembarked.<sup>22</sup>

Notwithstanding these rules of international law, to which Italy is certainly bound having ratified the amended conventions, Italy’s “closed ports” policy is based precisely on the aim of reaffirming the sovereignty of the State and its unconditional power, in implementing the “will of the people”, to defend its borders from any unwanted intrusion.

The first relevant episode concerns the military ship Diciotti, which in August 2018 had loaded on board almost two hundred people rescued by the Italian Coast Guard in international waters. The ship remained in the port of Lampedusa for three days and then another five in that of Catania, before the Minister of the Interior authorised the disembarkation of the migrants held on board. The goal was to negotiate with other states of the EU on the redistribution of the foreigners *before* allowing them to leave the rescue ship. A similar episode occurred a year later, when more than one hundred shipwrecked migrants were detained on board the military ship Gregoretti from 26 to 31 July, pending relocation agreements.

An even more radical approach is that of bans on NGO vessels that, since the interruption of the *Mare Nostrum* operation in 2014,<sup>23</sup> have been carrying out search and rescue activities along the central Mediterranean route, often requesting permission to land in Italy as a safe port closer to the place of recovery of migrants. On the assumption that such operations not only entailed the landing of irregular foreigners on Italian territory, but also constituted a pull-factor for further departures, the Minister of the Interior instructed the maritime border authorities to deny entry to anyone who allegedly carried out a rescue activity in order to bypass immigration laws. According to these

<sup>21</sup> See SOLAS Conv. Ch. V Reg. 33.1; SAR Conv. Ch. 3.1.9. The mentioned amendments have been introduced in 2004 by the Maritime Safety Committee’s Resolutions 153(78) e 155(78), respectively.

<sup>22</sup> See Francesca De Vittor and Massimo Starita, “Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters” [2019] *Italian Yearbook of International Law*, XXVIII, 77.

<sup>23</sup> The *Mare Nostrum* operation, aimed at conducting search and rescue activities along the central Mediterranean route, was launched by the Italian Government in October 2013 but was abandoned one year later due to the lack of financial and political support from the rest of the EU. See, also for further developments (operations Triton and Sophia), Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, *Unlawful death of refugees and migrants* (15 August 2017) 17.

directives, NGOs were responsible for conducts such as “possible manipulation of international obligations in the field of search and rescue”; or “mediated cooperation [implied: with smugglers] which, in fact, encourages the crossing by sea of foreign citizens without residence permit and objectively facilitate their irregular entry into the national territory”.<sup>24</sup>

These directives have been severely criticised by the United Nations High Commissioner for Human Rights. In particular, a letter of 15 May 2019 signed by five Special Rapporteurs<sup>25</sup> highlighted its radical incompatibility with the obligations arising from the UNCLOS, SOLAS and SAR Conventions on the International Law of the Sea, as well as with the principle of *non-refoulement*. The inhibition of rescue activities carried out by NGOs and other private vessels in the central Mediterranean, in fact, entails very serious risks for the fundamental rights of migrants, who are increasingly destined to lose their lives in a shipwreck or to be recovered by the Libyan Coast Guard and taken back to a country where arbitrary detention, torture and sexual violence represent a tragic daily routine.<sup>26</sup>

#### 10.4 A LEGAL BASIS FOR THE “CLOSED PORTS” POLICY: THE SECURITY DECREE 2019

Not only were the above-mentioned recommendations of the UN Special Rapporteurs not heeded, but shortly afterwards the Government approved, under an accelerated procedure which reduces the role of Parliament to the mere approval of the executive’s discipline, the Decree Law n. 53/2019 (hereinafter “Security Decree 2019”),<sup>27</sup> aimed both at providing an express legal basis for the entry-ban directives, and at introducing severe administrative sanctions against offenders. This reform thus represents a further step of the “closed port” policy, obtained by granting a legal basis to the Minister of the Interior’s initiatives.

<sup>24</sup> See the directives of 18 March 2019, 4 April 2019, 15 April 2019, 15 May 2019, available on the Italian Government’s website <[www.interno.gov.it](http://www.interno.gov.it)> accessed 19 March 2021.

<sup>25</sup> See Joint Communication from Special Procedure (AL ITA 4/2019, 15 May 2019).

<sup>26</sup> See United Nations Support Mission in Libya, Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (20 December 2018).

<sup>27</sup> This label is meant to distinguish it from the first Immigration law reform enacted by the “Conte 1” Government, which has been commonly called “Security Decree 2018” or simply “Salvini Decree”. As the latter did not address maritime borders, it is not analysed in this chapter.

The decree, in fact, conferred to the Minister the power to issue orders aimed at prohibiting or limiting the entry, the transit or the stay in territorial waters of ships (excluding military or state-owned vessels), where reasons of public order and safety occur, or where a foreign ship passage qualifies as “prejudicial” under the UNCLOS Convention, namely because the ship “engages in the unloading of any person contrary to the immigration laws and regulations of the coastal State” – Article 19, para. 2 (g).<sup>28</sup> In case of violation, the shipmaster and the ship owner could be served with an administrative sanction of up to 1 million euros, together with the confiscation of the boat.<sup>29</sup> Against this background, especially during the first Conte government, law can be seen as a contributing factor to the incremental undermining of migrants’ rights, instead of a source of resilience. However, as we will see below, judges have counteracted as a shield to impede constitutional backsliding.

It is pretty obvious that the discipline introduced by Security Decree 2019 was affected by the very illegitimacy which the Special Rapporteurs had pointed out right before it was approved. Indeed, as a matter of hierarchy of legal sources, national rules cannot affect the system of obligations set by supranational instruments that Italy has ratified and been bound by. In addition to those criticisms, the Italian President of the Republic, at the moment of the enactment of the reform, pointed out in an official communication to the Parliament that the severity of the administrative sanctions raised serious doubt about their compatibility with the principle of proportionality, which can be drawn from the Italian Constitution and which is codified in Article 49 of the Charter of Fundamental Rights. Although the latter literally refers to criminal punishment and does not mention administrative penalties, the “administrative” sanctions for shipmasters could fall within the classification of “criminal penalties” under the *Engel* criteria,<sup>30</sup> due to their seriousness and deterrent purpose. Despite these critical aspects, neither the Special Rapporteurs’ recommendations nor the President’s concerns were taken into account by the populist majority: any criticism against the policies enacted was rejected as anti-democratic; and any attempt to restore the rule of law was considered an instrument of conservatives to counter the “will of the people”.

<sup>28</sup> See new para 1-ter of art. 11 Italian Immigration Law.

<sup>29</sup> See new para 6-ter of art. 12 Italian Immigration Law.

<sup>30</sup> In *Engel and Others v. Netherlands* (1976) 1 EHRR 647, para 82, the Strasbourg Court ruled that a sanction may be criminal in nature under the European Convention on Human Rights, regardless of its classification under national law, where its purpose is deterrent and punitive and/or its effects could be “appreciably detrimental”.

### 10.5 LITIGATING THE “CLOSED PORTS” POLICY: THE SEA WATCH AND OPEN ARMS CASES

The first Ministerial entry ban based on the Security Decree 2019 was issued against the vessel *Sea Watch 3*, led by Captain Carola Rackete, after it had rescued several dozen irregular migrants in international waters in June 2019. *Sea Watch*'s lawyers first applied to an Administrative Court, arguing that the ban was illegitimate under international law and its effects should be immediately suspended. The Court dismissed the suspension demand on the grounds that children, pregnant women and other vulnerable persons had already been brought to the mainland. Subsequently, an application for interim measures under Rule 39 was made to the European Court of Human Rights (ECtHR), relying on Articles 2 and 3 of the Convention. After having questioned the Italian Government about the situation on board, the ECtHR decided not to grant interim measures, which implied that disembarkation in Italy was not ordered. The ECtHR only recommended that Italy continued to provide all necessary assistance.<sup>31</sup> This outcome could at first sight be considered as an expression of judicial self-restraint with respect to reviewing the legitimate migration policies; more likely, however, it is in line with the well-established Strasbourg jurisprudence that grants interim measures in a limited number of cases, most of which related to pending expulsions and extraditions. It was after this failed attempt to obtain a favourable decision regarding the request for interim measures, that Commander Rackete decided to break the blockade imposed by the patrol boats of the Italian border authorities. The Commander directed the ship carrying the shipwrecked people, who were at the limit of their physical and psychological strength, to the port of Lampedusa. Here, she was immediately arrested for the criminal offences of resisting a public official and resisting a warship. A few months later, as it will be shown in more detail below, the arrest of Carola Rackete was found to be illegitimate by the Court of Cassation (i.e., the Italian court of last instance on issues of law), which recognised the legitimacy of the operation as it was carried out in fulfilment of the duty to rescue at sea. In the light of this outcome, we can conclude that, on the one hand, the judiciary (namely the ECtHR) was initially not able to promptly react to (what later turned out to be) an unlawful interference with the fundamental rights to personal liberty and physical integrity of both the ship's Commander and the castaways; on the other hand, the prevalence of those fundamental rights over border protection emerged at a later stage

<sup>31</sup> The ECtHR Press Release is available at <<https://hudoc.echr.coe.int>> accessed 19 March 2021.

before a national high court, thus representing from that moment on a crucial reference at least for the national case-law.

A few weeks after the Sea Watch accident, a similar stalemate arose for the NGO Open Arms' ship. Although in this case an Administrative Court ordered the suspension of the entry ban, the Minister of the Interior continued to deny permission to disembark. After nineteen days, the situation was "resolved" thanks to the intervention of the Prosecutor's Office of Agrigento: noting that the authorities failed to reply to the shipmaster's requests for a place of safety to be assigned, the Prosecutor started an investigation against unknown persons for the offence under Article 328 of the Penal code (unjustified refusal to act) and ordered the seizure of the ship, thus obtaining (as indirect effect of the seizure order) the disembarkation of the people on board.

The epilogues of the Rackete and Open Arms cases are relevant to investigate the responses of the legal system to attempts to unduly interfere with the fundamental rights of foreigners: that is, the importance of the independence of the Italian judiciary, including prosecutors, with respect to the executive power, and the related possibility of re-establishing guarantees by means of prosecution and within the criminal process. Even when the legal system did not seem to have effective tools at its disposal, the judiciary has shown to be able to find creative, unconventional solutions to address violations, as in the mentioned case of the seizure of the Open Arms in order to obtain the disembarkation of migrants. The importance of the national criminal law in safeguarding the interests of migrants has been confirmed in another even more remarkable set of situations: criminal proceedings initiated against the Minister of the Interior for unlawfully depriving migrants of their liberty on board of ships. We shall now turn our attention to these issues.

#### 10.6 THE CRIMINAL CHARGES FOR ILLEGITIMATE DEPRIVATION OF PERSONAL LIBERTY ABOARD SHIPS

With regard to the conditions of migrants held on board pending the disembarkation bans and the entry bans, the Italian Ombudsman on the Rights of Persons Deprived of Personal Liberty had expressed concerns since, in its opinion, the circumstances qualified as *de facto detention* without proper legal basis and without judicial control.<sup>32</sup> In that regard, the Ombudsman pointed

<sup>32</sup> See Garante nazionale dei diritti delle persone private della libertà personale, *Relazione al Parlamento* (2019) 74–75; Id., *Relazione al Parlamento* (2020) 43–44; see also the Ombudsman Press Releases related to each of the mentioned accidents. All these documents are available at <[www.garantenazionaleprivatiliberta.it](http://www.garantenazionaleprivatiliberta.it)> (accessed 19 March 2021).



out that these cases raise the same issues that led the European Court of Human Rights to find a violation of Article 5 in the case *Khlaifia and others v. Italy*, in which Italy was condemned by the Grand Chamber for the violation of Article 5 of the Convention,<sup>33</sup> for having kept three Tunisian nationals for about ten days within the reception centre of Lampedusa and later on board private ships docked in the port of Palermo (used as a temporary detention centre) pending the expulsion procedure.

Personal freedom as a fundamental right threatened by the policy of “closed ports” has come to the attention of the Italian judiciary too. With regard to the *Diciotti*, *Gregoretti* and *Open Arms* cases, the Minister of the Interior at that time, Mr. Salvini, was charged with the crime of kidnapping (Article 605 of the Italian Criminal Code). Since the alleged offence was arguably committed by a Minister in the exercise of his duties, the accused was covered by immunity unless the Senate granted authorisation to proceed against him. While in the *Diciotti* case the Senate refused authorisation on the grounds that the Minister had pursued the public interest without irreversibly infringing a fundamental right,<sup>34</sup> in the *Gregoretti* and *Open Arms* cases, the same Assembly granted the authorisation and the criminal trials are currently pending.<sup>35</sup>

Technically, the different outcomes regarding the authorisations to proceed with the criminal trials against Salvini derive from the fact that, according to the testimonies collected, the decision not to allow disembarkation in the *Diciotti* case was taken collegially by the Government, while in the subsequent *Gregoretti* and *Open Arms* cases it was a decision taken by the Minister of the Interior alone. Beyond these formal reasons, however, one fact certainly had a decisive bearing on the outcome of the two procedures: while the request for authorisation to disembark in the *Diciotti* case came under the first Conte Government, supported by a majority which included the Lega, that is the party of the accused; vice versa, the request for authorisation in the other cases came under the “Conte 2” Government, after the Lega had left the Government and had been replaced by the Democratic Party.

<sup>33</sup> *Khlaifia and Others v. Italy* App no 16483/12 (ECHR, GC, 15 December 2016).

<sup>34</sup> The Senate’s decision that denied the authorisation is dated 20.3.2019. A summary of the whole procedure is available on the Italian Senate’s website: <[www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda41153.htm](http://www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda41153.htm)> (accessed 19 March 2021).

<sup>35</sup> The Senate’s decisions on the *Gregoretti* and *Open Arms* cases are dated 12.2.2020 and 30.7.2020, respectively. The summaries of the procedure are available at <[www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda42968.htm](http://www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda42968.htm)> and <[www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda43185.htm](http://www.senato.it/leg/18/BGT/Schede/ProcANL/ProcANLscheda43185.htm)>, respectively (accessed 19 March 2021).

## 10.7 THE CRIMINALISATION OF SEARCH AND RESCUE ACTIVITIES

Since 2017 several criminal investigations for the offence of facilitating irregular immigration (Article 12 Italian Immigration Law) have been initiated against crew members of NGO ships who, after carrying out search and rescue activities along the Central Mediterranean route, brought shipwrecked people to Italy.<sup>36</sup> So far, there have been no convictions, and criminal proceedings against NGOs are either in the phase of investigation, or have been dismissed. However, this phenomenon is of paramount importance in order to investigate the wider issue of “criminalisation of solidarity”, which is a source of concern throughout Europe, both at sea and land borders.<sup>37</sup>

These initiatives are difficult to classify. On the one hand, they seem to pursue, through prosecution, the same aims as those of the “closed ports” policy, namely cracking down on illegal immigration and its (alleged) facilitators. On the other hand, as the Italian judiciary (including prosecutor offices) is completely independent from the executive power, criminal proceedings against individuals who participate in search and rescue cannot be traced back to migration policies as set by the Government. From a strictly legal point of view, these proceedings fall within the scope of the principle of mandatory prosecution embedded in the Italian Constitution: given that bringing foreigners without documents to Italy potentially falls within the offence of facilitating illegal immigration, the public prosecutor is formally obliged to assess criminal responsibility. The general principle of mandatory prosecution shall be read in conjunction with the code of criminal procedure, which provides that the prosecution shall be dropped where the accused has acted under some exemption, such as necessity or in the fulfilment of the duty to rescue.<sup>38</sup> However, the

<sup>36</sup> After the end of *Mare Nostrum* in October 2014, several NGOs (large ones such as *Save the Children* and *Médecins Sans Frontières* as well as smaller ones such as *Jugen Rettet*, *Proactiva Open Arms*, *Sea Watch*, *Mediterranea*, etc.) have tried to fill the protection gap left by the States.

<sup>37</sup> Stefano Zirulia, “Is that a Smuggler? The Blurring Line between Facilitating Illegal Immigration and Providing Humanitarian Assistance at the European Borders”, in Gian Luigi Gatta, Valsamis Mitislegas and Stefano Zirulia (eds), *Controlling Immigration through Criminal Law* (Hart Publishing 2021).

<sup>38</sup> The case study on the subject actually dates back to 2010, when the captain of the humanitarian vessel *Cap Anamur* was accused of facilitating irregular entry for having transported to Italy thirty-seven third-country nationals rescued in international waters. The man was eventually acquitted by the Court of Agrigento for having acted under the duty of rescue (Tribunale di Agrigento, 7 October 2009–15 February 2010). With regard to more recent activities of NGOs, necessity and duty to rescue exemptions have been recognised, sometimes cumulatively, in the following cases: Tribunale di Ragusa, 16 April 2018 (*Open Arms*) <[www.questionegiustizia.it/articolo/dissequestrata-la-nave-open-arms-soccorrere-i-migranti-non-e](http://www.questionegiustizia.it/articolo/dissequestrata-la-nave-open-arms-soccorrere-i-migranti-non-e)

misleading narrative spread by populists (“NGOs create extra ordinem humanitarian corridors”, “NGOs are a pull-factor for further departures”, etc.) can somehow influence the prosecutors’ assessments that the conduct of the crew members *could be* blameworthy enough to justify the opening of investigations.

Such an attitude becomes clear when examining the judicial orders for the seizure of ships. These orders are the main documents that can give us indications as to the reasons underpinning prosecutors’ assessments since so far there has not been any judgments on the merits. For instance, in the *Iuventa* ship case, the judge for the preliminary investigations of Trapani held that “the praiseworthy and continuous presence of rescue ships in the Libyan territorial waters has made it even easier to send more and more dinghies unsuitable for navigation and significantly reduced the risks for smugglers to be intercepted in international waters allowing them to abandon the boats in Libyan territorial waters in the awareness of the immediate rescue activities carried out by the NGO boats”.<sup>39</sup> Subsequently, in the *Open Arms* case, the judge for the preliminary investigation of Catania pointed out that the crew members violated the “Code of conduct for NGOs”<sup>40</sup> when they did not wait for the Libyan Coast Guard to intervene, thus engaging in illegal conduct “because the NGO cannot be allowed to create autonomous humanitarian corridors outside of state and international control”.<sup>41</sup>

[reato\\_19-04-2018.php](http://www.questionegiustizia.it/articolo/il-sequestro-della-iuventa-ong-e-soccorso-in-mare_18-09-2017.php)>; Tribunale di Palermo, 15.6.2018 (*Open Arms e Sea Watch*) <[www.questionegiustizia.it/articolo/open-arms-e-sea-watch-la-richiesta-di-archiviazione-della-procuradi-palermo\\_21-06-2018.php](http://www.questionegiustizia.it/articolo/open-arms-e-sea-watch-la-richiesta-di-archiviazione-della-procuradi-palermo_21-06-2018.php)>; Pubblico Ministero di Agrigento, richiesta di archiviazione 27.1.2020 (*Mediterranea-Mare Jonio*), all accessed 19 March 2021.

<sup>39</sup> Tribunale di Trapani, 2 August 2017, 134 <[www.questionegiustizia.it/articolo/il-sequestro-della-iuventa-ong-e-soccorso-in-mare\\_18-09-2017.php](http://www.questionegiustizia.it/articolo/il-sequestro-della-iuventa-ong-e-soccorso-in-mare_18-09-2017.php)> accessed 1 March 2021.

<sup>40</sup> The “Code of conduct for NGOs undertaking activities in migrants’ rescue operations at sea” (whose legal nature is much discussed) was drawn up by the Italian Government (with the support of the EU Ministers of the Interior meeting in Tallinn on 6 July 2017) with the alleged aim to prevent the activities of the NGOs from opening new corridors of irregular immigration. The Code provides, *inter alia*, that subscribing NGOs undertake commitments such as: “not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct search and rescue by the Libyan Coast Guard [...]; not to make communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants [...]; commitment to cooperate with the competent MRCC, executing its instructions and informing it in advance of any initiative undertaken independently because it is deemed necessary and urgent; commitment to receive on board [...] judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling [...]”.

<sup>41</sup> Tribunale di Catania, 27 March 2018, p. 14 <[www.questionegiustizia.it/articolo/il-sequestro-della-nave-open-arms-e-reato-soccorrere-migranti-in-pericolo-di-vita\\_31-03-2018.php](http://www.questionegiustizia.it/articolo/il-sequestro-della-nave-open-arms-e-reato-soccorrere-migranti-in-pericolo-di-vita_31-03-2018.php)> accessed 19 March 2021.

Even in this field, however, the Italian judiciary has so far proved to be more of a guarantor of fundamental rights than a further oppressor of them. This has become clear in the already mentioned case of the arrest of the Sea Watch commander Carola Rackete, which was declared illegal by the judge for preliminary investigations, with a ruling confirmed by the Court of Cassation.<sup>42</sup> The judges on both instances have in fact clarified that: *i*) the duty to rescue enshrined in the conventions of international law (UNCLOS, SAR) ends with the transport of shipwrecked persons to a safe port; *ii*) the choice of the latter is not only up to States but also to the ship's Commander on the basis of his assessment of each single case (weather conditions, distances, safety of coastal countries, etc.); *iii*) this legal framework is well known to the border authorities, so that they are in a position to distinguish the situations where a Commander is committing an offence (such as failing to comply with the authority's order not to cross maritime borders), from those where she or he is acting in the performance of the duty to rescue; *iv*) in the latter cases, border authorities are not entitled, under the Italian code of criminal procedure, to place the Commander under arrest. Although Carola Rackete was arrested not for facilitating irregular immigration, but for resisting a public official and resisting a warship (see above), these principles seem to have a much broader scope, capable of justifying the commission of a wide array of offences (including the one of facilitating illegal immigration), when necessary to fulfil the duty of assistance. Indeed, in cases which have followed the Rackete's one, prosecutions have been dropped on account that the accused Commanders acted under necessity and/or had fulfilled the duty of rescue as provided by international conventions on the law of the sea.<sup>43</sup>

<sup>42</sup> Tribunale di Agrigento, 2 July 2019 (Sea Watch) <[www.archiviodpc.dirittopenaleuomo.org/d/6767-l-ordinanza-del-gip-di-agrigento-sul-caso-sea-watch-carola-rackete](http://www.archiviodpc.dirittopenaleuomo.org/d/6767-l-ordinanza-del-gip-di-agrigento-sul-caso-sea-watch-carola-rackete)>; this ruling has been confirmed by the Court of Cassation on 16 January 2020, judgment n. 6626 <[www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete](http://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete)>, both accessed 19 March 2021.

<sup>43</sup> For example, on January 27th 2020 the Prosecutor of Agrigento requested the judge for preliminary investigations to drop the charges for facilitating illegal entry against the Commander and head of mission of the Mare Jonio ship, belonging to the Italian association Mediterranea. The search and rescue operation concerned fifty migrants rescued between 18th and 19th of March 2021 in International waters (Libyan SAR zone). On December 4th 2020, the judge granted the request and dismissed the case. See "Migranti, Mare 25 Jonio il gip archivia l'inchiesta", *La Repubblica* 4.12.2020 ([www.repubblica.it/cronaca/2020/12/04/news/migranti\\_mare\\_jonio\\_il\\_gip\\_archivia\\_l\\_inchiesta-276973378/](http://www.repubblica.it/cronaca/2020/12/04/news/migranti_mare_jonio_il_gip_archivia_l_inchiesta-276973378/)), accessed 2 April 2021). Similarly, on November 4th 2020 the charges against the crew of the Open Arms ship, on the basis of which the vessel had been initially seized in March 2018 by the judge for preliminary investigations of Catania (see above, footnote no 41), had been dismissed by the judge for preliminary investigations of Ragusa, to whom the file had been transferred for

What is even more interesting to observe is that, by voiding the arrest of Rackete for resisting a public official and a warship, the Court of Cassation has implicitly recognised, upon a civil society actor, a sort of “right of resistance” to those police activities that, contrary to the hierarchy of interests at stake (life and physical integrity versus border control), attempted to hinder the success of the rescue operation.

Still, the criminalisation of humanitarian assistance is a source of concern, even where proceedings are dismissed, due to the risk of deterrent effects towards the whole of civil society. As long as providing help to irregular migrants (or to those whose status is not known) can lead to criminal prosecution, a “chilling effect” may spread among potential rescuers, resulting in further deterioration of social and human ties between citizens and foreigners.

The origins of this situation, however, lie long before both the “Government of change” and the previous governments. The obligation to impose sanctions of a criminal nature for any conduct facilitating irregular entry of third-country nationals, including conduct which is not carried out for financial gain or as part of organised smuggling activities, stems from the combination of provisions in Directive 2002/90/EC<sup>44</sup> and Framework decision 2002/946/GAI<sup>45</sup> (the so-called EU Facilitators’ Package). Through these provisions, the European legislator intended to target the widest possible range of conduct aimed at facilitating irregular entry. In order to reduce the risk of criminalising conduct motivated by purely humanitarian aims, Article 1(2) was included in Directive 2002/90/EC, allowing the (mere) *possibility* for the Member States to exclude liability in cases where the facilitation of irregular entry or transit is motivated by the purpose of providing humanitarian assistance. However, Italy (as well as most Member States) has not introduced such a “humanitarian clause” allowing the exclusion of liability: this is one of the reasons why the current proceedings against individuals who have assisted migrants are so complex.

In conclusion, the origins of the problem of criminalisation of solidarity can only partially be found in the most recent populist policies. From a strictly normative point of view, in fact, this problem has much more distant roots. It is clear, however, that the present social context, conditioned also by the narratives of a populist mould, has contributed to “activate” criminal legislation that

reasons of territorial jurisdiction. See: “Il tribunale di Ragusa ha deciso il ‘non luogo a procedere’ per comandante e capo missione di Open Arms”, *Il Post* 4.11.2020 ([www.ilpost.it/2020/11/04/open-arms-migranti-prosciolti-non-luogo-a-procedere/](http://www.ilpost.it/2020/11/04/open-arms-migranti-prosciolti-non-luogo-a-procedere/), accessed 2 April 2021).

<sup>44</sup> Council Directive 2002/90/EC, of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence.

<sup>45</sup> Council Framework Decision 2002/946/JHA, of 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

had remained dormant until now. In other words, if the origins of the phenomenon are quite ancient insofar as primary *criminalisation* is concerned, its practical and undesirable consequences are experimented with today because the social conditions for *applying the criminalisation* have changed.<sup>46</sup>

#### 10.8 A WIND OF CHANGE? ONLY IN PART

The “Government of change” fell in August 2019 and was replaced (without new elections) by a new majority formed by the centre-left wing *Partito Democratico* and (again) the *Movimento 5 Stelle*. The new coalition did not include the party that had been the main promoter of anti-immigration policies in 2018–2019 (the *Lega*). This resulted in a number of initiatives which showed a certain discontinuity with the previous season. The first one has been the Malta agreement for the relocation of rescued asylum seekers,<sup>47</sup> after which no more entry-bans towards NGOs have been issued and their vessels are normally allowed to disembark, although only after a certain amount of waiting,<sup>48</sup> during which authorities carry out the negotiations for the relocation of castaways in other Member States. Moreover, Law Decree n. 130/2020 has introduced a new form of special protection permit, has enhanced reception services and – more importantly to the purpose of this chapter – has repealed the administrative sanctions for boat masters who violate entry bans.

However, besides those overall encouraging signs, there is clear and worrisome evidence of continuity with the past. First, the strategy of externalisation of borders is still ongoing, given that the 2017 Memorandum of Understanding between Italy and Libya has been renewed in February 2020 and that Italy is still channelling funds to Libya to manage migration and to train its coastguard.<sup>49</sup> Second, NGOs’ rescue vessels are often blocked by Italian authorities after their

<sup>46</sup> For a general account of this phenomenon, described by criminologists as the gap between primary criminalisation (i.e. the criminal provision itself) and secondary criminalisation (i.e. the actual enforcement of the provision), see Massimo Pavarini, “Sicurezza dalla criminalità e governo democratico della città”, in Emilio Dolcini and Carlo Enrico Paliero (eds), *Studi in onore di Giorgio Marinucci*, (Giuffrè 2006) 1030.

<sup>47</sup> The Malta “Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism” is a temporary scheme to relocate asylum seekers rescued in the central Mediterranean, signed on 23 September 2019 by Italy, Germany, France and Malta under the Presidency of Finland <[www.statewatch.org](http://www.statewatch.org)> accessed 19 March 2021.

<sup>48</sup> The average number of days spent at sea by boats with rescuers halved, from 9.1 to 4.5 days: see the charts in Matteo Villa (n 17).

<sup>49</sup> Amnesty International, *Libya: Renewal of migration deal confirms Italy’s complicity in torture of migrants and refugees* (30 January 2020).

missions, with bogus arguments of “administrative irregularities”, resulting in the depletion of the civil society’s rescue capacities along the central Mediterranean.<sup>50</sup> The outbreak of COVID-19 in Italy has further exacerbated the situation, as migrants upon arrival serve a period of quarantine aboard ships.<sup>51</sup> This “floating quarantine” measure raises a number of issues from the standpoint of balancing the need to protect public health with the fundamental rights of migrants and asylum seekers, as detention on ships entails deprivation of personal liberty, which is in turn a risk for the psycho-physical health of migrants on board, and could lead to inhuman and degrading treatment.

Third, and most importantly, the Minister of the Interior’s power to issue entry bans has been maintained and the administrative sanctions have been replaced by criminal sanctions (Decree Law n. 130/2020, art. 1, para 2). This latest development, although it may at first sight seem like a new crackdown, may in fact represent at least some progress compared to the previous legislation. From now on, in fact, the offence of violating the entry bans will have to be assessed by a criminal judge, who will necessarily have to follow the principles indicated by the Court of Cassation in the case of *Sea Watch-Carola Rackete*.<sup>52</sup> On the basis of these principles, the criminal courts will have to recognise that the rescue operation only ends when castaways are transferred to the mainland. As a consequence, the new offence of violating entry bans is very likely to be excluded, just as already happens with the other mentioned offences (facilitating illegal immigration; resisting a public official and a warship), on the basis of the duty to rescue.

## 10.9 CONCLUSION

In this chapter we tried to respond to the research questions of the volume in order to see to what extent restrictions of the rights of migrants represent a

<sup>50</sup> See e.g. ECRE news, “Med: 65 Lives at Risk, Inaction Continues, Evidence Culminates, NGOs Blocked” (17 July 2020); “Med: Death Toll Rising, Search and Rescue Capacities Low and the Pact Misses Opportunity to Decriminalise Saving of Lives at Sea” (2 October 2020); both at <[www.ecre.org](http://www.ecre.org)> accessed 19 March 2021.

<sup>51</sup> Decree of the Head of Department of Civil Protection of 12 April 2020, art. 1. Just before, on 7 April 2020, the Government ordered that, during the health emergency, Italian ports could not qualify as a “Place of Safety” under the SAR Convention of 1979. See Vera Magali Keller, Florian Schöler, Marco Goldoni, “Not a Safe Place?: Italy’s Decision to Declare Its Ports Unsafe under International Maritime Law” (*VerfBlog*, 14 April 2020) <<https://verfassungsblog.de/not-a-safe-place/>> accessed 21 March 2021.

<sup>52</sup> On the risk that administrative law may lead to more profound interferences with fundamental rights than criminal law, due to the levelling down of substantive and procedural guarantees, see Chapter 14 in this volume.

form of democratic decay in populist times. In so doing, we also explored the possibilities and limitations of legal resilience to safeguard migrants' rights against further regression in times of populism. Although the recent experience of a populist Government resulted in more restrictive and repressive immigration laws, we have shown that the immigration policies of closing borders, segregating migrants and approaching foreigners' mobility only as a public order issue, even at the cost of violating fundamental rights such as life and personal liberty, both preceded and continued after the populist wave; and has contributed to the construction of some sort of wall separating the lives of citizens from those of third-country nationals. Useless and criminogenic measures have sprung up across more than two decades, aimed at, on the one hand, satisfying an induced demand for greater security and, on the other hand, worsening those same conditions of marginalisation of "the foreigners" that fuel the fears of the citizens, thus building their support for those measures that look more like the cause (rather than the solution) of the problem.

Looking at the future, given that anti-immigration positions are still majoritarian among voters, the challenge against unjust legislation and practices seems to have more chance of success if pursued through judicial remedies rather than by legislative reforms. After all, this is precisely what happened during the last decade, where the most important achievement in terms of restoring the rule of law and stopping systemic violations of fundamental rights in the field of immigration have been obtained through litigation before the EU Court of Justice (*El Dridi*), the European Court of Human Rights (*Hirsi, Khlaifia*) and also national jurisdictions. It was precisely the latter that laid the legal groundwork for overcoming the two main constituent elements of the Italian "wall" erected against boat migrants: the practice of unlawful deprivation of personal liberty on board ships, which was tackled through the seizure functional to disembarkation and the start of investigations for kidnapping against the Ministry of the Interior; the criminalisation of search and rescue activities, which was overcome through the recognition of the justification of the duty to rescue, on the basis of the relevant Conventions on the International law of the sea.

Populists also tend to perceive limits and procedures as obstacles in the path of establishing the democratic principle. Moreover, populists depict courts and independent agencies as biased and non-neutral since "independent judges and courts are understood as an illegitimate constraint on majority rule, and hence legal means are to be employed to counter this situation".<sup>53</sup>

<sup>53</sup> P. Blokker, "Populism as a Constitutional" (n 9) 547.



These considerations clarify why populists seem to be on a permanent political campaign. The Italian case is particularly emblematic of this trend, as the (former) Italian Deputy Prime Minister and Interior Minister, Matteo Salvini, has recently been responding to critics with the same mantra – “you should first resign and run for elections instead of doing politics from the judicial bench”<sup>54</sup> – but this was a rhetorical element already present in the approach endorsed by the Berlusconi government.<sup>55</sup>

Against this background, contemporary populisms do not emerge completely out of the blue, since they are a consequence of long-standing issues that have characterised the political contexts in which they operate. In parallel, it is paramount to challenge the current immigration policies on the grounds of language and narratives. As the rhetoric of the “invasion of economic migrants” and “false refugees” fuels a vicious circle leading to increased securitisation and criminalisation, some sort of cultural revolution is required to reverse this course of action. This means reintroducing the (lost) human element within the discourses on immigration and replacing the concept of “mass immigration”, evocative of a one-way phenomenon bearing public order problems, by the more nuanced one of “mobility of people”, that is a global phenomenon coessential to human nature.

<sup>54</sup> “Salvini come Berlusconi: ‘Io ministro eletto dal popolo, i magistrati non lo sono’”, 2018, [www.ilfattoquotidiano.it/2018/09/07/salvini-come-berlusconi-io-ministro-eletto-dal-popolo-i-magistrati-non-lo-sono/4611540/](http://www.ilfattoquotidiano.it/2018/09/07/salvini-come-berlusconi-io-ministro-eletto-dal-popolo-i-magistrati-non-lo-sono/4611540/).

<sup>55</sup> David Nelken, “Legitimate Suspicions? Berlusconi and the Judges” [2002] *Italian Politics* 1, 112.