CONNECTING THE EUROPEAN UNION OF SHARED AIMS, FREEDOMS, VALUES AND RESPONSIBILITIES

EUROPEAN UNION AND ITS VALUES: FREEDOM, SOLIDARITY, DEMOCRACY

Edited by
Agnieszka Kłos, Jan Misiuna, Marta Pachocka, Aleksandra Szczerba-Zawada

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The book is published with the support of the Erasmus+ Programme of the European Union within the scope of the EUSHARE project – "Connecting the European Union of shared aims, freedoms, values and responsibilities" (Decision Number: 2016-1675/001-001, Project Number: 575176-EPP-1-2016-1-PL-EPPJMO-SUPPA), and in cooperation with the Konrad Adenauer Foundation in Poland.

Photo (Graphics) courtesy of: Oliver Cole – Unsplash.com

Cover design: Agnieszka Natalia Bury

DTP: CeDeWu Sp. z o.o.

1st Edition, Warsaw 2020

ISBN 978-83-8102-370-2
EAN 9788381023702

Published by: CeDeWu Sp. z o.o.
00-680 Warsaw, 47/49 Żurawia Street
e-mail: cedewu@cedewu.pl
Publisher's office: (4822) 374 90 20 lub 22

Economics Bookstore
00-680 Warsaw, 47 Żurawia Street
Tel.: (4822) 396 15 00...01

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Preface

Recent years have seen numerous challenges to the European Union and its functioning. These have concerned both the situation in some Member States but also the relationship between national governments and EU institutions. Much attention has been paid to the issues of border control, migration, and asylum because of the migration situation within the EU and its neighbourhood, as well as to the rule of law, human rights, and the judicial system in member countries.

In dynamic national, regional, and global conditions, it is necessary to discuss the foundations of the European Union and its basic values such as freedom, solidarity, and democracy. Such analysis should be multidimensional, covering both legal and institutional matters at different levels of governance, as well as the implementation of specific practices and policies.

The success of integration processes in Europe is dependent upon the mutual trust built into axiological foundations that allow the EU Member States and their societies to cooperate and the EU to act as a united, although diversified actor. In this context, special attention should be paid to the contribution that academia can make to policymaking to support and protect the shared European values of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights—values that represent the foundations of any free and democratic society.

The complexity of the European Union is reflected in the variety of topics addressed in the presented book from an interdisciplinary perspective. Among the contributing Authors are researchers from Poland and abroad who approach the subject matter from their backgrounds in law, political science, international relations, and others. The issues they explore were discussed at the PECSA International Conference "Connecting the European Union of shared aims, freedoms, values and responsibilities" on 5 December 2019 at SGH Warsaw School of Economics (Poland). Both the conference and this book were prepared with the support of the Erasmus+ Programme of the European Union within the scope of the EUSHARE project "Connecting the

European Union of shared aims, freedoms, values and responsibilities", which was implemented by the Polish European Community Studies Association (PECSA). This was only possible thanks to fruitful cooperation between many institutions and exceptional people. Therefore, we would like to express our very great appreciation to all of them, believing that this book is an important voice in the discussion on the EU today and in the near future.

Agnieszka Kłos, Jan Misiuna, Marta Pachocka,
Aleksandra Szczerba-Zawada

*Adriana Ciancio**

1.

Why we could and should discuss about European constitutional law

Introduction: A true constitutional law without a Constitution?

At the beginning of this paper, it is important to clarify in what sense it is already possible to talk about a European constitutional law – as the title suggests – despite the fact that the European Union still lacks a formal Constitution. It is well known that a first attempt in this direction proved unfruitful with the failed entry into force of the so-called "Treaty establishing a Constitution for Europe" following the 2005 referenda in the Netherlands and in France.

Indeed, it is not difficult to overcome this argument against our assumption since talking about a constitutional law does not necessarily coincide with setting down a "Constitution" (Weiler 1999, 3) as a unique formal document including the norms that establish a society's fundamental organisation.

Rather, looking beyond and considering, from a substantial point of view, what we should assume as "constitutional law" – identifiable as a set of rules suitable to give identity to the members of a political community since it expresses "what they stand for, the values they want to affirm and that are distinctive for them" (Ferrara 2018, 44) – it is possible to conclude that, despite the fact that formally the Lisbon Treaty is another international treaty, signed as

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an intergovernmental agreement (Grimm 2015, 465), after its entry into force the EU is finally provided with norms that one might define "ontologically" constitutional, *id est* constitutional in nature (Ciancio 2017, 29).In this light, it is needed to consider first and foremost Art. 2 TEU and the values this article sets down as shared values among all Member States that constitute the "common constitutional platform", in order to serve the judiciary both as hermeneutic criteria and legitimacy parameters of all other European and national norms. Moreover, the EU common values represent at the same time a warning and an evaluation criterion for further requests of accession to the EU (De Vergottini 2009). It is also worth remembering that these values are protected with adequate guarantees, including political ones (Caravita 2015, 21), such as the procedure set in Art. 7 TEU in order to manage the "clear risk of a serious breach by a Member State of the values referred in Article 2".

Furthermore, the assumption resumed in the title faces the argument sprouting from Art. 16 of the famous 1789 Declaration of Human and Civic Rights that clearly affirms that "any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". Indeed, even though a Charter of Fundamental Rights has been established, the EU's functioning does not yet rely on a clear separation between the legislative power and the executive one, as it is easily verifiable looking at the Council's functions. Rather, the EU inspires itself to a principle of "collaboration" among functions instead of the more traditional principle of separation.

Nevertheless, it would be difficult to deny that the functioning of the European Union is however based on a form of functions' distinction as the one set between decision-making powers (as those exercised by the European Council, the Commission, the Parliament and the Council itself), on the one hand, and powers of control (as those entrusted to the Court of Justice and the European Court of Auditors), on the other. Nor is it possible to deny that this distinction of functions is set to limit the EU powers in order to guarantee the aforementioned EU shared values and principles at large as well as the fundamental rights and freedoms, as ruled by the EU Court of Justice in its most recent case law (Gonzàlez Pascual 2018).

Therefore, also from this perspective we should conclude that – after the entry into force of the Lisbon Treaty – the European Union, despite the persistent lack of a formal Constitution, is already provided with a true constitutional law that includes both Art. 2 TEU and the Charter of Fundamental Rights (Ferrara 2018, 45-47), which has been given the same efficacy of the Treaty

itself, jointly representing what could be described as the EU "constitutional core", protected through the EU institutional set-up, by and large entrusted to guarantee these values and rights.

1.1. Why we need the EU constitutional law: fostering an "*idem sentire de Europa*"

This statement is hard to accept for those who consider the idea of "Constitution", of "any" Constitution, strictly depending on the notion of State (Grimm 1995), since the EU is not a State yet, not even of federal scope.

But looking at Lisbon provisions as a whole, even with the (intended) absence of any "federalist" reference, the EU appears now shaped as a truly, even if still in an embryonic state, political union, sufficiently defined in its legal and institutional profile (Weiler 2003, 511). Indeed, it is provided with common institutions and related attributions, with a defined balance of powers (legislative, executive and judicial), even if according to a scheme of collaboration and complementarity towards a reciprocal equilibrium, rather than a separation, as just said. Competences are assigned according to the attribution and subsidiarity principles. An original system of sources of law is set, furthermore destined to prevail over national ones. A Charter of Fundamental Rights (and more generally, a body of inalienable rights) is defined and European judges recently have shown to apply it even over traditional economic freedoms. Moreover, European case law ensures uniformity in the interpretation of the law through preliminary ruling ex Art. 267 TFEU, essential for the very process of, at least, judicial integration (Grimm 2015, 467-470, even though from a critical perspective). Even more upstream, there is a common value heritage, expressed in the above-mentioned Art. 2 TEU, as guaranteed by the CJEU against infringements both by Member States and, even more importantly, by the European institutions themselves.

Nevertheless, considering the European integration project, one cannot but consider that, in contrast with a sufficiently defined, even "sophisticated", legal institutional system – already defining the EU as a, however embryonic, political union – it is possible to perceive among the European peoples a persistent lack of consent towards the project of "an ever closer union" (Offe 2015).

In order to discover the main obstacle facing the full implementation of a true political union, it is easy to find out that this issue consists in the absence of the needed presupposition of each political community that, from a sociological point of view, is to be found in the so-called "*idem sentire*" (i.e., same feeling), in this case about Europe, its future and aims.

The statement is easily verifiable just by looking at the genuine hostility that a big part of the EU citizens show towards the European integration process, claiming more and more urgently (further) restorations of sovereignty as the outcomes of both domestic and European elections have revealed in several Member States through growing of nationalisms, populisms and even xenophobia, also at the cost of exiting from the Union, as chosen by the majority of the British voters in the well-known "Brexit" referendum.

The main causes of such "detachment" between (a large part of the) European society and the Union, its institutions and policies are easily summed up: an evident inability to effectively manage epochal challenges, both domestic and international, such as the economic-financial crisis and migration; the still-lingering issue of democratic legitimacy of the EU decision-making process in the new and different shapes it has taken after the signature of Lisbon (Manzella 2014, 5; Grimm 2016); and, further upstream, the persistent lack of a genuine system of European political parties able to foster the political synthesis at supranational level (Ciancio 2016; Ciancio 2019a, 281-291) and to "contribute to forming European political awareness" as hoped for by the Treaties (Art. 10.4 TEU), which since Maastricht have identified European parties as the privileged channels to express the political willingness of Union's citizens (Tsatsos 1995, 1-8). These are among the most evident reasons preventing European citizens from feeling a deep sense of common political belonging to the EU.

Conversely, only fostering an *idem sentire (de "Europa")*, which represents the necessary condition for the establishment of any political community, it could be possible to cope with the widespread disaffection of European citizens towards the prospect of a truly political union.

Therefore, also considering the lack of a common language as well as the growing ethnical and religious pluralism, it is necessary to find other features of cultural and political identification in order to consolidate among European citizens a sense of collective identity apt to root each national identity in the wider supranational context, strengthening the perception of belonging to the

"European common home". In other words, it is urgent to foster what others call a sense of "civic solidarity" among strangers (Habermas 2012, 345-346).

Thus, from this point of view, it becomes easy to grasp the basic "mission" of the above-described European constitutional law: as heritage of common principles, it is destined to constitute the fundamental – one might say – "catalyst element" of a true European people, identifiable, other than just the sum of all EU citizens, as a real political community brought together and unified thanks to shared values. Without this perception, it would be unlikely (and in any case futile) to re-launch the constitutional process to sign a true formal Constitution (Weiler 1995; Weiler et al. 2005), long argued for to abandon the intergovernmental method (Habermas 2001), in order to overcome all the limits that the Lisbon "compromise" has revealed (Fabbrini 2016), particularly considering the spread of the economic and social crisis (Habermas 2012, 347-348) and, more recently, because of the big "external" challenges of immigration and international terrorism.

1.2. From national Constitutions to the EU constitutional law and back

These shared values and inalienable rights have well-known origins. They represent the transposition as EU primary law of the so-called Member States' "common constitutional traditions", initially identified thanks to the CJEU's case law (Fichera, Pollicino 2019, 1102-1105) and later set down in the aforementioned Art. 2 TEU and EU Charter of Fundamental Rights.

Indeed, this European constitutional heritage acts as a sort of constitutional "lower common denominator" among countries with different legal cultures (common law *vs* civil law) and with various political and institutional histories and experiences (Ackerman 2015), sometimes even in opposition (far-right totalitarianism; communism). Therefore, all Member States are expected to comply with the same fundamental values, including, as declared in Art. 2 TEU, the protection of human rights, freedom, equality, democracy and, more general, the rule of law in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and gender equality, even though with different

meanings, interpretations and applications, depending on each country's institutional history and legal tradition.

Conversely, if these values, and the rule of law above all, are not fully respected in some Member States, the EU institutions are tasked to recourse to all the remedies provided in the Treaty for their safeguard, as recently recalled by the President-elect of the new EU Commission Ursula von der Leyen in her speech delivered in the EP Plenary session of November 27, 2019. In fact, as already mentioned, these values and rights must be protected by the supranational institutions via both judicial and political means.

Thereby, the so-called "European constitutional law" appears to be committed with another fundamental task: ensure the protection to democracy and its corollaries of rule of law, pluralism and human rights even within each Member State's legal system (Ciancio 2019b, 8).

1.3. Conclusions: why it is not possible to do without the European constitutional law

Looking more in depth at the topic from the domestic perspective, it is possible to conclude that Member States can no longer forgo the EU constitutional law. Indeed, considering the European political integration process, on the one hand, and the national Constitutions' implementation path, on the other, it is clear that the two phenomena are inextricably linked (Caravita 2017, 5-7).

This statement is easily evincible for those countries whose current Constitutions have been established after the EU's birth, like all the Eastern Member States that gained independence with the Soviet Union's end: in this case it is evident that the national fundamental rules' application has always gone in parallel with the EU's development so that the former has naturally been strongly influenced by the latter.

But the same is true even in those countries, as Italy or Germany, whose Basic Laws entered into force well before the Treaty of Rome, considering all the relevant transformations the national institutions have gone through as a result of the European integration process, sometimes even without formal revisions of the respective Constitutions (Ciancio 2019, 9-12).

This state of affairs cannot surprise since it seems the natural result of the growth of the EU public law, as a set of rules sprouting from the national legal systems, which, after being harmonized at the supranational level, are later suitable to further influence the domestic set-ups from which they stem, bringing them closer and closer, as the consequence of a sort of circular motion. Indeed, this is the main goal of the integration process itself. Thus, the final outcome is a deep interpenetration between European constitutional law and national one that make it extremely difficult, or even almost impossible, to conceive the national institutions' organisation and functioning autonomously from the process of European integration and – one might say – able to live "out" of the EU.

Abstract

This paper stresses the fact that the European Union, despite the lack of a formal Constitution, is nevertheless already provided with norms that are substantially constitutional. Indeed, from a constitutional-law perspective, it is possible to consider both Art. 2 TEU, setting down the EU shared values, and the Charter of Fundamental Rights, which – with the entry into force of the Lisbon Treaty – has been given the same efficacy of the Treaties themselves. Therefore, with a legal method of analysis, the paper focuses on origins and guarantees of what we might describe as the EU "constitutional core", in order to show how its spreading and complete implementation throughout Europe would represent a unique and fundamental mean for a true and full political integration.

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*Monika Stachowiak-Kudła**

2.

Transnational judicial dialogue in case law related to academic freedom

A characteristic feature of adjudication in some jurisdictions is the increase in dialogue between judges across national boundaries. Transnational judicial dialogue is a metaphor for the comparative analysis found in judicial decisions. It can manifest in the references to the interpretation of national fundamental rights guarantees of international tribunals and constitutional courts, international conventions, doctrine of another state and foreign legislation.

The purpose of this article is to demonstrate that in the countries where a given right or freedom is not expressed explicitly in the constitution, where it lacks a legal definition or where there is a dispute as to the essence of these rights and freedoms, constitutional courts will be more likely to rely on international conventions and the jurisprudence of international tribunals and constitutional courts of other states. Constitutional courts are also more likely to recall the legislative solutions of another state in difficult or controversial cases.

The use of foreign and international law by constitutional courts raises a lot of controversy, which contributes to the fact that the majority of the courts in democratic countries avoid both the use of foreign regulation that would

* Warsaw University of Technology, e-mail: mstachowiak@ans.pw.edu.pl. The author gratefully acknowledges the support of the Polish National Research Council (NCN) through its 2016/23/D/HS5/00206 grant. The author would also like to thank the constitutional courts of Belgium, Italy, Germany, Portugal and Slovenia for the help in accessing the necessary information presented and referred in this paper.

conflict with the position of their national governments, and citing foreign jurisprudents (Young 2005, 148-167; Waldron 2005, 129-147; Alford 2006, 656–664; Kirby 2008, 172). In this article, I strive to determine whether transnational judicial dialogue is justified.

Academic freedom is understood as "freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action" (Declaration of Principles on Academic Freedom and Academic Tenure, Dec 31st, 1915). In some countries (France, Hungary, Italy, Poland, Spain and Slovenia), academic freedom does not have a legal definition, and in the event of a dispute, courts have to determine the essence of this right. The inclusion of the countries where the legal definition exists, namely Belgium, Czechia, Germany and Portugal, in this study, made it possible to examine whether the intensity of transnational judicial dialogue depends on the possession or the absence of a legal definition of a particular right. The article analyzes 99 judgments referring to the academic freedom from the constitutional courts of 10 European Union countries. Only countries which guarantee academic freedom in their constitutions (appearing in the form of freedom of scientific research and freedom to teach) and which have constitutional courts were selected.

2.1. Transjudicial communication

Constitutional courts play an active role in the legal protection of fundamental rights: controlling the compliance with the constitutional law of final court rulings and initially resolving the issue of constitutionality of laws. Constitutional courts are also seen as more likely to employ the judicial citation of foreign regulations.

There are several types of recourse to foreign regulation by courts. Firstly, courts may be legally required to apply foreign legal rules or to apply foreign citations. In such cases, we are dealing with a mandatory or binding application of foreign law. As an example, based on Article 39 of the Constitution of South Africa, more than half of the judgments of the Constitutional Court of this country cite foreign courts' decisions (Bentele 2009, 227). Secondly, citing foreign judgments may be advisable but not

binding. For example, it applies to a situation where foreign regulation has a clear normative and reputational value. Judicial interactions are then based on the persuasive authority and the courts have discretion and control over the choice of the cited judgments (Slaughter 1994, 124-125; McCrudden 2000, 503-510). Courts around the world consider the rulings of the following courts as "persuasive authority": the Supreme Court of Canada, the German Federal Constitutional Court and the European Court of Human Rights (Hirschl 2014, 550-551). However, attitudes toward the citations of other courts vary. For example, the Spanish Tribunal Constitutional is very prone to cite, for example, the European Court of Human Rights (Queralt Jiménez 2006, 311-315), while the French *Conseil d'État* is reluctant (Krisch 2008, 196; El Boudouhi 2015, 283-284). Thirdly, quoting foreign judgments and foreign rules may be voluntary if there is no formal requirement or expectation, or if the citation of foreign courts is not required by domestic law. However, it can still be practiced (Bobek 2013, 20).

The literature points to several factors that affect the ability and readiness of a given court to cite the case law of a foreign court. Quoting foreign courts' judgments may depend on linguistic permeability: the judge's knowledge of particular foreign languages (McCrudden 2000, 503). Judges may prefer the jurisprudence of a court from a country whose language they know or one which also publishes its decisions in English. The second factor discussed in the literature is the similarity of legal tradition: courts refer to the case law of courts with similar legal traditions (Mak 2012, 20-21; Hirschl 2014, 551). For example, Polish law is strongly affected by the German, then Prussia, legal tradition, as Germany is a neighbor of Poland and in the past, almost half of the present territory of Poland was part of Germany. Another factor concerns legal education. Judges may prefer to cite the case law of a foreign court whose law they know. Courts in the United States rarely invoke foreign courts in the context of human rights. This may result from the way in which prospective lawyers and judges in the USA are educated, namely, the lack of comparative- and foreign-law training (Law, Chang 2011, 576). Finally, the professional networks that judges operate in are important in the context of the international migration of constitutional ideas (Slaughter 1994, 136).

Various factors influence judges' decision-making process. In studies of American courts (Segal, Harold 2002), as well as those in Canada, India, the Philippines, and Israel (Weinshall, Sommer, Ritov 2018, 334-352), it

is emphasized that judicial decisions are influenced by the ideological and political attitudes of the judges. A model in which judges settle disputes in line with their ideological positions is called the attitudinal model. Conversely, the model in which judges' decisions are influenced by the roles and norms of the court as an institution is called the neo-institutional model (Weinshall-Margel 2011, 556). It can be expected that the decisions of judges in Europe are also affected by their ideological attitudes. It is likely that left-wing judges will be more positive about the judgments of the European Court of Human Rights, because it extends the protection of rights and overcomes national restrictions (Voeten 2007, 677-678). On the other hand, moderately conservative judges will be more skeptical about these judgments (Krisch 2008, 212). National judges may perceive the solution enshrined in their law as better than the solution from a foreign source (Krisch 2008, 212).

Beliefs of judges regarding the proper role of courts may also be relevant for transjudicial dialogue in Europe. "The more judges value judicial restraint vis-à-vis the political branches, the less they will approve of attempts by any court – including Strasbourg – at checking politics" (Krisch 2008, 212). The example of this attitude is the reluctance of British courts and the French *Conseil d'État* to use the jurisprudence of the European Court of Human Rights (Krisch 2008, 212). Similarly, judges who consider their country's constitution to be the final point of reference and who perceive national decision-makers and judges as having the last word may be skeptical about quoting foreign courts' judgments (Krisch 2008, 212).

Judicial comparativism has three main advantages. Judges use international tribunals and constitutional courts' case-law analyses in their human rights decisions in order to find a way to settle the matter of the case (Glendon 1991, 158-159). Such analyses facilitate "self-reflection or betterment through analogy, distinction, and contrast" (Hirschl 2006, 41). Judges believe that citing other jurisdictions will contribute to the legitimacy of this decision. In this way, judges want to convince the parties of the dispute that their judgment is correct. Proponents of the courts' citing judgments of other courts also indicate that the consideration of a foreign judicial approach has often resulted in a better understanding of the court's views on domestic law (McCrudden 2000, 512). Finally, the use of foreign law sources and the jurisprudence of international tribunals and foreign courts facilitates the ability of national governments to withstand the pressure brought by

interest groups and foreign governments, and it insulates national courts from intergovernmental pressures (Benvenisti 2008, 242).

Opponents of judges' appeals to the decisions of the courts of foreign jurisdictions in interpreting domestic human rights guarantees point primarily to a lack of democratic legitimacy. Judicial comparativism may be aimed at influencing the introduction of legal changes, and the responsibility for introducing such changes and causative power does not belong to the judiciary, but to the legislative authority (Larsen 2009, 767). Another important complaint is the "court's inability to grasp and accommodate distinctive constitutional identities and ways of legal thinking" (Lienen 2019, 172). The constitutional judge decides in the complex institutional, doctrinal, social and cultural reality characteristic of her country. The judge's underestimation of the way the case cited is related to all the contexts in which it exists may lead her to commit errors (Tushnet 2008, 10.). The third major point of criticism is arbitrariness in the choice of the cited decisions. Courts may prefer decisions that are consistent with their choice of dispute resolution (Lienen 2019, 172). They can also "use international law to buttress a shaky domestic foundation" (Waters 2007, 660).

2.2. Description of the cases

Academic freedom is a defensive right, which means that it protects scientific and teaching activities against the interference of the state and other authorities, including university and faculty authorities. Academic freedom is guaranteed by Art. 13 of the Charter of Fundamental Rights of the European Union and the constitutions of many states in which it appears in the form of freedom of scientific research and freedom of teaching.

Academic freedom may be the subject of a dispute before a constitutional court. Constitutional courts usually resolve two types of disputes: appeals against the alleged unconstitutionality of laws and of regulations having the force of law, and individual appeals for protection against the violation of a right. Disputes in which the constitutional court resolved the issue of the violation of academic freedom are rare (22 cases). Most often, academic freedom is cited in the background of a dispute that regards another right.

In 36 cases out of 99 analyzed, the other right was university autonomy. In these matters, constitutional courts cite academic freedom to indicate that the university autonomy is the protection of this freedom.

A small number of academic freedom judgments indicate that academic freedom does not cause a lot of tension. However, if such tensions do appear and are presented before a constitutional court, they are often "hard cases". According to Fontana (2001, 557-558), comparative constitutional law is justified only in "hard cases", when constitutional sources of law do not provide exact answers. Amongst these "hard cases", one can distinguish two categories. The first category includes cases referring to the collision of principles. Academic freedom can conflict with both individual rights, such as the right to privacy and personhood, or with institutional rights, such as university autonomy or the right of the religious community to self-determination. The position of academic freedom is not as strong as that of other principles. In cases concerning the collisions of principles in European countries, the basic procedure of rational decision making is proportionality. The courts use this rule to determine whether a statutory limitation imposed on a fundamental right is justifiable. Conflicts of principles are perceived as "hard cases" because the application of the proportionality principle creates problems for the courts. The most important of them are means-ends decisions (Rivers 2014, 413).

The second category of cases which are hard to resolve for constitutional courts appears in countries in which the sources of law do not provide specific answers. This happens when one of the constituent parts of the idea of academic freedom is not guaranteed in the constitution, there is no legal definition of academic freedom, or there is no agreement as to the essence of this right. If a right is not explicitly guaranteed in the constitution, a constitutional court may try to derive it from other rights. Such is the case with the freedom of scientific research in Belgium (Constitutional Court of Belgium, Arrêt n° 167/2005 du 23 novembre 2005) and Spain (Tribunal Constitutional, STC 26/1987, 27 de febrero de 1987 and STC 55/1989, 23 de febrero de 1989).

2.3. Transjudicial communication in case law related to academic freedom

Transnational judicial dialogue can be observed in 18 out of the 99 examined judgments of constitutional courts. In these judgments, at least one of the court's behaviors characteristic of this phenomenon took place: the court cited the judgment of a court of another state (in 5 cases), the European Court of Human Rights (in 7 cases), or the Court of Justice of the European Union (in 2 cases), quoted a foreign law (in 5 cases) or the doctrine of another state (in 2 cases), or referred to the Charter of Fundamental Rights of the European Union or the European Convention on Human Rights or the International Covenant on Economic, Social and Cultural Rights (in 12 cases). The courts whose case law was cited were the Federal Constitutional Court of Germany, constitutional courts in Italy and Spain, and the US Supreme Court. Transnational judicial dialogue has been observed in six countries: Belgium, Czechia, Poland, Portugal and, to a limited extent, Germany and Spain. An interesting result of this study is that only one of the above behaviors occurred only in 7 cases. In the remaining 11 cases, however, we observe several of these citation forms in one judgment at a time.

In the examined cases, the judges used foreign jurisprudence or foreign regulations or pointed to the doctrine of another country as support for their own interpretation based on traditional analyses of a domestic legal text. Only in one case did the court cite convergent legal solutions and explain why it was in favor of one of them. The Portuguese Constitutional Court presented different legal models (German, Italian and Spanish) in a case concerning whether the constitutional right to access a public service, based on the principles of equality and freedom of choice (Article 47 (2) of the Portuguese Constitution), includes competitions for academic positions. The court explained that it was in favor of interpreting national law in accordance with the German model, because the Portuguese constitutional model is similar to the model of the Bonn Basic Law. In this judgment, the court also cited German doctrine and the jurisprudence of the Federal Constitutional Court of Germany (Acórdão 491/2008, de 7 de Outubro).

We can also deduce other reasons for judicial dialogue from some judgments. Judges cite foreign jurisprudence because it explains a procedure

of conflict resolution that had not been developed in their court or was incorporated into it from a foreign court as a "good practice". An example of such a decision is the decision of the Constitutional Court of Czechia of 2017. Upon examining the collision of freedom of scientific research with the rights to privacy and personal integrity (Articles 15 (2) and 10 of the Czech Charter of Fundamental Rights and Freedoms), the court cited the principles in accordance with which the European Court of Human Rights resolves conflicts between freedom of expression and other constitutional rights (Constitutional Court of Czechia, 13. září 2017, III.ÚS 3393/15). The Constitutional Court of Czechia, which did not have a procedure of resolving conflicts between the freedom of scientific research and other rights, adopted the principles proposed by an international court. In this case, the court also cited the judgment of the European Court of Human Rights: Handicide v. United Kingdom, explaining that freedom of expression, freedom of thought and freedom of scientific research were one of the basic pillars of democracy and a condition for the development of society. The guarantee of protection applies not only to generally accepted ideas, opinions and information, but also to those that are "contradictory", "shocking" or "harmful" by nature, whether this concerns a natural person or a larger group of people. The court also cited a judgment of the Federal Constitutional Court of Germany, recalling that freedom of scientific research concerns not only one specific concept of science or one particular scientific theory, but can be represented by any activity that can be understood as a serious and thoughtful (systematic) attempt to establish the truth (13. září 2017, III.ÚS 3393/15).

Judges may use foreign judgments to challenge the validity of the arguments put forward by a lower court. An example of a decision in which the jurisprudence of an international tribunal and international law were used to challenge the legitimacy of such an argument is the decision of the Constitutional Court of Czechia. The court considered the case of the conviction of the students of an art college for violating the provisions of the Czech penal code which protect peaceful coexistence against serious attacks that disturb public peace and order, and for violating laws which protect non-property rights. The students created and displayed a public monument resembling an explosive charge. The constitutional court used the judgments of the Court of Justice of the European Union and international norms to show that in this case, the right which was unjustifiably limited was not the freedom of

teaching but the freedom of expression and the freedom of artistic creativity (Constitutional Court of Czechia, 27 Září 2006, IV.ÚS 211/06).

Quoting foreign jurisprudence, doctrine and law can serve to strengthen something that would otherwise be an uncertain argument if it was based solely on domestic sources. The Constitutional Court of Poland cites regulations originating from Germany, Slovenia, Czechia, Hungary and Romania to prove that although the Polish Constitution does guarantee freedom of scientific research for everyone (Article 73 of the Polish Constitution), the requirement of a recommendation from a researcher or an independent scientific institution for a person who wants to conduct research on documents collected by the Institute of National Remembrance is not an unjustifiable limitation of academic freedom (Wyrok z dnia 25 listopada 2008 r., sygn. akt K 5/08).

We see slightly different reasons for transnational judicial dialogue in international treaties. In some judgments, the discussion of international law was treated as a reflection on domestic law. For example, in the analyzed judgments, there are cases where the constitutional court refers to the European Convention on Human Rights to explain the essence of the right to a fair trial (Constitutional Court of Belgium, Arrêt n° 157/2009 du 13 octobre 2009; Arrêt n° 155/2011 du 13 octobre 2011) or freedom of assembly and association (Constitutional Court of Belgium, Arrêt n° 157/2009 du 13 octobre 2009; Arrêt n° 53/2016 du 21 avril 2016; Constitutional Court of Poland, Wyrok z dnia 28 kwietnia 2009 r., Sygn. akt K 27/07).

Another reason for undertaking transnational judicial dialogue is the need to supplement incomplete legal regulation. The 2005 decision of the Constitutional Court of Belgium best illustrates how international treaties penetrate judicial reasoning. It shows how the courts introduce the obligations arising from the Charter of Fundamental Rights of the European Union into domestic statutory law. The Belgian Constitution does not explicitly state a guarantee of the freedom of scientific research. It only guarantees freedom of teaching (Article 24 (1)). The Constitutional Court first explains the essence of academic freedom, pointing out that this freedom should be explained by the principle that teachers and researchers must have great freedom to conduct research and express opinions. Freedom lies in the interest of the development of knowledge and diversity of opinion. Next, the court indicates that academic freedom is a derivative of the freedom of expression guaranteed by Article 19 of the Belgian Constitution and Article 10 of the European Convention

on Human Rights, and part of freedom of teaching guaranteed by Article 24 (1) of the Belgian Constitution. The court also points out that by virtue of the fact that freedom of the sciences is guaranteed in Article 13 of the Charter of Fundamental Rights of the European Union, that freedom is a common value of the EU (Arrêt n° 167/2005 du 23 novembre 2005).

In some cases, we are dealing with a contextual interpretation – the courts use treaties to resolve ambiguities in specific fundamental rights regulations (Constitutional Court of Spain, STC 127/1994, de 5 de mayo de 1994, Constitutional Court of Poland, Judgment of May 11, 2007, reference number K 2/07; Constitutional Court of Belgium, Arrêt n° 2/2014 du 16 Janvier 2014).

The courts also apply treaties to distinguish the scope of certain restrictions on fundamental rights in domestic law. The Constitutional Court of Spain, in its 1981 judgment, makes use of Article 13 (3) of the International Covenant on Economic, Social and Cultural Rights to show the limitations arising from the right of parents to decide on the religious and moral education of their children. For the same reason, it explains the findings of the German doctrine (STC 5/1981, de 13 de febrero de 1981).

Of the 18 cases in which we observe transnational judicial dialogue, 5 belong to the first category of "hard cases", concerning the collision of principles and the principle of proportionality, while 6 should be classified as belonging to the second category, concerning situations in which the sources of laws of constitutional and statutory significance do not provide specific answers.

In the cases under examination, the constitutional courts of France, Italy, Hungary and Slovenia did not cite international conventions or the case law of international tribunals and constitutional courts of foreign countries. However, in the last thirty years, academic freedom only appeared in four cases in the constitutional court of France, six in Italy, two in Hungary and three in Slovenia. 11 of these 14 cases were resolved in the 1980s and 1990s. Transnational judicial dialogue may not have been used back then yet. Its development coincides with the popularity of the internet. Hungary and Slovenia had no reason to rely on the case law of the Court of Justice of the European Union before 2004, the date of their admission to the EU.

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The case-law analysis has shown that only some countries use the case law of international tribunals and constitutional courts of other countries to interpret the national guarantee of academic freedom. The intensity of transnational judicial dialogue in case law related to academic freedom should be characterized as not very widespread. The case-law analysis made it possible to find two additional reasons for starting a dialogue not previously indicated in literature. A judge may use foreign case law to challenge the validity of the arguments put forward by another court. Alternatively, the judge may use foreign jurisprudence because it contains a description of the procedure for resolving a given type of case absent from their domestic legislation.

Judicial comparativism is justified in "hard cases". I share the opinion that if there are divergent decisions on similar cases, the court should present both of them. It should not limit itself to quoting only the decision consistent with its vision for resolving the dispute. The court should explain why one of these models is chosen to be applied in a particular case.

The impact of the lack of a definition of academic freedom on the intensification of transnational judicial dialogue has been found only for Belgium and Poland.

Abstract

Courts have different preferences regarding the use of citations to the jurisprudence of international tribunals and constitutional courts of foreign countries, regarding the interpretation of national guarantees of fundamental rights in their jurisprudence. Similarly, they refer to or do not refer to the international conventions, e.g. the Charter of Fundamental Rights of the European Union. It would be expected that in the countries where a given right or freedom is not expressed explicitly in the constitution, where it lacks a legal definition or where there is a dispute as to the essence of these rights and freedoms, constitutional courts are more likely to refer to international conventions and the jurisprudence of international tribunals and constitutional courts of other states. The article delves into this problem by analyzing 99 judgments on the dispute over the violation of academic freedom taken by the constitutional courts of 10 European Union

countries. An analysis of the case law has shown that only some countries use the case law of international tribunals and constitutional courts of other countries in order to interpret the national guarantee of academic freedom. The analysis additionally answered an important legal question: Can we define causes that help to explain why this is happening? And a normative question: Is that justified? There is no agreement in literature whether such a trend is appropriate at all.

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3.

Harmonization of EU criminal law – issues of implementing EU directives

One of the principles of the EU is the harmonization of laws (Kusak 2017, 11; Prechal 2005, 3). In the field of criminal law it is important to deepen mutual trust, set similar standards for the procedural guarantees and ensure the execution of decisions of foreign courts and prosecutors. The EU directives set mutual standards and oblige states to implement general provisions in their own ways. Two main problems can be found in this field: firstly, states simply do not implement the directives or do implement them incorrectly (Prechal 2005, 7-8). Secondly, states implement the directives differently and the standards in EU countries still vary a lot. The right to an effective remedy sets a perfect example. Five EU directives aimed at enhancing rights of accused and suspects include the right to an effective remedy. The problem is that the definition, or even a common understanding of this term, does not exist, neither in European criminal law, nor in the doctrine or judicature.

A question must be posed: how is the EU criminal law to be harmonized, if the Member States (MS) understand their obligations differently or do not understand them at all? The paper is aimed at presenting the implementation of the right to an effective remedy in Poland on the grounds of three EU criminal law directives. Following that, the author will try to answer the question if the transposition of the directives is a correct tool to harmonize MS law and what could be the solution to the presented problems.

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Five of the six directives aimed at protecting the rights of individuals in criminal proceedings provide for the right to an effective remedy. These are:

- Directive 2012/13/EU on the right to information in criminal proceedings,
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,
- Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,
- Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings,
- Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

The scope of this paper will be limited to two of them: directive 2012/13 and directive 2013/48.

3.1. Directive 2012/13/EU

Directive 2012/13/EU, according to the data held by the European Commission (EC), has been implemented into the Polish legal system by means of eleven legal acts (EUR-LEX 2014). The directive has four main provisions:

- the right of a suspect or an accused person to information about their rights,
- the right of a detained or arrested person to be informed in writing about their rights,
- the right of a suspect or an accused person to report the charges,
- access to proceedings materials.

In this respect, corrective measures should be provided to challenge the absence or refusal to exercise the aforementioned rights. As indicated by the authors of the Report on the implementation of Directive 2012/13/EU (Kopczyński, Wiśniewska 2016, 81), a general measure securing the exercise of the right to information in Polish criminal procedure is Article 16 of the Code of Criminal Procedure (CPP) and regulation, according to which misinformation or lack of instruction may not cause negative procedural consequences for a participant in the proceedings or any other persons concerned. Art. 438 point 2 CPP is also a basis for questioning the failure or refusal to provide information to suspects or accused persons (Kopczyński, Wiśniewska 2016, 81). As for the access to criminal proceedings materials, Art. 159 CPP establishes an independent basis for a complaint against a refusal to give access to files in preparatory proceedings. Moreover, a complaint against a decision of a public prosecutor may be lodged with a court. Fingas indicates that this regulation does not fully implement the provisions of the directive, because "judicial control over the decision to refuse access to the case file is limited only to rulings issued in this regard by the prosecutor. (…) due to the systemic location of the Polish prosecutor's office, it should be noted that the prosecutor cannot be considered as a judicial body in this respect" (Fingas 2018, 57). Such a standpoint must be approved. This catalog should be complemented with a complaint about the detention action filed pursuant to Art. 246 § 1 CPP, allowing to challenge the legitimacy, legality and regularity of detention, and Art. 252 § 1 CPP, allowing a complaint against temporary arrest.

Serious doubts about the effectiveness of these measures should be raised, as often the process of raising an infringement is resolved after a long period of time and at a later stage of the procedure, which makes it impossible to repair the damage. This calls into question the fairness of such proceedings. The problem of effectiveness also appears in practice: research of the Helsinki Foundation for Human Rights in the field of remedies for breach of rights arising from Directive 2012/13/EU shows that questioning the failure to provide information is often ineffective. One respondent indicated that "in his opinion, there is currently no effective remedy in this respect" (Helsinki Foundation for Human Rights 2016, 84). Yet another study participant claimed that "any failure by competent authorities to comply with disclosure obligations could be used as a part of an appeal against a judgment" (Helsinki Foundation for Human Rights 2016, 84), which confirms the thesis about limiting the possibility of challenging deficiencies.

Articles 16, 159, 246, 252, 438 point 2 of the Code of Criminal Procedure are not the result of the implementation of Directive 2012/13/EU, as they were all already in force before. The Act of 27 September 2013 amending the Act – the Code of Criminal Procedure and some other acts, introduced changes in the wording of Art. 252 CPP, but it had no effect on the scope of the appeal. Undoubtedly, however, an important change was the amendment to Art. 244 § 2 CPP, extending the right to information, and thus allowing to raise these deficiencies in a complaint about detention pursuant to Art. 246 § 1 CPP.

3.2. Directive 2013/48/EU

According to information appearing in the database of EU legal acts, Directive 2013/48/EU has been implemented in Poland by five legal acts (EUR-LEX 2016). However, it seems that no changes have been implemented to the Polish system aimed at adapting Polish law to the requirements of the directive. The Act amending the Code of Criminal Procedure and some other acts adopted in 2018 indicates in Art. 1 point 1 that the Act, within the scope of its regulation, implements the provisions of Directive 2013/48/EU. Further provisions, however, do not refer to the rights provided in the directive (Grabowska-Moroz 2018, 31). The draft of the amendment act implementing the solutions adopted in the directive was withdrawn due to the fact that "the Ministry of Foreign Affairs confirmed the compliance of Polish law with the directive, and there is no need to implement it" (BIP 2017). Similarly, representatives of the Ministry of Justice indicated that "a detailed analysis of the provisions contained in Directive 2013/48/EU and the corresponding national regulations was carried out. It led to the conclusion that Polish law currently fully reflects the postulates of the directive, and therefore there is no need for adaptation measures" (Piebiak 2017). A different position from that has been taken by the Criminal Law Codification Commission (CLCC 2013), Ombudsman (RPO 2017), First President of the Supreme Court (First President of the Supreme Court 2017), Helsinki Foundation Human Rights (Klepczyński, Kładoczny, Wiśniewska 2018, 43). Therefore, it should be considered that no new solutions regarding effective remedies in the event of a breach of the rights were adopted. It should be noted that Poland is not

alone in this view among the MS – at least in terms of effective remedies, most of the countries indicated that the existing solutions are sufficient and do not require any amendments (Soo 2018, 20).

One right under the directive is the most significant: the right of immediate access to a lawyer. It is necessary to point towards Art. 438 point 2 CPP once again, as it establishes grounds for an appeal based on a violation of the rules of procedure, which could have affected the content of the court's decision. Wąsek-Wiaderek also indicates that in case of an absent or erroneous instruction of the suspect before the interrogation – e.g. failure to inform about the right to silence – the inherent basis for recognizing the inadmissibility of the use of evidence from explanations is Art. 16 § 1 CPP (Wąsek-Wiaderek 2013, 551-552). It seems that a similar situation occurs in the event of a failure to inform, contrary to applicable regulations, of the right to a defense counsel, and then obtaining evidence from suspect's explanations. As for the situation of detained persons, an appeal review is also possible in respect of violation of Art. 245 § 1 CPP. Nevertheless it is, in principle, a measure aimed at counteracting future violations through information for superiors, since, apart from rare situations of examining a complaint before releasing a detained person, it has no tangible result for them by remedying the situation, in particular with regard to the violation of the rights to defense counsel. A kind of remedy may also be provided by Art. 344a § 1 CPP. The court transfers the case to the prosecutor in order to complement the investigation if the case file indicates significant deficiencies in this proceeding, in particular the need to search for evidence, and performing necessary actions by the court would cause significant difficulties. This provision makes it possible to return the case due to both significant evidentiary and procedural shortcomings (Cora 1987, 39; Eichstaedt, 2019).

There is no prohibition of evidence in our system regarding the use of evidence obtained in breach of the right to a defense counsel or restrictions on the admissibility of such evidence. The provision of Art. 168a CPP clearly indicates that evidence cannot be declared inadmissible on the sole ground that it was obtained in breach of the rules of procedure. There is an array of demands in the doctrine regarding remedies in the event of a breach of the right to a lawyer. There are proposals to introduce a prohibition against such evidence, based on the judgments of Salduz (Salduz v. Turkey, 2008) and Płonka (Płonka v. Poland, 2009), regarding suspects particularly vulnerable

to harm (Wąsek-Wiaderek 2013, 556; Rusinek 2019, 110-111), developing a jurisprudence line regarding the assessment of evidence based directly on the content of the directive or ECtHR case law (Wąsek-Wiaderek 2013, 556).

It should be pointed out that effective remedies in an event of a breach of right to a lawyer adopted by the MS are extremely diverse (Soo 2018, 18-55). 23 MS have the exclusionary rule and do not accept evidence gathered in the way that breaches the defendant's rights, two MS have the rule of the inadmissibility of prosecution in that case, in Finland charges are dismissed and the accused is acquitted, in Ireland a reduction of sentence is possible, and an annulment of the court's judgment with the possibility of a retrial is the most popular remedy. All of the abovementioned remedies exist in different ways, with different changes and conditions; and all of these countries confirmed that they have fully implemented the directive. This calls into question the achievement of the directive's goal of common minimum standards and deepening mutual trust and mutual cooperation in judgments recognition. It also raises a legitimate question: how can we assume that the right to a lawyer in all MS operates in the same way if the regulations on remedial measures differ - from the adoption of the doctrine of the fruit of the poisoned tree, the exclusion of evidence, the mitigation of judgments, resuming the proceedings, up to the total prohibition and excluding any evidence from the proceedings (Soo 2018, 52). Poland is one of five countries providing the least protection in the event of a breach of the right to a lawyer (Soo 2018, 28-19).

* * *

Summarizing, it can be said that presented directives have not been implemented correctly into the Polish legal system. It can be observed, particularly on the example of the Directive 2013/48/EU, that a similar situation exists in many MS. The directives are only partly transposed, or not transposed at all. As a consequence, in the EU 28 different legal systems still exist and the common minimum standards are hardly ever achieved. The idea and effectiveness of the directives must be called into question, as they do not lead the EU law towards harmonization. Pondering upon possible solutions of the problem the enhancement of the EC's power should be taken into account, at least as far as the EU law implementation is concerned. The EC should exhaustively verify the MS legislation in this area and sanction

them for any deficiencies. What is more, the multi-language of EU law can be perceived as a problem. Languages vary a lot and currently all the language versions of legal acts are considered official. Establishment of one official exemplificatory version could be a proposition aimed at solving the problem of non-understandable terms in the directives (Doczekalska 2019, 15). One of the main problems is also a lack of references. The concept of the effective remedy has no unified definition, neither in the EU law, nor in the public discourse. Therefore, it cannot be expected that the right to effective remedy will be implemented correctly and consonantly by 28 different legal systems.

Abstract

The EU criminal proceedings directives are aimed mostly at protecting the parties of criminal proceedings and at harmonization of protection standards among the EU members. Presenting how the provisions of the criminal law directives are implemented into the domestic law systems allows us to answer the fundamental question – is the harmonization of law, in the field of criminal law, a success or a failure.

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wania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności". https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego/download,2663,0.html [accessed on: 1.09.2016].

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1-8.

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4.

L'ordre public and the European private international law: Sharia effects on the European family law

EU countries are facing an increase in the Muslim population. Many of them get married in Europe, but within a different legal system, as provided by the Article 5 of the Rome III Regulation (Council Regulation (EU) No. 1259/2010). This paper aims to analyse the implications involving the use of the Sharia in the EU, especially regarding the conflicts between the Islamic family law and the European public policy. The first section of this article deals with the definition of *ordre public* and what is the implication of the European public policy to the family law in the EU Member States (MS). The second section of this article is dedicated to the EU legislation on family law. Finally, the third and final section addresses the issues concerning application of the Sharia in the EU MS.

4.1. *L'ordre public* in the EU private international law

The subject of the present paper requires a proper definition of what *ordre public* is. This French expression translates as *public order/policy* and is best

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described as an exception to the party autonomy that is used to prevent the application of a foreign *lex causae* that is repugnant to the domestic public policy (Briggs 2013, 208-209).

States use this method to repel any legal instrument that may violate the inner foundations of their constitutions. The *telos* of public policy is safeguarding the basic values of the *lex fori* and, *ergo*, avoiding unacceptable results (Gebauer 2007). Notwithstanding, *l'ordre public* today is facing a transformation to the supranational level throughout the EU law and for some authors is not confined to domestic jurisdictions anymore.

Vital issues may emerge when trying to establish a public policy in a political and economic association with MS that diverge deeply in matters of integration, policies and culture, given that the existence of a supranational public policy may cause an internal fragmentation of concepts shared between the EU and its MS.

Some authors advocate for a necessity of forming an EU concept of *ordre public* and developing a coherent notion based on premises that take into consideration both the domestic public policies and common values between MS. The European *ordre public* would not coincide with *l'ordre public* from any of the MS, even though it would be deeply rooted in the constitutional traditions of the states (Corthaut 2009, 53). Whenever the set of values created by the EU conflicts with the principles of the MS, the core established by the EU must prevail (Courthaut 2009, 53).

It has been argued elsewhere that EU treaties allow the MS to derogate their obligations before the EU in order to safeguard the domestic national security (Jeauneau 2015, 242-243). In this case, the EU would renounce the supremacy of its legal order, wherein lays the public policy, and grant states with the possibility to evade responsibility before the EU law.

The concept of domestic public policies in the EU law also considers that states are not obliged to supply the EU with information that may be sensitive and essential to their national interests regarding security and that they can take any measures to protect it (TFEU, Art. 346). Likewise, both the Brussels I (Art. 34) and the Brussels I Recast (Art. 45) bring into view *l'ordre public international* for the recognition of judgements (enforcement) that might violate the national public policy of MS (Van Calster 2016, 194). Thus, even the regulations that cope with the subject focus solely on *ordre public*

for the domestic jurisdictions of the EU countries, giving them a margin of appreciation to define what *ordre public* means.

The scope of this paper is not to specifically address the foundations of *ordre public* in the domains of the EU institutions, but to verify the application of a foreign law that might violate the set of basic principles established by a MS. After dealing with the Rome III Regulation, the next sections will indicate how public policy is being called upon by domestic jurisdictions of the EU countries and how the EU law and domestic courts deal with conflicts with the Sharia.

4.2. The EU legislation on family law: the Rome III Regulation

The Council Regulation (EU) 1250/2010 on the implementation of enhanced cooperation in the area of the law applicable to divorce and legal separation (henceforth referred as the Rome III Regulation or Rome III) is one of the most crucial EU legislations regarding family law. Its primary objective was to fulfil the gaps left by Brussels II Regulation with regards to the legal certainty of the applicable law, since there were only provisions about matters of jurisdiction and recognition and enforcement of foreign decisions in the Brussels II (Viarengo 2011, 601).

However, Rome III is an instrument of enhanced cooperation that only applies to some MS (Walker 2018, 235). The most innovative feature of the document is the introduction of the party autonomy as a connecting factor (Viarengo 2011, 603). Spouses can freely choose the law applicable to divorce and legal separation, including the legislation of third countries (Beltrame de Moura 2018, 39).

Rome III provides a series of connecting factors in order to fulfil the gaps that may appear due to the lack of manifestation of spouses. The following items represent the cascade system that connects factors presented in the Rome III Regulation: (i) Habitual residence of spouses; (ii) Former habitual residence of spouses; (iii) The law of the nationality of one of the spouses; (iv) The *lex fori* (Viarengo 2011, 619). These are also the available laws for the

purpose of the choice of law that is to be made by spouses via party autonomy (Walker 2018, 235).

The CJEU has already ruled that the habitual residence is that in which the individual has established the permanent centre of his or her interests with the intention of a lasting character (Fernández, C-452/93 P, para. 22). The case law of the CJEU creates a standard to be used by the MS that can be complemented with the domestic interpretation of habitual residence of the EU country.

Concerning the choice of law, some examples are paramount to give a proper explanation of the party autonomy provided by the Rome III Regulation since 2010. The first example is a pragmatical one in which two European nationals from different countries decide to get married in an EU MS that is not the place of habitual residence of neither of them. In this case, the spouses can choose the applicable law from among the connecting factors provided by Rome III. In this hypothesis, the cascade system would be only applicable in the event of an absence of choice by the spouses. The second example considers nationals from third countries in the process. This is where things start to become more complicated, since this is where the issues concerning the *ordre public* start to appear and a MS might call upon the exception to repel the application of a foreign legal system that is considered contrary to its national values. These illustrations help to verify the range of applications of the Rome III Regulation and how the Sharia law could enter into the realm of European law with the party autonomy provided by the system. Further discussion on this matter will be handled in the dedicated session about the Islamic law below.

4.3. The Sharia and the *ordre public* of the EU

The Sharia is not a homogenous or unitary legal system and it is important to know which convictions are followed by the Muslim individuals settled in the West (Rinella 2019, 635). In general, the Sharia is God's immutable and eternal will for humanity (Otto 2008, 8) that is expressed by Quran and the Muhammed example (*sunna*) and developed by the Islamic jurisprudence (*fiqh*). In brief, the Sharia consists of a set of fundamental rules created by God and is a legal system based on an ethic-religious structure which every believer must obey in any place or context (Rinella 2019, 635).

Given that conception, the task now is to verify how the Sharia has been applied in the EU family law. The analysis will focus on the case law from both the CJEU and the domestic courts of the MS. With regard of the chosen domestic courts, this paper relies on the EUFam's Project Public Database. As of 14 June 2018, fourteen entries referring to the Sharia were found in the project. Taking into account that this paper focuses on Rome III, only the cases regarding this specific regulation about the European private international law will be regarded for the present analysis, which consists of a single case from Spain, two from Germany and one from Italy.

The case regarding Spain took part in the autonomous region of Catalonia (Audiencia Provincial Barcelona num. 53/2015, 4 February 2015) and involve Moroccan nationals with double nationality (Spanish/Moroccan) and habitual residence settled in Spain. The Sharia plays a significant role in Morocco in issues regarding personal status of an individual, e.g., marriage and divorce. When they separated, some issues regarding the law applicable to several questions of family law emerged, such as divorce, parental responsibility, maintenance and matrimonial property regime. The Spanish authorities used Rome III to apply the Spanish law to the relation and without reference to the cascade system or the dispositions that were applicable in the case. The Spanish court applied the law of the habitual residence of the spouses (Spain) for the issues arising from the divorce. The authorities decided to apply a rule of the Spanish international law for cases with conflict of laws provided by the art. 9.2 of the Spanish Civil Code in order to designate the law of Morocco for the matrimonial property regime. No justification or reference has been made to the Brussels II Regulation for the application of Catalonia law to the issues of parental responsibility and maintenance.

With regard to the German judiciary, the first case (Oberlandesgericht Hamm, 07.05.2013, 3 UF 267/12) discussed in second instance the divorce application of an Iranian woman with German citizenship married to an Iranian man, under a marriage certificate with several conditions, including the possibility for the wife to file for a divorce. The first instance understood in favour of the divorce by arguing that the Iranian law was applicable to the case, based on the private international law from the German legal system (Art. 17, 14, EGBGB). Afterwards, the husband applied to a court of appeal seeking for a review of the divorce, claiming that the due process was violated in the course of the case and that the first instance misinterpreted the Iranian

law, since no interpreter at that instance could understand the proceedings. Although the court of appeals held that the law applicable to the present case should be Iranian, the first instance did not apply Rome III and the Iranian law would be the chosen law according to the dispositions of the regulation, as a result of a choice of law agreement.

What is interesting to note about the above-mentioned German case is that the conditions of marriage certificate allow the wife some guarantees, such as a divorce on the occasion of *delegate repudiation*, which gave the wife the possibility to pronounce *repudiation* against herself. The repudiation is a tool to justify the divorce in favour of men and may be *delegate* to wives if established in the marriage certificate. In practice this framework makes the divorce subordinate to the repudiation of the wife, which may constitute a public policy issue in European countries with more secular legal systems. Also, the use of a marriage certificate could be interpreted as a choice made by spouses, since the parties chose several rules from a diverse legal system.

Another case involving German courts concerns a couple married and divorced in Syria (Oberlandesgericht München, 02.06.2015, 34 Wx 146/14). The husband was also a German national and they lived in Germany as a result of the Syrian civil war. In 2013, he declared the divorce before a spiritual Court based on the Sharia in Syria with the effectiveness of the divorce guaranteed by the Higher Regional Court of Munich. His wife claimed that the divorce made in the sharia spiritual courts conflicts with the German law and cannot be recognised, invoking an *ordre public* issue, considering that the husband used the repudiation system. The case was submitted to the CJEU, which declared that it has no jurisdiction to answer the questions made by the Higher Regional Court of Munich (Sahyouni, C-281/15, para. 34), initially avoiding a definition of the notion of divorce provided by Rome III.

In Italy, the last domestic case to be examined (Tribunale di Padova, prima sezione civile, 8 September 2017) is also about a married Moroccan national that habitually resided in Italy. In this case, the Italian court's solution was simply to apply the Moroccan family law by using the cascade system, since the spouses agreed to choose that law when they got married. No issues related to the direct application of the Sharia were taken into consideration in this case.

In the supranational level, the CJEU pronounced another position in the Sahyouni case in 2017 (Sahyouni, C-372/16). This time, the Court decided that the Rome III Regulation does not cover the Sharia and that a unilateral

declaration of divorce made by one of the spouses before a religious court does not come within the scope of the Regulation (Sahyouni, C-372/16, para. 49). When the Court analysed the public policy, it remarked that the divorce itself was not rejected on the basis of Article 12 of Rome III, since the Higher Regional Court of Munich did not object the divorce *per se* (Sahyouni, C-372/16, para. 22). The CJEU asserted that the objectives pursued by Rome III clarify that a divorce provided in the regulation is one pronounced before a national court or under the supervision of a public authority (Sahyouni, C-372/16), rejecting the idea of private divorces before religious courts.

Both domestic and supranational courts avoided dealing with public policy directly when it comes to conflict of laws between the Sharia and the EU, even though Rome III provides the application of *l'ordre public* in Article 12 (public policy clause) and in Article 10 (prohibition of application of a law that is discriminatory on the basis of sex). However, both levels of jurisdiction, national and supranational, address matters that may emerge public policy issues.

* * *

L'ordre public is a tool to prevent a foreign law that might be considered repugnant to be applied in a specific legal system. In brief, it is an exception to the party autonomy in the private international law. With regard to the EU legislation on family issues, the Rome III Regulation established a cascade system for choosing a law applicable to a divorce and to a legal separation of international couples in the EU, which allows spouses to choose a law of a third country to be applicable to their relation. The regulation also provides the application of the public policy when the choice of law is not compatible with the *lex fori* and prevents the application of the law of the forum when the law applicable is discriminatory on the basis of sex.

After the entry into force of Rome III, domestic and supranational courts had to deal with cases related to application of the Sharia law. In both levels of European jurisdiction, deciding upon the issue of public policy is avoided, even though some cases deal directly with the provisions of Articles 10 and 12 of the Regulation.

The Sahyouni case is the more illustrative one about the Sharia in both levels of jurisdiction. In the view of the CJEU, the application based on a

divorce made by a Sharia Court cannot be considered valid according to Rome III, since the Regulation provides only divorces made by public authorities on the understanding of the CJEU. Nonetheless, although the case deals with both exceptions of the Regulation (Articles 10 and 12), the decision was not based on these dispositions, but on the prevention of private divorces, especially the ones made by a religious authority.

A sturdier case law on the subject is still required to better apply the EU legislation on family issues and discuss the public policy with regard to the application of the Islamic family law in the EU Member States.

Abstract

This work aims to analyse the effects of the Islamic family law in the European public policy by verifying the most relevant case law from domestic jurisdictions and from the Court of Justice of the EU involving the Rome III Regulation in order to shed some light on how judges are reasoning in reference to party autonomy and public policy in European private international law. Furthermore, this paper verifies that European courts avoid dealing with public policy in cases involving the Sharia and that a more robust case law about the subject is necessary to better understand the effects of the Islamic family law in the EU.

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5.

EU soft power: sharing democratic values

The concept of soft power was coined at the begging of 1990 by Joseph Nye – an American political science scholar. It was not until the begging of the 21st century, after the 9-11 attacks, however, that soft power started to play a significant role around the world. The events of September 2001 constituted a clear message to U.S. high level authorities that their foreign policy and security strategies were not effective. The EU also began to appreciate the importance of soft power in the modern international relations at that time.

According to the approach to the study of power popular in the EU, three different types of it can be distinguished: soft, normative and transformative (Muś 2017, 364). Normative power is connected with determining norms and standards of EU actions at the international level (Manners 2002, 235-258). Transformative power encompasses mechanisms of EU influence on third countries (Muś 2017, 364). Association agreements are an example of instruments of transformative power, for instance Eastern Partnership. Soft power, in turn, covers cultural aspects that led to the growth of the EU's attractiveness around the globe (Dimitrova et al. 2016, 3).

At the beginning of the 21st century the concept of Normative Power Europe spread across the EU, serving as explanation and justification of the EU's foreign policy. It was developed by a Swedish political scientist – J. Manners. The concept postulated positioning EU as a new international "superpower", promoting sustainable and balanced world peace policy (Piskorska 2015, 347).

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5.1. The main principles of EU soft power concept

EU soft power is presented as "a method by which the attractiveness of country's ideals and values can be promoted" (Rasmussen 2010, 266). It is based on the liberal values that reflect the high position of this actor at the international level. There are three main soft power resources in EU: European culture and identity, EU principles, EU institutions (e.g. The European External Action Service) (Azpíroz 2015, 6-7). The European External Action Service (EEAS) was founded in 2010. It became the EU's diplomatic service that, among various foreign policy activities, was the lynchpin of the EU's soft power. The EEAS handles the following instruments:

- Foreign Policy Instruments – responsible for the actions related to foreign policy;
- Partnership Instrument (PI) – covers projects carried out in cooperation with partner countries.

The PI is responsible for the promotion of EU's interests all over the world, concentrating on four main objectives:

- creation of policies to address global challenges;
- the shaping of the international dimension of Europe 2020;
- striving to attract foreign investors and favorable business opportunities for EU companies;
- promotion of academic cooperation and public diplomacy (European Commission 2019a).

In 2014 the European Parliament and the Council released the PI Regulation – a complex document concerning the EU external policies, the aim of which was to implement the Partnership Instrument. The Regulation's purpose was also to sustain the spreading of soft power and to facilitate collaboration in the educational and academic spheres. Its main priorities were:

- "enhancing cooperation in higher education: enhancing student and academic staff mobility, leading to the creation of partnerships aimed at improving the quality of higher education and of joint degrees leading to academic recognition (e.g. "Erasmus+ Programme");

- enhancing widespread knowledge of the Union and raising its profile: promoting the Union's values and interests in partner countries through enhanced public diplomacy and outreach activities in support of the objectives of the instrument" (Regulation (EU) No. 234/2014).

Soft power became one of the main instruments of EU's foreign policy. The implementation of the soft power concept in the EU was possible through the usage of public diplomacy. Contemporary understanding of public diplomacy in the EU is based on the idea of "long-term engagement aimed at building trust by engaging with the public in partner countries in a more meaningful way on issues that resonate most at the local level" (European Commission 2019). The European Commission allocated EUR 85 million to PI projects in 2014-2020. In 2016 the main instruments for the implementation of public diplomacy were considered to be:

- people-to-people contacts;
- networking events;
- outreach activities;
- empowering cultural operators and encouraging collaboration activities (European Commission 2019).

Apart from the European External Action Service, one of the main actors related to the EU soft power are the EU Delegations directly engaged with foreign audiences and the so-called European Union Centers, hosted at universities all over the world. Those Centers' main functions are:

- promotion of "greater understanding of the EU, its institutions and its policies;
- dissemination of information and EU views on issues of interest within regional communities;
- increase of awareness about the political, economic and cultural importance of the relationship between the EU and the specific country" (Cycak 2016, 14).

In general, the EU Centers are responsible for the realization of multidirectional educational and teaching programs, scientific conferences

and events, promoting education and EU democratic values. They can also be treated as information centers that popularize information about the EU abroad through social media and websites. New foreign audiences can also be reached through the cooperation with media, scientific centers, think tanks, policy makers, students and youth, according to EU Global Strategy adopted in 2017. EU public diplomacy as key instrument of soft power was "highlighted as an essential means to facilitate more effective cooperation with partner countries" (Baumler 2019, 7).

The future of EU soft power lies in the cooperation with non-EU citizens and NGOs. Core values here are mutual understanding and trust. The importance of developing soft power in the EU's foreign policy strategy is demonstrated by a high level of funding. According to the 2019 Annual Action Programme, EUR 18 150 000 was allocated for the cooperation with third countries in the general budget of the EU until January 2020. The Action Document for Public and Cultural Diplomacy specifies that action goals are to "develop EU's soft power by building alliances and better-informed decision-making on priority EU themes such as response to global challenges, use of multilateralism, promotion of EU values and principles, economic partnerships and fundamental rights, including in the field of trade and human rights" (European Commission 2019b).

The following were determined to be the main actions:

- "investment in public diplomacy activities reinforcing the study, research, teaching and debate on EU-related issues among students and academics through Jean Monnet Actions in selected priority countries/territories;
- funds will be provided to reinforce the capacity of the EU Delegations to do outreach and develop partnerships with local stakeholders in Canada, China, India, and the USA;
- support will be made available for people-to-people contacts and civil society dialogue in the USA;
- specific attention will be given to foster the role that culture in external relations can play in public diplomacy by increasing mutual understanding and confidence through dialogues and contributing to promote shared values as well as intercultural tolerance in strategic countries" (European Commission 2019b).

Within the EU Global Strategy, the purpose of soft power is to establish more EU long-term communicational links with different levels of foreign audience: from students/youth to business groups, think thanks, as well as to share common democratic values such as intercultural tolerance.

In 2016 an international research project was initiated to examine the connections between EU and European Eastern neighborhood countries as an attempt to increase the quality of the EU soft power. The project, named EU-STRAT, was launched on May 1 2016 and continued until the end of April 2019. Its main goal was to provide "an inside-out analysis and strategic assessment of the links between the EU and Eastern Partnership countries" (EU-STRAT 2019). The EU-STRAT's strategic tasks are:

- "to develop a conceptual framework for the varieties of social orders in Eastern Partnership countries to explain the propensity of domestic actors to engage in change;
- to investigate how bilateral, regional and global interdependencies shape the scope of action and the preferences of domestic actors in the Eastern Partnership countries;
- to evaluate the effectiveness of the Association Agreements and alternative EU instruments, including scientific cooperation, in supporting change in the Eastern Partnership countries;
- to formulate policy recommendations to strengthen the EU's capacity to support change in the Eastern Partnership countries by advancing different scenarios for developmental pathways" (EU-STRAT 2019).

Nowadays European Parliament utilizes new approaches to democracy support and mediation, calling them "evolving soft power". "The Parliament almost always organizes democracy support activities around the electoral cycle, so as to establish a better link between election observation and complementary activities such as mediation, election follow-up, parliamentary support activities and human rights action" in the priority countries and non-EU countries. The process of democracy building was not limited to election monitoring, so the European Parliament has recently developed a new approach to supporting democracy that expands on its predecessors. The actions it entails were planned to be applied to the whole of electoral process as "pre-election dialogue and the follow-up to election observation". What is

important is that the Parliament also organizes various trainings and study visits for representatives of third-country parliaments. At the beginning of 2019, comprehensive approach to democracy support was targeted at several priority countries: Georgia, Moldova, Ukraine, Morocco, Tunisia, Nigeria, and Peru (European Parliament 2019). Also, as part of democracy support activities, the European Parliament formed several groups of planned actions that were dedicated to "capacity building, mediation and dialogue support, and support for human right actions" (European Parliament 2019).

The initiative of the European Parliament under the "mediation" action – The Jean Monnet dialogue for peace and democracy – played an important role in the spread of the EU soft power. This program covered special consultations to political leaders aimed at building mutual trust and establishing a democratic parliamentary. The Jean Monnet dialogue for peace and democracy also contributes to institutional reform processes and establishes a platform for dialogue to seek consensus on national priority policies. The initiative was applied in cooperation with the Ukrainian parliament and with the parliament of the former Yugoslavian Republic of Macedonia (Jean Monnet Dialogues for peace and democracy 2019).

5.2. Eastern Partnership initiative – EU soft power tool for sharing democratic values

Eastern Partnership – which is a dimension of European Neighborhood Policy – represents a practical application of the EU's soft power. Its aim is the deepening of cooperation and promotion of EU democratic values and standards among six Eastern European countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine).

The Eastern Partnership initiative was presented in 2008 by Poland and Sweden as a way of "bringing up to speed" for Caucasus and Eastern European countries in terms of European standards, values and traditions. In 2009 this initiative was accepted by all EU members. The cooperation's aim was to carry out economic, cultural, business etc. projects. The Eastern Partnership's additional aim was to support democratic changes in the European neighborhood. The Partnership is a kind of "manifestation of the

EU's soft power approach to foreign policy; an approach that achieves wanted outcomes by attracting foreign governments to join your side through peaceful diplomatic strategies like offering economic aid, or appealing to shared values. It contrasts with hard power policies, which coerce cooperation through threat of military intervention, war, economic sanctions and other strong-arm tactics" (Center for European Studies 2019).

It should be mentioned that among all EU Member States (MS), Poland was and still remains the biggest supporter of the Eastern Partnership program itself and strong promoter of democratic values in the region. In the second decade of 21st century Poland appears to have developed a "peculiar philosophy" towards the Eastern European countries. On the one hand, for Eastern European countries Poland was a good example of positive economic, democratic and political transformations that result from joining the EU. On the other – Poland became a "bridge" between EU and Eastern Partnership countries – promoting European values and standards as well as applying soft instruments of persuasion (Szczerba-Zawada 2016).

Eastern Partnership remains one of the most important directions of Poland's foreign policy with different levels of cooperation: development, science, sport, business, culture, etc. Also the "initiative of Eastern Partnership gives a possibility of new positioning for Poland in EU" (Ociepka 2013, 121).

Since its begging in 2009, the Eastern Partnership, has faced a lot of challenges, mainly with regards to Russia's foreign policy towards neighboring countries, as well as the spread of disinformation and propaganda of the "Russky Mir" concept. Many scholars claim that the EU's soft power still remains weak against Russian hard power in the region of the Eastern Partnership program. That is why the variety of programs under the Eastern Partnership initiative was extended to include scientific cooperation between universities, student and academic staff mobility programs, people-to-people contacts initiatives, cross-border cooperation etc. Eastern Partnership countries took an active part in such programs as "Erasmus+, Horizon 2020, TAIEX, Twining, SIGMA, Neighborhood Investment Facility and Cross-Border Cooperation" (European Commission 2019c).

More than 10,400 students have studied in foreign universities across the EU since 2014 as part of the scientific programs targeted at young leaders from Eastern Partnership countries. When the Erasmus + program is taken into account, approximately 30,000 young people – students and academic

staff – benefit from the initiative (European Commission 2019c). It is also important to mention that the first Eastern Partnership European School was opened in Tbilisi with the studies of EU democratic values and standards as one of its program's focal points.

Trade between the EU and six Eastern Partnership partner countries has also visibly increased since 2016: by 15% with Armenia, by 17% with Azerbaijan, by 19% with Belarus, by 6% with Georgia, by 20% with Republic of Moldova, and by 24% with Ukraine (European Commission 2018).

According to the Eastern Partnership countries, the EU policy based on the principles of soft power, brought many transformations. Due to numerous consultations in the area of strengthening institutions, good governance, raising standards for the democratic functioning of political parties, implementing main judicial reforms and fighting corruption, some positive improvements were observed: e-asset declarations systems were set up in Armenia, Georgia, Republic of Moldova and Ukraine, and improvements in civil service laws paved the way towards a more depoliticized civil service in Armenia, Azerbaijan, Georgia, Republic of Moldova and Ukraine (European Commission 2018).

* * *

The European Union is not a military super-power, which is based on the concept of hard power. Its main accomplishment is building long-term international relations based on trust, using soft power instruments. Currently, the main EU soft power resources are European culture and identity, basic principles and key institutions, the European External Action Service playing a major role. On a more practical level, the EU soft power is based on the usage of its main instrument – public diplomacy. Its aim is to spread positive image of the EU and its MS among foreign audiences or, in other words, to win the hearts and minds of foreign societies. The responsibility for directing the EU soft power lies with the European Parliament which considers democracy support activities one of its priorities. The Eastern Partnership program was established to address the unstable political and economic situation on the EU's eastern borders. This initiative is a soft power "product" of the EU in this region, its aim to share democracy, stability, instant development and strengthen cooperation at different levels, including science, business, culture etc.

Abstract

The processes of globalization, an intensive development of informational society, EU enlargement, challenges connected with the migrants… All of the above have highly transformed the vector and specificity of EU soft power. Irrespectively, maintaining and sharing democratic values remains an integral part of EU policy. Soft power is presented as one of the main instruments of EU foreign policy. The aim of this research is to analyze contemporary understanding of the soft power concept in EU, main soft power actors and their initiatives. Special attention is dedicated to the study of the Eastern Partnership program (EaP) that became one of the most substantial EU soft power initiatives. The development of civil society and sharing democratic values in Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine play an important role in the thematic projects under EaP program. This article is based on the data presented by official EU institutions responsible for foreign policy realization, analyses of the European External Action Service activities, think tanks, EU-STRAT, EU Global Strategy and other scientific documentation. This study examines the role and importance of scientific diplomacy in EU soft power realization for growing number of people-to-people contacts, exchange of knowledge and creation of common strong democratic societies.

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6.

The definition of "refugee" in the 1951 Convention: some legal reflections

The 1951 Convention has been the main object of a significant number of publications focused on human rights.

This paper examines the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) through the application of a case-law study and a human rights approach. It focusses on the interpretation of Article 1(2)A [Definition of the term "refugee"]. Particular attention is paid to the difference between the terms "economic migrant" and "refugee". Moreover, concrete examples taken from the national constitutions of EU-28 Member States (MS) demonstrate the different approaches taken by various lawmakers regarding the crystallization of the right to asylum. One possible reason for this diversity could be related to the economic effects of accepting refugees, since the implementation of refugee rights entails – in the short and medium term – high costs for national budgets.

In the conclusions, the contribution offers a general overview of Article 1(A)2 and emphasizes it is important that judges ascertain refugee status not abstractly but on a case-by-case basis.

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6.1. The definition of refugee in the 1951 Convention

The 1951 Convention is considered an authoritative source of international law, codifying international refugee law (Jackson 1991). It was ratified by 146 out of the 193 UN members (75% of all countries). Article 1 (A)2 states that the term "refugee" applies, among others, to any person who: "As a result of events occurring before 1 January 1951 and 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".

The main contribution of the 1951 Convention is this precise definition of a refugee. The treaty does not include an explicit right to asylum. Nevertheless, the right to asylum can be understood as presumed by the Convention, for several reasons. First, the 1951 Convention prohibits *refoulement* (Article 33). As a result of this prohibition, the international community agrees that refugees have the right to temporary residence in the host country until a final decision regarding their claims has been made (Coleman 2003). Secondly, according to Article 1(A)(2), refugee status is an *ipso jure* status. Thirdly, the 1951 Convention cites in its preamble the 1948 Universal Declaration of Human Rights, whose Article 14 establishes the right to asylum.

Not all migrants are entitled to recognition as refugees. Article 1 (A)2 of the 1951 Convention specifies several grounds for persecution that entitle a person to refugee status. The first type of persecution is on the grounds of race, often being considered ethnic persecution (Cherubini 2014). The second type of persecution is on the grounds of religion. A clear example is when an individual is prohibited from becoming a member of a religious group (UNHCR 2004). The third type of persecution is on the grounds of nationality; under a textual interpretation of the 1951 Convention, "nationality" was understood as "citizenship". The UNHCR (UNHCR 1979, re-edited 1992) and case law (USA: Court of Appeals, Ninth Circuit, decision of 8 June 1999) have adopted a broader approach by overlapping "nationality" with "race".

The fourth type of persecution is when someone is a member of a group holding a particular political opinion; this notion originally aimed to grant

refugee rights to people coming from the communist bloc. Actually, this was the main goal of the 1951 Convention, and indeed, its definition is broad (Goodwin-Gill, McAdam, 2007). However, refugees must prove their membership of a political party (Canada: Federal Court of Canada, decision of 17 July 1998). However, States can refuse refugee status if applicants have committed political crimes, as established by Article 1F.

The last type of persecution is on the grounds of membership in a specific social group. This is a residual notion applied to grant refugee protection. Examples of such cases include homosexual persons in totalitarian regimes (New Zealand: Refugee Status Appeals Authority of New Zealand, decision of 7 July 2004; UK: Vraciu Immigration Appeal Tribunal (11559)) or people with HIV-positive status in paternalistic or conservative societies (Canada: OPK (Re)).

A review of the EU-28 national constitutions reveals a diversity in the applications of Article 1 (A)2 of the 1951 Convention, even in the framework of such a close community of the EU Member States (MS). Thirteen out of the EU-28 make no mention of the right to asylum in their national constitutions. In Austria, the "right to asylum" has been recognized as one that needs a decision of a special court – the Asylum Court. The other countries have acknowledged the "right to asylum" as a constitutional right. Some argue that these countries are conveying an image of a State highly protective of human rights in order to increase their status in the international political arena (Sugden 1982).

However, protections vary, from the most basic to the highest form of protection. For example, in Poland, Spain and Romania, the national constitutions delegate to the legislature the task of laying down the terms under which citizens from other countries and stateless persons may enjoy the right to asylum. In contrast, Italy's constitution includes the right to asylum, which is recognized not only on political grounds, but also on the possibility of a foreigner's actual exercise of constitutional democratic freedoms. In addition, there are differences among the countries in the levels of protection according to different criteria and/or different grounds of persecution.

While not all EU-28 national constitutions establish persecution on the grounds of race (23/28), nationality (22/28), or membership in a specific social group (23/28), all EU-28 national constitutions recognize the right to non-discirmination based on religious or political grounds.

A possible reason of why all the EU-28 national constitutions recognize the right to non-discrimination based on religion might be understood through the study of refugee protection in a historical approach. It is thought that the first modern recognition of the right to asylum occurred in 1648, with the Peace of Westphalia (Betts, Loescher, and Milner 2013). It included several agreements that ended several wars, such as the Thirty Years' War (1618-1648) in the Holy Roman Empire, and the Eighty Years' War (1568-1648) between Spain and the Republic of the Seven United Provinces of the Netherlands. Refugees were recognized as a minority group which shared the same religious affiliation, which differed from that of their local monarchs. Nevertheless, in contrast with today, refugee rights were group rights and not individual rights. A similar argument might be applied in the case of recognition by all the 27 (central written constitutions) of the EU Member States of persecution based on political grounds, since, as mentioned above, the goal of the 1951 Convention was the protection of persecuted individuals from the Communist Bloc.

The diversity among EU Member States' constitutions might be related to the economic effects deriving from the acceptance of refugees. Applicants who are recognized as refugees in EU host countries are entitled to several rights, which entail high costs for national budgets. A narrow interpretation of international norms governing refugee status and of the principle of *non-refoulement* decreases the number of foreign applicants recognized as refugees. It follows that States which use this narrow interpretation can spend less on the temporary protection of refugees, the protection of refugee rights in the short and medium term, or on refugee integration.

In fact, some potential positive economic effects of accepting refugees might become visible in the long run. Refugees could also be a significant economic factor for an increase in the national GDP (International Monetary Fund 2016). In general, refugees have a young average age, which might positively affect the labour market unskilled jobs (Legomsky 1994), since their employability is closely linked to their exploitability (Neuman 2010). Moreover, several economic studies have demonstrated that after a few years of residence in the host countries, refugees earn more than "economic migrants" (Cortes 2004; Dustmann 1997; Rivera-Batiz 1990). Other empirical research has shown that while refugees have escaped from their home countries and will invest their human and economic capital in the host countries, economic immigrants will eventually invest their earnings in their countries of origin (Borjas 1985; Carliner 1980).

6.2. The difference between "economic migrant" and "refugee"

The main characteristic of economic migrants is the fact that they leave their home voluntarily (Jackson 1991). Their main driving incentive is the regional or international wage differentials (Czaika 2009). As a result, in contrast with refugees, they are not entitled to receive international protection. The dichotomy of traditional literature on migrants is between "voluntary economic migrants" and "involuntary political refugees" (Martin 2001; Menjívar 1993). However, nowadays, this distinction is not that clear (Tuitt 1996).

The simplistic dichotomy between "voluntary economic migrants" versus "involuntary political refugees" has been applied by several countries, such as the US policy of interdiction with respect to Haitian refugees in the early 1980s (Farer 1995; Villiers 1994), to Vietnamese refugees by Hong Kong in the late 1980s (Diller 1988), or more recently, in the Chinese policy to push back thousands of North Koreans (Lee 2001).

The key element in the classification of refugees is the notion of persecution. The traditional literature has emphasized persecution in order to exclude the violation of socioeconomic rights from the definition of a refugee (Hathaway 2017). However, most scholars (Lambert 2001; Musalo and Knight 2001; Harvey 2000) and judges (ICJ Namibia; UK: Hoxha [2005] 4 All ER 580; Shah [1998]; in Sepet [2003]; R on the Application of Altin Vallaj; Canada: Suresh v. Canada), in addition to the UNHCR (1990), Amnesty International, Human Rights Watch (2004), and other international organizations, argue that the 1951 Convention also covers socioeconomic rights.

The official position of the UNHCR (1992) is that an economic migrant is a person who leaves their country *voluntarily* and *exclusively* due to economic considerations. The use of the word "exclusively" indicates that a person who flees their country for other reasons besides economic motives cannot automatically be denied classification as a refugee. In addition, the UNHCR has specified that persecution can sometimes take the form of economic discrimination or punishment, such as the denial of trading rights or excessive taxation of a specific social group based on its religion or ethnicity is also considered persecution (UNHCR 1992).

A case-law study of citizens leaving their home country due to economic reasons shows that several judges have ruled in favour of refugee status. For instance, homosexual people in totalitarian regimes (Belgium: Conseil du Contentieux des Etrangers, decision of 31 March 2010), people with HIV-positive status in paternalistic or conservatory society (Canada: OPK (Re), the case of Chinese women not allowed to have more than one child during the one-child policy (Australia: Chen Shi Hai); a woman who "voluntarily" agrees to be smuggled into a foreign country as part of a prostitution trafficking operation as it is her only possibility of survival (Canada: PYM (Re), HDO (Re); and NWX (Re)), or Roma people who suffer extensive discrimination in education and employment (New Zealand: Refugee Appeal No. 71193/98).

Therefore, according to the literature, persecution and economic considerations are not mutually exclusive alternative conditions. Indeed, refugees *might* respond to economic incentives (Czaika 2009). By taking into consideration all these abstract differences, it follows that judges shall ascertain refugee status on a case-by-case basis and not abstractly.

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The 1951 Convention Relating to the Status of Refugees reflects a human rights approach. This paper offered a general overview of Article 1(A)2.

Although the majority of the EU-28 MS codifies the protection of persecuted persons, protections differ from the lowest form of protection to the highest. While in Poland, Spain, and Romania, the national constitutions delegate to the legislature the task of laying down the terms under which citizens of other countries and stateless persons may enjoy the right to asylum, Italy's constitution includes the right to asylum recognized not only on political grounds but also on the possibility of a foreigner's actual exercise of democratic constitutional freedoms. However, all the EU-28 national constitutions recognize the right to non-discrimination based on religion or persecution based on political grounds, since this is the direct result of lessons of the past.

In addition, the official position of the UNHCR is that an economic migrant is a person who leaves their country voluntarily and exclusively due to economic considerations. Thus, persecution and economic considerations are not mutually exclusive alternative conditions. A case-law study of citizens

leaving their home country due to (apparently) economic reasons confirmed that several judges have ruled in favour of refugee status. These might be cases of a woman who "voluntarily" agrees to be smuggled into a foreign country part of a prostitution trafficking operation as it is her only possibility of survival, or Roma people who suffer extensive discrimination in education and employment.

In conclusion, the main contribution of the 1951 Convention is this precise definition of a refugee. However, judges shall ascertain refugee status on a case-by-case basis and not abstractly.

Abstract

This paper analyses the 1951 Convention Relating to the Status of Refugees through the application of a case-law study and a human rights approach. In particular, the contribution focusses on interpretation of Article 1(2)A. In addition, concrete examples taken from the national constitutions of EU-28 Member States demonstrate the different approaches taken by various national lawmakers regarding the right to asylum. Moreover, this analysis explores the difference between the terms "economic migrant" and "refugee", by examining the position of the United Nations High Commissioner for Refugees.

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*Sinem Bal**

7.

Refugee crisis and the limits of the EU's human rights norm promotion

The EU is a unique actor in world politics: neither a state nor an international organisation but comprised of both because of its supranational and intergovernmental nature. What makes it different from other actors is its use of a catalogue of values and principles that are shaped, shared, and diffused by Europe around the world. By expanding these values beyond Europe, the EU constitutes its self-identification and reflects a particular kind of actorness in international affairs. These performances occur within specific role conceptualization interpretations, such as a "civilian power" (Duchêne 1972; Telò 2004), "structural power" (Keukeleire 2003), "normative area" (Therborn 2001), and "normative power" (Manners 2002). All these classifications aim to clarify what the EU is, what kind of political actor the EU is, and what the EU does. Among these academic works, Ian Manners (2006) contends that these approaches and related theoretical studies all include a degree of normativity through the term "normative", which overlaps with the EU in many ways. Manner, in most of his works, describes the EU as a norm promoter as it conditions universal norms, which are derived from international human rights conventions and states' constitutional order, to third countries in order to consolidate the moral consciousness in international politics. The EU first socialises these norms inside its borders before diffusing it to other actors through treaties or financial support to local and national public bodies and NGOs. The EU's role in norm diffusion has two paths. The first one is to adopt

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and socialise universal principles inside its borders, whereby the EU is a norm importer; the second is to diffuse these principles as EU norms in its external relations, thereby acting as a norm entrepreneur or norm leader.

However, the EU's stance on the case of refugee crisis, the practices in migration and asylum policies, the rise of nationalist parties in Member States' (MS) parliaments, Brexit process and specifically EU-Turkey deal's implementation and violation of non-refoulement principle unravels that the EU got stuck between human-right norm-promoter self-image and European security dichotomy. From a constructivist – by using norm's life cycle – perspective, the paper examines to what extent human rights norms are internalized inside the EU borders. This paper argues that before designating the EU as a normative power and related meta-narratives, it is important to understand whether the EU acts in compliance with its founding principles that shape its political-normative identity. Hence the paper first elaborates how to interpret the EU's human-right promoter role in norm's life cycle constructivist approach, and then uses the EU's reaction to refugee crisis and the limits of its norm-promotion role. Methodologically, apart from literature review in related articles and internet sources, specifically in the case of the EU-Turkey Deal, in-depth interviews were made with four humanitarian aid/refugee professionals who work in the refugee NGOs in Turkey (İstanbul and İzmir). Open-ended questions that need more than one answer are preferred. There are also other interviewees, which will be completed in forthcoming months

7.1. EU's human rights norm promotion through constructivist perspective

After laying the economic foundations for integration on substantial grounds, the EEC gradually changed its outlook towards a deeper union, through the Treaty of Maastricht in 1992, the Copenhagen Summit and its membership criteria in 1993, Treaty of Amsterdam in 1997, and the Lisbon Treaty in 2007, along with various other documents, directives, and declarations. These treaties, summits, and declarations are noteworthy due to their intensified political dimensions and contribution to the EU's self-representation. Particularly Treaty of Lisbon and its agenda gave rise to

external actions of the EU and one of the key aspects of normative identity of the EU in the external relations. Previously, the Copenhagen criteria, which were designed for the candidate countries wishing to become EU members, have been constituted as one of the significant political images in terms of human rights, democracy and rule of law. The political criteria aligned with the universal values, which are derived from international agreements and conventions, were primarily intended to harmonize institutional, judicial, and political structures of the candidate states. These values helped these states as well as MS to re-constitute their domestic laws, prepare for a market economy, and reform their political structures.

It is clear that these norms matter for the EU's external relations, especially for enlargement and neighbourhood relations. Hence, researchers have tended to analyse how these norms penetrate and are activated in third countries and adjusted to these states' domestic laws. Another research focus is whether these norms create constant change and sustainability in these countries' institutional and legal structure, and whether they are internalized locally and create ideational change in the society. If concrete sustainability and ideational change occurs after norm diffusion, then EU conditions have credibility and the EU has a degree of "power" that includes a "normative" character.

Manners (2015) grounds his "Normative Power Europe" (NPE) argument on normative justification, which is embodied by principles that appear through actions, which have impacts that influence the principles and produce an ongoing mutual constitutiveness. Considering this normative justification, he defines "power" in terms of EU actions and their effects. By considering ideational change as the expected effect, Manners locates the NPE argument among other power definitions: "idée force, power over opinion, or ideological power" (Manners 2002, 239). These approaches, which are far from state-centric interests, are not only derived from the EU's historical background but also products of the United Nations and the European Charter of Human Rights (Diez 2005). The EU then integrated them into the Union's identity construction while simultaneously contributing and consolidating to the United Nations Charter's as well as other Conventions' principles. Hence, given the definition of normative theory, all international relations are normative and designed by cosmopolitan law, and there are normative judgements that show us what ought to be done. This encompasses actors with their moral cases, directing them towards the normal, which is an extension of the norm.

Likewise, Manners' normative theory, norm's life cycle modelled constructivist theory also suggests employing the power of ideas and norms at the centre of the EU's external relations debate. Although the EU's international identity and its norm promotion role link with several theoretical debates in international relations (IR), the importance of ideas, norms, and identity concepts in foreign policy analysis deserve more investigation from a constructivist approach. While theorizing NPE, most studies have not overtly identified the stages of the process, although phasing is crucial for ascertaining the EU's shortcomings and neglected acts. That is, these absences can reveal where the EU should readjust its foreign policy self-image.

7.2. EU's human rights norms through norm's life cycle approach

With respect to the EU's human rights norm promoter role and its normative power on "other" countries, Manners suggests a three-stage analysis for normative justification comprising an action-impact-change cycle, which overlaps with and suggests similar processes to Finnemore and Sikkink's (1998) constructivist norm's three-stage life cycle: norm emergence, norm acceptance/cascade, and norm internalization. Finnemore and Sikkink's categorization of norm diffusion can help this study to detect what the EU does not do and should do. Secondly, Manners' insistence on reflexive monitoring for a more normative Union is defined by a "should" modality that is similar to Finnemore and Sikkink's counterpart modality "oughtness" as an advice for shaping the "normal". Although Finnemore and Sikkink do not directly suggest shaping the "normal" in their arguments, both approaches reach the same conclusions and a constructivist life cycle analysis to crystallize the normative and ideational performance of the EU as a norm-exporter and promoter.

To scrutinize how international norms are accommodated in place of the domestic structure, Finnemore and Sikkink divide norms into three steps located in a loop that they call the life cycle. These three stages are based on emergence, acceptance/cascade, and internalization, all of which are designed to theorise the effect of norms on other actors' behaviours. First, the idea finds grounds through norm entrepreneurs who look for suitable opportunities to

spread this agreed norm. These "norm entrepreneurs attempt to convince a critical mass of states, without which the achievement of the substantive norm goal is compromised" (Finnemore, Sikkink 1998, 901). Sometimes this conviction needs time because it is not easy or fast to institutionalize a norm and habituate it in the given society and in its ideational structure. Thus, permeation of any norm occurs through socialization. During norm construction, Payne (2001) stresses the significance of framing the norm through using the right instruments to persuade normative change to a given standard. After norm is emerged in a proper kind of standard, between the first and second phases, there is a threshold that defines success of the norm acceptance and the succeeding moves. Threshold specifies whether to proceed towards change or not. During this first phase cycling of the norm, different social actors may be involved to pressure the state for accepting the new norm. In the following, the new norm becomes a subject of state socialization, which decides whether the society can digest the norm or not, as there is no guarantee that every nation or locality would accept and internalize the norm.

As Finnemore and Sikkink showed, once the life cycle of any norm has been completed, it can be asserted that the norm is internalized, bureaucratized, and institutionalized. This means that both the society and its political leaders have accepted and habituated the norm. If the transmitted norm has not explicitly completed its life cycle, then this ill-completed norm will certainly face non-conformity in its arrival. Therefore, socialization and internalization stages should be justified first in the norm emergence stage, which is dependent on the efforts of the norm entrepreneurs who first formed the norm's content. In terms of human rights norms, norm emergence was completed at the universal level before being issued by the EU during the acceptance process, then through policies and legal arrangements the EU socialises it inside it borders. Since then, the internalized human rights norm has become part of EU identity. This is because, at both EU and member state levels, "benign" universal norms are acknowledged as an essential part of the Union. Thus, these common principles are expected to be practiced by both EU institutions and MS, given that the norm originated from the EU.

7.3. EU's responses to refugee crisis and limits of human rights norm promotion

Since Syrian Crisis started, more than 5,714,664 Syrians have fled from their country to their neighbour countries like Lebanon, Jordan, Iraq, Egypt and Turkey as to obtain a protection under the international protection principles. Other thousands have made their way to Europe either by land or by sea and applied for a refugee status (Connor 2018). After their arrival to the EU Member State, these people are subject to international protection and depending on his/her individual circumstance, persons receive a refugee, asylum, migrant, temporary protection or subsidiary protection or related statuses. Because both from a human rights context and specifically in terms of protection of refugees and asylum seekers, European countries are the signatories of UN Convention on the Status of Refugees (1951, the Geneva Convention), the European Convention of Human Rights (1950) and Responsibility to Protect (UN 2005) in the international scale, the EU Charter of Fundamental Rights (2007) and Dublin Regime III (2013) in EU level. Hence these people's arrival and how they are protected is a significant "existential question" for the EU's credibility in human rights self-image (Barbulescu 2017).

When concerned this process from Dublin Regime III, the arrival person should be assessed on individual basis and dependent to its specific circumstance. In addition, Dublin Regime assigns the arrival country as the responsible country for the asylum seeker/migrant or refugee. The EU MS have been receiving asylum seekers or refugees from all around its borders, and according to Frontex's data the migration route is based on Eastern-Central and Western Mediterranean and Western Balkans.

The origins of countries are as follows:

- people who cross the border illegally in 2019 (January - September) to East Mediterranean Route are originally from Afghanistan, Syria, Turkey, Iraq and Palestine;
- people who cross to Central Mediterranean are originally from Tunisia, Sudan Pakistan, Cote d'ivoire, Algeria;
- people who cross to Western Mediterranean are from Morocco, Algeria, Guinea, Mali and some unknown,

- people who cross to Western Balkans are originally from Afghanistan, Iraq, Iran, Pakistan and Turkey.

In terms of Syrians, it is indicated by Frontex's 2015 annual risk analysis report that majority of them do not register to asylum/refugee status to the member state of arrival, instead, due to welfare state benefits or more different reasons, they move to other – especially northern-countries, such as Germany and Sweden.

Among the EU MS, Italy, Greece and Hungary, whose geographic location makes them easier entry points, are those most affected by the influx of Syrian refugees. Nevertheless, in terms of asylum applications, restrictive responses made by Hungarian far-right government, which was constantly warned by both the EU especially over Afghan Refugees and by the UN on draft laws that threatens refugees and violate for human rights. On the other hand, the Southern first entries of immigrants are to Italy and Greece, where mentioned in the worlddata 2018 statistics, majority of asylum applications have been rejected in the first instance. Likewise, the new governments in both countries do hesitate to receive more migrants either by reducing safeguards for asylum seekers from countries like Afghanistan, Syria, and Iraq in an effort to block the arrival of migrants and refugees or by blocking disembarkation of rescued persons in Italian ports.

The failure to register in the first entry or blocking these people's entry "reflect the fact that the two countries clearly broke the EU's Dublin Regulation No. 604/2013" (Neergaard 2019, 81), which indicates that the first member state where fingerprint is recorded or asylum/refugee claim is lodged is responsible for this claim, not other countries. Hence, Dublin regime obliges MS in charge of examining the request of international protection presented by a third-country national or by a stateless person in one of the European states. According to Neergaard (2019), these practices of the EU MS show that there is a wavering legitimacy of the EU, in which this legitimacy deficit becomes distinct especially between the years 2015-2016, when refugee flux increased. Ippolito (2014) also contends that the Common European Asylum System has failed to achieve its primary objective, which was to establish a common standard of protection across the EU. It is because MS have implemented EU-based asylum law in different ways and these disparities negatively impact upon both asylum seekers and individual MS.

In a similar vein, Newman and Stefan (2019) point out that the EU's legitimacy as well as credibility in terms of Normative Power Europe conceptualization has been tested through Brexit process, rise of national parties in MS and most importantly the EU's engagement to Responsibility to Protect (R2P) norm, which is a commitment endorsed by the MS of the UN at 2005. It commits states to protect their society from any violence against humanity on the one hand, but also obliges these states or international society - to take responsibility in the protection of people who are facing atrocities by their national authorities. Indeed, Syrian refugee flow makes one question "the international community's duty to act on behalf of the afflicted people inevitably arise, thereby fuelling convoluted debates about Responsibility to Protect (R2P)" (Panebianco, Fontana 2018, 1). Despite the EU taking this international human rights norm with respect to human protection as a reference to its core values, it has taken slow paths in establishing collective actions towards Syrian and Refugee Crisis as refugee protection is an essential instrument for the implementation of this Responsibility to Protect norm. However, the sudden and ongoing refugee crisis shed the light that there is a lack of desire for promotion of this norm especially inside its borders.

Hence, it can be argued that the EU foreign policy and its self-image pulls between security, state sovereignty and MS' limit for immigration reality, to freedom, rule of law and human rights norm promoter role in the world politics. In this point Lavenex (2019) contends "the development of common asylum/immigration policies is the indicative of the normative tensions implied in EU's transition from a regulatory polity towards a political Union" (581), in which the EU got stuck among conflicting identities: normative power-market power and statist identity addressing internal migration/asylum policies. From the interviewees Erçoban (Mülteci-der 2019) and İsal's (STL 2019) perspectives, these conflicting attitudes of the EU are indeed the reflection of "Fortress Europe", in which the EU has been disguised for many years but unravelled in the Refugee Crisis and following policies that also threaten the protection of asylum seekers.

7.4. Turkey as a safe country?

In the EU's list of safe countries, the main criteria are aligned by referring International Law (the Geneva Convention) and EU law (the Asylum Procedures Directive) consider a country is safe when there is a democratic system, rule of law and respect to human rights such as not persecution, war crime or inhuman practices. In a similar vein in the Copenhagen Criteria the EU reflects its concern on these values and any candidate state that wants to join the EU should fulfil these conditions. According to this list, candidate countries are envisaged as safe countries because an asylum seeker or a refugee would not face an automatic rejection and would be assessed on an individual, case-by-case basis. This also means that because candidate countries desire to be a member of the EU, they arrange their political, economic and judiciary system align with the EU norms.

It is clear that this list is mostly designed by the EU law on Asylum Procedures as according to 1951 Geneva Convention's safe country definition, in addition to the aforementioned criteria, if one person is granted as a refugee in the host country but has to resettle to another third country, he/she should get a guarantee that he/she would still protect his/her refugee status.

In March 2016, it is agreed by the EU and Turkey to control the crossing of refugees and migrants from Turkey to EU borders (particularly to Greek Islands) in order to curb the large numbers of refugees arriving in Europe. According to the Deal, every person arriving irregularly to the Greek islands – including asylum-seekers – would be returned to Turkey. In exchange, EU MS would take one Syrian refugee from Turkey for every Syrian returned from the islands.

This "Deal" is problematic in many respects; first in Turkey under Law on Foreigners and International Protection, those who fall within the refugee definition in Article of the 1951 Convention supposed to come from a "European country of origin", which means the refugee should be a European. Hereby Turkey has a geographical reservation to the Convention and should not be designated as a safe country. Second, UNHCR's three durable solutions for refugees as part of its core mandate are voluntary

repatriation, local integration, and resettlement. During the Deal these are not materialized, and the desires of the Refugees have been bypassed. Third, according to Deal "results must be achieved in particular in stemming the influx of irregular migrants", but it is vague whether the parties were referring to Syrians as irregular migrants or others. In addition, the Deal also includes Asylum Seekers into the return process, although Asylum Seekers should be evaluated under international protection and not counted in this process. Fourth, the Deal directly violates the non-refoulement principle of Geneva Convention and returns the refugees to the transit country where they came from. Finally, in political context the EU acknowledged Turkey as safe country and agreed on a Deal for Refugees resettlement. However, Turkey is subject to EU's criticism for 20 years as it does not fulfil the Copenhagen Criteria properly. Especially in recent years according to progress reports, Turkey violates human rights, democracy and rule of law, which are both universal core values – as well as safe country definition criteria.

With respect to EU-Turkey deal and its trajectories in Turkey, four interviews have been made with a civil society organization that works with refugees in Turkey. The interviewees are Pırıl Erçoban who is the director of "Solidarity with the Refugees Association", Abdullah Resul Demir, the lawyer and the director of "International Refugee Rights Association", Mahmut Can İsal, the lawyer of Support to Life Association; and Hilal Gençay the Former Humanitarian Aid Organisation Professional and recent Human Rights Trainer of Raoul Wallenberg Institute in Istanbul. The interviews are done between the September and October of 2019 and to be continued with more civil society organisations and humanitarian aid workers.

All four interviewees agreed in one point that this Deal is a human rights violation from a humanitarian perspective and legal context. First refugees become a negotiation/bargaining tool between EU-Turkey Relations, which makes the case more inhuman and creates a contradiction in terms of security and human rights. Second, non-refoulement is a principle in refugee law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened. According to İsal and Demir, as these people are not granted as refugee in Turkey, this return circumstance increases their vulnerability and threatens their access to rights. The EU

as the major donor in the international arena gives financial assistances to the NGOs in Turkey if they conduct a project that concerns refugees. According to the interviewees, the budgets are limited, the procedures of the projects are complicated and onerous, and the major humanitarian NGOs sometimes need urgent funding for large-scale activities but cannot access to EU financial assistance easily. Hence it is not always easy for these NGOs to get EU funding. As indicated also by the Gençay, these returns augment the refugee population in Turkey and local integration go from bad to worse. Because with the mass refugee population, xenophobia has been increasing and threatens the lives of these people.

* * *

The EU's normative power is based on both an EU's power of attraction in the world politics in terms of constitutive values, the way it actualises these values and its behaviours, and the EU's authority in promotion of human rights norms in its foreign policy. It is always significant to assess what the EU is and what the EU does, however it is also important to shed a light on what the EU does not do. This might be elaborated by the capacity and the expectations gap approach, yet the EU itself designs the capacity and the others' expectations.

In fulfilling the Dublin Regime III's commitments, Responsibility to Protect norm and Geneva Convention criteria, the EU puts down to the fact that neither the EU level nor the MS level human rights norms are not explicitly internalized. Refugee crisis management is held hostage of the dilemma or a dichotomy between "border control argument" based on security concerns versus "duty of protection" triggered by human rights norm promotion self-image before others.

Although the EU remains one of the most substantial donors in the international financial assistances under humanitarian aid or empowering civil society that works with refugees, the EU puts Syrian people as well as other asylum seekers as a bargaining tool. It curves international regulations in favour of the EU or more specifically MS' interest in which at the same time becomes the subject of human rights violation.

Abstract

In its foreign policy, the EU puts both candidate states and its neighbourhood countries into a normative vacuum to conform and adopt universal values such as human rights, democracy and rule of law. Hereby, the EU represents a norm promoter actorness that obtains, declares and as well as employs universal values inside and outside its borders. Nevertheless, after the Syrian war escalated, and when a large influx of refugees was fleeing to Europe, it becomes significant to test the limits of EU's human rights norm promoter self-image. The EU's uncertainty reveals itself in EU's slow paths in the European consensus for the Responsibility to Protect principle of the UN, in breaking the Dublin Regime, and wrong and insufficient practices in Turkey-the EU deal or breaking the articles of Geneva Convention makes one to question the EU's credibility. From a constructivist perspective, this paper examines to what extent human rights norm's life cycle is completed inside the EU borders and argues before designating the EU as a normative power and related meta-narratives, it is important to understand the contradiction between the rhetoric and the act, and how this dilemma of the EU represents an "ambivalence power" on others.

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8.

EU, states, and NGOs – multi-agency response to refugee crisis and its challenges for EU values

The aim of the paper is to research the cooperation between three levels of actors (EU, states, and NGOs) in dealing with refugee crisis since 2015. The topic is relevant for understanding how the project of European integration, still evolving, has been transformed by one of its most serious disturbances in the 21st century. The conceptual, legislative and practical aspects of that cooperation should be seen as both effect and cause of a transformation of EU Member States' view on their community and the role of civil society.

Methodology of the research is based on legal, institutional and conceptual analysis, with reference to political thought relevant to the issue. Especially the views of founders of the European integration and philosophers who examine conceptual basis and evolution of the EU will be taken into account. A theoretical basis for the research is the human security approach elaborated within the United Nations.

The main question of the paper is to explore how multisectoral crisis management impacted values of the EU. The first section of the paper analyses mutual relations between EU institutions, states and NGOs in the main elements of the response to the migration crisis, i.e. the relocation programme, search and rescue operations at sea and hot-spots. Next, the article attempts to elaborate which values are fundamental for the EU

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project. In the conclusion the results are summarised in a way which shows the impact of the practical application of projected crisis response on the ideological fundament of the EU.

Before starting the analysis, it is essential to explain the understanding of the term "migration crisis". As Berger and Luckmann point out, a reification of human phenomena (i.e. considering them to be something other than human products) leads to forgetting who is their author and creates a "dehumanized world" (Berger and Luckmann 1966, 106). Therefore, in this paper, the term "migration crisis" is understood as a situation of difficulties for *humans* – both migrants and EU citizens. In turn, the responding actors are seen as different forms of organisation of people attempting to manage the abovementioned difficulties.

8.1. Three levels of European response to the migration crisis

Following the conceptual frame drawn up above, this chapter aims at research on mutual relations between three kinds of organisations (EU, states, and NGOs). The Treaty on the Functioning of the European Union states that in an emergency of a sudden inflow of migrants, the Council "may adopt provisional measures for the benefit of the member state(s) concerned" (TFEU, art. 78[3]). That legal basis allowed to react in 2015 within the relocation programme stipulated in "A European Agenda on Migration"(EC 2015, 19), together with the so-called "hot spot approach", which is a procedure of cooperation of EU agencies with Member States (MS) (EC 2015, 6). Other actions set in the document were Frontex operations aiming at saving lives at sea (EC 2015, 3), as also the assistance of the EU with returning irregular migrants and with investigations against smugglers (EC 2015, 6). As we can see, the EU's proposal to deal with the crisis has been based on solidarity between the MS and facilitating role of European agencies.

The relocation programme, a core of the EU response, has been launched by two decisions of the Council in September 2015 for a period of two years. Since its beginning, the solution has caused discord between the MS. Hungary and Slovakia (supported by Poland) brought legal actions against the

Council's decisions on relocation, claiming both procedural and substantive reasons. Their claims were finally dismissed by the Court of Justice of the EU (CJEU 2017) and the European Commission has launched infringement procedures against several governments for non-compliance with the relocation obligations (EC 2017). Nevertheless, the programme cannot be evaluated as successful. After the set period of two years, the goal assumed in the beginning was fulfilled only in less than one third, deeply varying between the MS (Šelo Šabić 2017, 7): that was criticised by NGOs. Catherine Woollard, Secretary General of the European Council on Refugees and Exiles (ECRE) called the relocation "the only game in town when it comes to solidarity" and she expressed an opinion that due to the absence of solidarity "a challenging but manageable situation became a crisis" (ECRE 2017). The causes of the final result of the programme are complex and exceeding the scope of this paper, however, it seems that after four years since it has been launched, the goal named "solidarity" has not been achieved.

Another problematic issue arose in a form of so-called "disembarkation crisis" which has been caused by the refusal of Italy to disembarkation of NGO search and rescue (SAR) vessels in Italian ports (ECRE 2019, 3). Reactions to that difficulty exposed discrepancy of attitudes between different NGOs. While Migrant Offshore Aid Station (MOAS) on its website called for avoiding politics in SAR initiatives (MOAS, n.d.), Médecins Sans Frontières (MSF) claims that humanitarian work is strictly attached to the critique of the causes of human suffering. Also members of Sea-Watch, another NGO, admitted that their work is both humanitarian and political and they want to put pressure on politicians (Cuttitta 2018). Nevertheless, it has to be noted that all of these three actors cooperate with the Italian authorities and also with Frontex what was commented by one representative of Sea-Watch by pointing out that politics cannot be a priority "in a matter of life and death" (Cuttitta 2018). Paolo Cuttitta (2018), a researcher on SAR operations at the Mediterranean, concludes that in this case governments are being relieved from their responsibilities by NGOs and, what is more, the border regime is getting humanitarian non-state legitimation by actors who declare to contest it. However, it is essential to be highly cautious with expressing such a conclusion when it comes to policies applied in case of emergency. In 2019 Italian court ruled that a captain of Sea-Watch ship who was arrested for breaking a naval blockade had not committed any act of violence because her duty was to protect life (The Guardian 2019). Therefore, "in a matter of life and death", the

border regime can be subject to contestation. What more we can observe, is that whereas in case of the relocation, the main discrepancy arose between EU institutions and MS, the situation at sea has triggered tensions mainly between state actors and NGOs. Moreover, the NGOs themselves presented different approaches to involving political agenda in their actions.

Hot-spots and other camps established mainly in Italy and Greece are also important fields of cooperation between EU, governments, and NGOs. Physically the hot-spot is a specific sort of camp equipped usually with containers and sanitation (Papadopoulou 2016, 46), designed exclusively for a working method assuming deployment of EU agencies to support member state authorities with registration, identification and first assistance of new arrivals (DRC 2017, 9). Several EU bodies, as well as non-governmental organisations are present in the hot-spots and other camps. For example, in Italy the task division in hot-spots is guided by Standard Operational Procedures, which have been developed in cooperation with the EU institutions, the Office of the United Nations High Commissioner for Refugees, and the International Organization for Migration, therefore, these actors had also impact at the policy level (DRC 2017, 14).

As Papadopoulu (2016) shows, in the hot-spots Frontex is focused on assisting with registration, nationality screening, fingerprinting and investigating on smuggling routes and traffickers, while European Asylum Support Office (EASO) provides information to migrants and offers operational support to national authorities in case of Dublin procedures[1]. In all cases, the role of Frontex in Italy is only to support and the responsibility remains with the national authorities. On the other hand, in Greece before 20 March 2016 nationality screening was conducted exclusively by Frontex and Frontex officers escort persons returned in line with EU-Turkey Statement (Papadopoulou 2016, 49). That agency provides also "technical and operational reinforcement" in providing information for new arrivals (DRC 2017, 22).

EASO is another important EU agency working in the hot-spots. In Greece, EASO experts are responsible for conducting asylum interviews (DRC 2017, 13; Papadopoulou 2016, 48), asylum processing and delivering opinions on the admissibility of applications. According to some NGOs, this role goes beyond EASO's mandate (DRC 2017, 4, 23) and the Greek national asylum

[1] Procedures in line with Regulation No. 604/2013 known as the Dublin III Regulation.

agency often relies on EASO's record and hence its opinions constitute *de facto* admissibility decisions (DRC 2017, 24). Also, ECRE notes that the role of EASO in Greece raises questions "in terms of compliance with the national legislative framework" (Papadopoulou 2016, 51). Thus, we can observe a stronger role of EU agencies in Greece than in Italy.

Similar conclusions can be confirmed by observation of social assistance for migrants in these two countries. Due to inadequacy of living conditions ensured by the Greek state, the European Commission and UNHCR signed an agreement to establish accommodation places funded by the EU (ECRE, n.d.). Moreover, on the Greek islands, most of the accommodation facilities operate under the UNHCR scheme or NGOs, while in Italy reception centres are generally run by public entities or other bodies chosen through public tender with facilities organised by NGOs serving as an additional pool (ECRE, n.d.).

In sum, that short research has exposed two features of the common response to the migration crisis. First, the EU-states relation has been strained by the relocation programme, whereas in the hot-spots and reception system the support of the EU and other MS seems to be quite intensive and welcome. Second, the NGOs' relations with the EU and MS triggered the biggest tension in the field of SAR operations at sea, while again in the reception the NGOs, remaining critical to many issues, offer vital support. Therefore, the fact of whether or not a migrant would appear in a state seems to be the crucial point which creates tension between the three-level actors examined above.

8.2. Core values driving European integration

For the purpose of that research, the examination of the ideological fundament of the EU will limit to point out the values essential in the process of projecting and applying solutions to deal with migratory challenges. "A European Agenda on Migration" referred to "values Europeans should be proud of" (EC 2015, 7) but it did not specify what it means in the context of migration. Some scholars note that so-called European values are contested (Attucci and Bellamy 2009, 214), while others attempt to enumerate at least the most agreed ones which are driving the European project from the beginning – e.g. respecting of democracy (Zorgbibe 1998, 209).

Treaty on EU claims that the EU is "founded on the values of respect for human dignity, freedom, democracy" and further lists also pluralism, non-discrimination, tolerance, justice, solidarity and gender equality as characteristics of the European society (TEU, Art. 2). In a book published in 2004, during discussions over the EU's Consitution, Barbara Skarga and Chantal Millon-Delsol, both independently from each other, indicated a dignity as the core value of European identity (Skarga 2004, 23; Millon-Delsol 2004, 26), whereas Wojciech Sadurski (2004, 32) comparing the EU with the US concluded that a typical feature of Europe is an approach based on positive (i.e. supportive and active) functions of the state. Therefore, primarily the ideas of respect to human beings as such and their dignity and individuality are pointed out by philosophers to build the European identity which has been reflected by the Treaty concluded by the MS.

Regarding the incarnation of these values in a form of political construction, we need to take into account that not the ideas themselves, but the lack of them, or the fear of losing them had the creating power. Jean Monnet wrote that in 1950s it was the German sense of humiliation and French fear of Germany that brought these two countries together (Monnet 2015, 290-291). Also, Luuk Johannes van Middelaar, a Dutch historian and political philosopher, points out that the fear about security served as *spiritus movens* of the integration process in its initial period (van Middelaar 2011, 172, 180-185). The crucial element of understanding the rationale of the European project is a conviction that the cooperation between nations alone is not enough and what is really indispensable is a "fusion of interests" (Monnet 2015, 316). It has to be noted that Monnet was very critical about what he called "narrow-minded national-interest mentality" and nationalism itself (Monnet 2015, 331; van Middelaar 2011, 270-271).

There should be posed a question how the above-mentioned founding values have evolved through the decencies from the 1950s. Some academics define the integration process as a change from Europe of homelands to the European homeland (Ruszkowski 2018, 79) or emphasise the significance of broadening of both the scope of majority decision making (van Middelaar 2011, 60, 108) and the power of Court of Justice of the EU (van Middelaar 2011, 49, 72). That analysis, focused on the extent of integrity and morphology of political power, does not provide much knowledge about the initial source of the process, which was the fear. The fear and crisis are mentioned by van Middelaar (2011,

240, 290) in the context of Arab-Israeli war in 1973 and war in Bosnia but in all these cases the threats are external so they do not correspond to the initial point of the EU, i.e. the internal danger being transformed to an ally.

Thus, the lost element, which is at the same time especially worth being researched in the migration context, is how the fear has been processed not to a mutual security system *sensu stricto*, but to the political body based on dignity. That *nexus* is linked to the words of Monnet who said about the French fear and German humiliation finding solution in integration. Another important question is the fact that whereas community assumes exclusive goods provided to its members, dignity is a universal concept blurring the discrepancy between the members and the others. As we can read in Art. 2 TEU, the EU founding values are obviously universal, but at the same time, they serve as a fundament for a strictly exclusive club of countries. From this point of analysis, it is extremely close to posing a doubt if dignity is really understood as purely universal concept offered by our community for all individuals regardless their citizenship without any differentiation or modulation.

Therefore, the primordial European value to examine in this paper in terms of the migration crisis is on the one hand, the ability to canalize the fear of societies in attempting to create common interests between the actors expressing mutual mistrust and on the other hand, still understanding security as a fundamental good (van Middelaar 2011, 296), a courage to declare that our community – a notion based on exclusivity – has been founded on human dignity – i.e. on a highly inclusive and universal concept.

* * *

The research exposed that the way the EU with its MS and NGOs were cooperating to rescue and assist migrants has not been fully in line with the values declared by the EU. In 2015 the EU faced a humanitarian disaster which endangered the myth that on the European ground (therefore, including also territorial waters) a principle of human dignity is its fundament. Two findings of crisis management are relevant for the conclusion of the research.

First, the biggest tensions between the EU and MS, but also between MS and NGOs, have been triggered by the response to the very basic fact that a migrant appears outside the door. Low fulfilment rate of the relocation and so-called "disembarkation crisis" exposed a lack of what Monnet believed in,

namely a fusion of interests between all actors. Second, the actions on Member States' territories, i.e. operating in hot-spots and other camps, seem less problematic for mutual cooperation and as the example of Greece indicated, both EU agencies and NGOs can share with the national authorities essential obligations in humanitarian response. That proves the way of understanding of the values, especially dignity, as they are not applied in an absolute way but rather "get activated" only when a person has already appeared on one's land.

Hence, we can observe multisectoral solidarity in ensuring the values for all, but what should be underlined – for all who have managed to pass a border. Therefore, the universality of the European ideas seems to be able to organise a common response of the EU, states, and NGOs if it aims at preserving human dignity within our frontiers. But how can we understand the border itself – as being inside or outside the order based on human dignity? Thus, the migration as a fear which is neither purely internal nor external can be neither included nor ignored. As a result it questions a basic concept of the community which is the antithesis inside-outside by attempting to join the area of values declared as unconditional – but join as a *human*, and not as a *candidate state*.

Foundation of the EU was based on the logic assuming, despite the tremendous harm made by Germany, not building a new, enhanced Maginot line, but the integration. Yet, that logic was not driven by naïve forgiveness but has resulted from a pragmatic sense of the founders inspired by an American, Roosevelt, who said in 1933 that "the only thing we have to fear is fear itself" (Monnet 2015, 290). The founding *nexus* of fear-dignity has been twice solved by the inclusion of the source of fear, i.e. Germany and next Eastern Europe. Van Middelaar in 2011 wrote about the sense of *finalité* after absorption of post-communist neighbours – "no more unexpected guests outside the door" (van Middelaar 2011, 244). Four years later the guests again have knocked on the door with a question – where are the limits of dignity we are so proud of?

Abstract

The aim of the paper is an examination of the cooperation between EU agencies, governments and NGOs in dealing with refugee crisis since 2015. Methodology of the research is based on legal, institutional and conceptual analysis within the human security approach. The migration crisis is presented as a factor of building

new capacities of humanitarian response, but also as a cause of tensions between three levels actors. The paper also attempts to examine conceptually EU values. The results of the research expose a crucial role of fear and dignity in the process of European integration. However, the response to the crisis posed a question if the European values apply to migrants in the same way as they do in case of EU citizens. In conclusion, an exclusive community based on universal values seems to be faced with a moral problem resulting from application of these values in circumstances of exclusivity materialised in a border regime.

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9.

Solidarity in EU asylum policy: perpetual or extraordinary call?

The principle of solidarity and fair sharing of responsibility governs the Union's competence on border checks, asylum, and immigration. The current pressure in this policy field demonstrates that an unforeseen increase in arrivals of migrants could exacerbate the operationalization and sustainability of the policy in the absence of consistency and balance in the attribution of competences. It is, therefore, essential to comprehend the existing body of primary law before examining the plausibility of a more effective operation. The main argument herein is the lack of common understanding of solidarity, resulting not only in unfairness but, most importantly, in both the EU's and the Member States' (MS) inaction. This failure to ordain the emergency necessitates a concretization of the interplay between the general principles of constitutional law in the operational scheme of the asylum policy regarding binding duties and political aspirations. The research unveils the inherent multiplicity (Wagner, Kraler, Baumgartner 2018) of the principle of solidarity for the unbundling of legal duties in theoretical, either political or humanitarian cooperation.

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9.1. The principle of solidarity and fair sharing of responsibility in the Treaty law

Within the European integrational legacy, solidarity represents the mechanism of fair distribution of prosperity outcomes among diverse partners. Given the collegial interdependence of interests and aims of an ever-closer Union (Bieber 2012, 295-298, 319; Thym 2017, 668-676) the Member States engage towards their fellows and towards the Union. The Treaty on European Union (TEU) elevates solidarity from a value of European Union law to an objective, a starting point, ultimate goal or even the *raison d'être* of the Union's polity (Opinion, Slovakia v Council, C-643/15 and C-647/15, para. 17) and its legal system (Commission v France, 6/69 and 11/69, para. 16).

Beyond this ontological perspective, solidarity differs from the "reciprocity" in international law, as MS are most extensively bound to the fate of domestic-level problems in the name of the Union's gestalt. Equitable allocation of responsibility earmarks commitment towards joint action, proportionally to the capacities and level of exposure of each MS. In the Treaty of the Functioning of the European Union (TFEU), solidarity is enshrined in three provisions: Art. 77 for the development of the borders' regulation, Art. 78 for the common asylum policy and Art. 79 for the migration policy. Stemming from the MS' constitutional traditions and the Court of Justice of the European Union's (CJEU) case-law, solidarity stands at the very core of the sovereign mandate to reciprocal support (Ross 2010, 41). Although sincere cooperation occasions one shade of solidarity, in the CJEU's view these notions are distinct (Thym, Tsourdi 2017, 614). Their mutual aim is to enhance operational readiness by additional restorative layers (Schlutter, 9/73, para. 39; Rewe-Zentral, Case 10/73, para. 26). Yet, this does not extend to uncritically comforting the MS' abnormalities but presupposes a reasonable level of compliance with the *acquis* (Tsourdi 2017, 667–686). Unlike sincere cooperation, solidarity creates autonomous obligations (Slovakia v Council, C-643/15 and C-647/15, para. 252) for definite operational management. The absolute benefit of tangible profits of the common good requires fidelity to collective values, regardless of perceived losses in self-interest (Küçük 2016, 965, 968; Commission v United Kingdom, 128/78, para. 12).

Art. 4(3) TEU injects collegiality among institutions and national administrations in a twofold manner. Firstly, by way of positive obligation, it necessitates "any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties". Secondly, it negatively calls MS to "refrain from any measure which could jeopardise the attainment of the Union's objectives". It follows that the innovation concerning the duty of cooperation lies in the idea of mutual respect, implying that the MS and institutions shall not infringe the prerogatives of one another, and in the duty of cooperation, applicable to tasks not explicitly worded, thus establishing a quasi-open-ended duty. Yet, where the Union has presumably failed to perform its competence, the duty of cooperation in good faith requires adequate temporary and provisional intergovernmental measures of conservatory nature. Similarly, in cases where the Commission submitted proposals to the Council, the MS discretion regarding their proposals was limited by their role as co-trustees of the common interest. Likewise, EU institutions shall refrain from adopting rules conflicting with substantive EU law and abolish practices diffusely obstructing the *effet utile*. The positive obligation signifies actions towards the realization of EU policies, namely securing the rule of law through good administration and legal certainty, deterring infringements through effective judicial processes and notifying the institutions on employment matters. For most academic scholarchs Art. 4(3) TEU establishes expectations concerning how a State can sustain its obligations and foster institutional action towards effectively sustaining the EU's policy. As for border checks, asylum and immigration – sincere cooperation implies that the Union and the MS shall assist each other in tasks under Art. 77-79 TFEU in conjunction with supplementary safeguards flowing from the spirit of the constitutional order. Secondary legislation shall be systemized in a way ensuring that all measures guarantee the full scope and effect of EU law, with respect to fundamental rights, and thus, derogations are possible on the basis of concrete justification of adequacy and proportionality and subject to an impartial, effective and dissuasive body.

As in Advocate General Bot's Opinion, solidarity is both a pillar and a guiding principle of the EU policies on border checks, asylum, and immigration. Principles are not only a normative ideal of constitutional law (Kadi I, C-402/05 P and C-415/05 P, para. 303) but also review standards and interpretative criteria of secondary law as well as a vital element of

legitimization. In case of ambiguous secondary law provisions, general principles such as Art. 80 TFEU (Ordre des barreaux, C-305/05, para. 28) or even Art. 2 TEU constitute a reference point or a constitutional paradigm of existential value (Ross, Bell 2010, 151-165) and govern the lawfulness, interpretation and operationalization of the entire body of EU law (Opinion, Slovakia v Council, C-643/15 and C-647/15, para. 18). Adversely, so far in the jurisprudence the Court's interpretation of the sovereignty clause (Art. 3(2) of the Regulation (EC) No. 343/2003), for instance in *Halaf*, (C-528/11, para. 25 et seq.) Art. 80 TFEU as such was not explicitly used as a legal basis. By avoiding this reference, the CJEU decided that the sovereign clause is absolute and unconditional by mere reliance on the preparatory documents of the Regulation. The admittance that Art. 3 of the Regulation (EC) No. 343/2003 calls a *prima facie* incompetent MS to examine an asylum application based on political, humanitarian, or practical grounds reflect the spirit of Art. 80 TFEU. The question referred, nonetheless, was not whether a MS could process that application but rather the limits of the obligation to do so under critical humanitarian conditions. The CJEU avoided the conjunction of the sovereignty clause with Art. 80 TFEU. Even so, it would be wrong to conclude that solidarity is not legally binding principle but merely a discretionary source of policy inspiration. Although arguably of limited or dubious enforceability, the norm does not render inapplicable (Hartley 2014, 192-197).

9.2. Justiciability and operationalization of the principle of solidarity

As the principle of solidarity in Art. 80 TFEU addresses operational responsibility to advance adequate measures beyond the financial level "whenever necessary", the readiness required remains disputed and has only indirectly been ascribed by the CJEU (Republic and Hungary v Council, para. 253). Beyond the political and academic disagreement on the provision's binding effect within the Common European Asylum System (CEAS), solidarity accords with mutual trust (Regulation (EU) No 604/2013 of the European Parliament and the Council (recast)).

In two joined actions for annulment against the validity of the measures of the two emergency relocation decisions of 2015 (Council Decision (EU) 2015/1523, 1st Emergency Relocation Decision; Council Decision (EU) 2015/1601, 2nd Emergency Relocation Decision), the CJEU was asked to define the material scope thereof - whether a limit to compulsory appointment of responsibility, reallocation, and relocation of asylum seekers based on distributive designs – endures. While for the peripheral MS these mechanisms reflected their idealized internal shared duty of fair collaboration with the countries of origin and transit, previously unsaid abstentions emerged in Central Europe.

Border controls according to international law pertain to fundamental margins of appreciation of the State. Within the CEAS, the coordination of domestic capacities on this matter is not only a normative imperative but also a practical necessity for the overall aspiration of a single market without internal frontiers. Once internal border controls are abolished, migration flows irrespective of requests for international protection affect the entire Union, as individuals are entitled to unobstructed interstate movements. Consequently, the abolition of internal borders requires a coordination to external borders. Yet, the lightening of the burden for the frontline MS so crucial for the doctrinally accurate functioning of the asylum system, has not substantially realized to date.

Furthermore, solidarity and fair sharing of responsibility with regards to asylum ascertains a duty to support fundamental rights as obligations of direct impact on the design and operationalization of the policy. The Treaty aspires a system where the status of beneficiaries of international protection or asylum seekers will be settled by rules of state-centered solidarity. By virtue of the legislation, asylum seekers are the indirect recipients of these actions as they bear the consequences of a State's determination of personal status and reception as well as integration conditions. Generally, the MS sovereign decision in offering appropriate status, while safeguarding non-refoulment and protection standardized in the Geneva Convention, is the *core interiorem* of public international law. Apart from the so-called state-centered solidarity, there are also individual-centered forms of transnational solidarity (Preamble to the TEU) that safeguard full access to national solidaristic welfare (Tsourdi 2017, 670-671). Beneficiaries of international protection are entitled to national protection status as well as access to welfare systems at the same

level as nationals of that MS (O'Brien 2008, 643). However, EU's confidence in MS welfare systems allocation (Tsourdi 2017, 671), has created inequalities among the MS and among the beneficiaries amounting to unjustified indigence and human dignity violations. Unsurprisingly, the perspective of protection safeguards and of labor or integration potentials interchange in the rational of the Reception Conditions Directive and the jurisprudence. Hence, paradoxically, frontline MS, despite rather weak social welfare systems of restricted or in adequate integration, language courses, rent subsidies or social housing for the destitute, are called to deal with an even worse situation since the activation of austerity policies.

Since funding allocation is anticipated by national sources, national authorities enjoy a large margin of appreciation concerning their *modus operandi* and the latter's compliance with protection standards. Generated migrant flows stressed the procedural and financial capacities of the first-entry countries. Notwithstanding their long-standing operational deficiencies and the overall burden, protection standards and reasonable time of application processing challenge the preservation of the rule of law in Europe. Having regard to the resource scarcity, first-line MS shared an implied common incentive to tolerate asylum seekers seizing the occasion of lack of internal borders to reach the countries of their preferred destination. Subsequently, some second-line MS launched border checks, signalizing the appearance of fear of distrust in the EU. Such national decisions affect the entire area of freedom, security, and justice and necessitate supranational action (Tsourdi 2017, 671) for refugee protection as a common concern, stemming from the unitary constitutional order (the CFR and international commitments included).

The CJEU confirmed these considerations by ruling on the claims brought against the Council decision regarding the relocation of asylum seekers from Italy and Greece. The legal argumentation on Art. 78(3) TFEU allowing the Council to adopt provisional measures in assistance to MS facing an emergency characterized by a sudden inflow of nationals of third countries was narrowly interpreted. Operationally speaking, the principle of solidarity militates in favor of a more flexible understanding of this threshold, not limited to extreme situations. Given that the alleged violation of limited duration has been established within the aim to tackle the pressure on the overburdened States, the measures were legitimately founded on Art. 78(3) TFEU. The same applies to the term "emergency" portrayed by sudden inflows, as the data in

the preamble of the Decision confirm that the intensity of application pace amounted near to the edge if not to total collapse of beneficiary MS. Based on this evidence, Hungary argued that the Decision mistakenly imposed binding quotas even on those MS that already had apportioned with a high number of asylum applications. Notwithstanding the constraints to the sovereign discretion of the affected MS, the Decision aimed at relieving Greece and Italy by virtue of the principle of solidarity and fair sharing of responsibility within a mandatory relocation system adjusted to the relative absorptive capacities of all MS. Besides, the relocation scheme seemed to be the most effective and less onerous alternative. Hungary's argument, apparently, related to the proportionality *stricto sensu*, namely the actual balancing of the contradictory interests and objectives, as the last stance of the assessment. Partly due to Hungary's initial listing among the beneficiaries of the financial stipulations in the draft proposal, there have been expectations for practical assistance of the absorptive capacities. Regardless, this argumentation was dismissed, by the manifestation of the priority to other recipient States more profoundly in need for solidarity.

As stated above, solidarity functions as a review standard and an interpretation tool. In the case of the Temporary Protection Directive, the solidarity mechanism is reserved to large-scale, spontaneous or aided movements of displaced either from a specific country or geographical area (Art. 2). It is not clear whether a mass influx comprises the arrival of many displaced at once or gradually. Art. 80 TFEU facilitates the emergency scope of the Temporary Protection Directive, ensuring that MS in operational difficulty will be assisted, when in "difficulty" and "emergency". While mere reliance on the number of displaced disregards chronic administrative malfunctions, the standard operational capability of the asylum system of reception States for hosting refugees is equally relevant.

* * *

The preceding presentation has shown the twofold dimension of the principle of solidarity. It is a primary law imperative towards cooperation and a standard of judicial review and interpretation. This idea prescribes also an obligation of engagement through partnership with third countries for the management of forced inflows of people in need of international

protection (Art. 78(2)(g) TFEU) within global multilateralism vis-a-vis a sound protection of rights under the Geneva Convention (Art. 3(5) TEU). Without prejudice to the principle of autonomous and uniform interpretation of Union law (Kozlowski, C-66/08, para. 42), and the principle of coherence the Union's action, the EU aims to preserve the continuity of its constitutional identity and international paradigm (Art. 2 TEU).

Abstract

This paper explores the multiple facets of the principle of solidarity and fair distribution of responsibility under the Treaty law and the jurisdiction of the Court of Justice of the European Union. The Treaty of the Functioning of the European Union elevates solidarity to an instrumental value preserving the theoretical and operational potential of the entire Area of Freedom, Security, and Justice. Building on a brief presentation of the institutional, and procedural peculiarity of solidarity concerning the triple duty of conduct, loyalty, and result permeating integration, as well as of the terminological background, the paper criticizes the current state of saturation from a constitutional point of view.

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10.

Why EU should urgently review its cooperation with Turkey on migration?[1]

In 2015, 1.3 million asylum seekers arrived in EU Member States (MS) seeking international protection, a number more than double than that of the previous year. Most of them made their way to Europe on boards of dangerously inadequate vessels, operated by human smugglers, arriving at the shores of Aegean and Mediterranean islands and from there travelling to other MS, particularly Germany, Hungary and Sweden. Almost 30% of the applicants were Syrians coming from or through Turkey (Eurostat 2015).

The capacity of the reception facilities in countries receiving the highest number of asylum applications has quickly reached its limits and conditions in the refugee camps have deteriorated. In response, the Council of the European Union adopted two decisions, according to which 120,000 refugees in need of international protection were to be relocated from Italy and Greece to other MS (Council Decision 2015/1523; Council Decision 2015/1601). As the relocation scheme has been contested by some of the MS and the consensus on a unanimous response could not be achieved, EU's eyes turned towards its external allies. Using the mechanism of border externalisation that has been frequently applied in recent years (Afailal, Fernandez 2018), the EU has decided to formalise its cooperation with Turkey to manage the migration flows.

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[1] This chapter presents the situation as of late 2019.

The EU Facility for Refugees in Turkey, a mechanism coordinating financial resources for Turkey made available under the EU budget and contributions from Member States, was set up in 2015, in a response to the European Council's call for significant additional funding to support Syrian refugees in Turkey. Contributions have been set to a total of EUR 6 billion in the period of 2016 - 2019 for humanitarian and development assistance, as well as migration management, including increasing the capacity of Turkish Coast Guard (European Commission 2015).

After a series of high-level meetings, the EU and Turkey agreed to introduce the Joint Action Plan aiming to strengthen their cooperation in terms of migration management. A final agreement has been reached on March 18 2016 and was announced in a form of a press release on the European Council website (European Council 2016). The Joint Action Plan has introduced a mechanism to return all new irregular migrants crossing from Turkey to Greek islands back to Turkey, and for every Syrian returned to Turkey resettling another Syrian from Turkey to the EU. The price of the deal for the EU was financial assistance and a promise of visa-liberalisation for Turkey.

Three years later, in the annual report on the implementation of the mechanism, the European Commission had informed that the number of arrivals of people seeking international protection has decreased sharply compared to 2015. The report, however, omitted the human rights cost of that cooperation (European Commission 2019). In recent years concerns have been raised as to whether or not Turkey can be perceived as a safe country for refugees, which, especially in the light of the ongoing Turkish military offensive in the north-eastern Syria, should give an impulse to reconsider the EU cooperation with Turkey regarding migration management.

10.1. Border externalisation as the EU's quick-fix solution for migration pressure?

The cooperation with Turkey has been established despite the existence of serious concerns about the human rights situation of refugees in Turkey, emerging from reports of independent organisations monitoring the situation on the spot. Amnesty International was pointing out serious deficiencies of the

Turkish asylum system as early as 2014 (Amnesty International 2014), while Human Rights Watch was reporting about cases of refoulement of Syrian refugees from Turkey taking place in 2015 (Human Rights Watch 2016).

In 2016, the Special Representative of the Secretary General of the Council of Europe on migration and refugees, Ambassador Tomáš Boček, also investigated the situation in Turkey. In his account of the monitoring mission (Council of Europe 2016), he reported considerable delays in the registration process of asylum seekers (adding that "[w]hen speaking with the authorities, it also became clear that the delays in the registration procedure were not to be attributed to lack of capacity"), a lack of safeguards for vulnerable groups such as unaccompanied children, restricted access to legal aid, healthcare and education, as well as a risk of refoulement and collective expulsion of refugees. Meanwhile, Amnesty International kept reporting about ongoing pushbacks and shootings of Syrians at the Turkish – Syrian border (Amnesty International 2016).

The reported violations put into question if Turkey could be considered a country to which refugees might be safely returned from the perspective of international asylum law. Returning an asylum seeker to a country where he or she faces appalling reception conditions, reaching the level of inhuman or degrading treatment and a risk of refoulement, might lead to a violation of the prohibition of torture as enshrined in Article 3 ECHR (ECtHR, *M.S.S.*, para. 365-368) and Article 4 of the Charter of Fundamental Rights (CJEU, *N.S. and M.E.*, para. 86). Moreover, if foreigners are returned in a collective manner, without thorough consideration of their individual cases, it might amount to a violation of Article 4 of Protocol No. 4 ECHR, which introduces the prohibition of a collective expulsion of foreigners (ECtHR, *Hirsi Jamaa*; ECtHR, *Sharifi and Others*).

In the light of the aforementioned reports raising doubts whether sending asylum seekers back to Turkey under the EU-Turkey statement was in line with international law, it could have been reasonably expected that the conclusive assessment of situation in Turkey would be conducted by the European Asylum Support Office (EASO). The duty of this EU agency is to "provide scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum" and to "be an independent source of information on all issues in those areas" (Regulation 439/2010, Art. 2(3)). For this reason, human rights organisations urged EASO to conduct a

fact-finding mission to examine the asylum situation in Turkey and to release a reliable report on the findings. Although EASO carried out a survey with asylum seekers staying in Turkey, the report has never been officially published. The document titled "The Country Information Pack on the Asylum System in Turkey" was redacted and marked for the internal use only (EASO 2016). Its classified content, revealing only carefully selected information, raised more doubts about the human rights situation in Turkey than it provided answers.

Apart from the reported deficiencies in the Turkish reception system and illegal pushbacks, the current Turkish asylum legal framework remains problematic as well. Although being one of the original signatories of the 1951 Geneva Convention related to the Status of Refugees, Turkey maintains geographical limitation and grants asylum only to refugees with European origin. Non-European refugees are granted "temporary asylum" only until they are resettled to a third country (Sarı, Dinçer 2017). Since Turkish legislation does not fully protect Syrian refugees against refoulement, returning them there may lead to chain-refoulement and result in violating Article 33(1) of the 1951 Geneva Convention.

The situation of asylum seekers in Turkey has deteriorated further when, in July 2016, following the attempted military coup, a state of the emergency has been introduced. The extensive purge and "national security" rhetoric have allowed marginalisation and criminalisation of migrants and refugees to an even greater extent (Sarı, Dinçer 2017). Since October 2016, under the emergency decree, a decision of deportation "may be taken at any time during the international protection proceedings" if an applicant is considered to be linked with terrorist groups or posing a threat to public order or health. Experts point out that these provisions allow for an excessively broad interpretation, which led to around 100,000 people falling under this category in 2018 (AIDA 2018).

In the light of continuing human rights violations of refugees in Turkey, three cases were initiated before the Court of Justice of the European Union (CJEU) by the asylum-seekers facing the risk of being returned there from Greece. Based on Article 263 TFEU, the applicants were seeking the annulment of an agreement concluded with the Republic of Turkey. On 28 February 2017, the General Court issued three identical orders in cases T-192/16, T-193/16 and T-257/16 (*NF, NG and NM v European Council*) ruling it had no competence to judge the legality of the EU-Turkey deal as "neither the European Council

nor any other institution of the EU decided to conclude an agreement with the Turkish Government on the subject of the migration crisis".

According to the position of the European Council, presented in the proceedings before the CJEU, the EU-Turkey statement on refugees, as published by means of the press release no 144/16, was "merely a political commitment of the Heads of State or Government of the Member States of the European Union vis-à-vis their Turkish counterpart" (CJEU, T-192/16, para. 60). Therefore, CJEU established that the EU-Turkey statement was adopted by the representatives of the Member States outside the EU legal framework and dismissed the action on the grounds of its lack of jurisdiction to hear and determine it (CJEU, T-192/16, para. 69-71), setting a dangerous precedent in terms of accountability and transparency of asylum policies made by the EU.

It must be reminded that the EU-Turkey statement on refugees is not the first nor last *de facto* readmission agreement concluded by the EU that has been presented as a "statement" or a "declaration" in order to bypass the legal procedures on the conclusion of readmission agreements set in Article 79(3) TFEU and the obligation of obtaining prior consent of the European Parliament as required by Article 218(6)(a)(v) TFEU. The same concerns were raised in relation to the Afghanistan-EU "Joint Way Forward" declaration (Warin, Zhekova 2017) and the Italy-Libya Memorandum of Understanding (Palm 2017). It seems that the questionable practice of using non-binding instruments to shape the EU migration and asylum policy is becoming increasingly common while border externalisation is treated as a quick-fix solution to any migration pressure the EU is dealing with in a given moment, regardless of the human rights violations reported from those "partner countries".

10.2. The (human rights) cost of the EU-Turkey statement on refugees

It should be borne in mind that the number of Syrian refugees sheltered by Turkey has increased from around 2.7 million in 2016 to 3.6 million presently. Turkey is hosting more refugees than any other country in the world and almost four times as many as the whole of EU. The lack of perspectives to repatriate

Syrians any time soon, combined with the increasing anti-refugee attitudes of the Turkish society, make it more and more challenging for Turkey to continue providing refuge for millions of people (Chudziak, Marszewski 2019). Recent reports show that Turkey might be handling this issue in a very concerning way: by forcing Syrians to sign the "voluntary return" forms and compulsorily returning them to the conflict affected areas (Human Rights Watch 2019). Such practice would be in clear violation of the non-refoulement principle.

In October 2019, the Turkish Armed Forces along with the Syrian National Army launched a military offensive in north-eastern Syria. Turkey has declared that the aim was to create a 30 km "safe zone" along the border, where some of the 3.6 million Syrian refugees living in Turkey would resettle. The first days of the offensive, called "Operation Peace Spring", have already resulted in tens of thousands of refugees, mainly Kurds, fleeing from the attacked areas deep into Syria and, partly, Iraq. The course of the operation, particularly dozens of civilian casualties and reported war crimes, combined with plans to relocate Syrian refugees, mostly Arabs, from Turkey, is perceived by some commentators as an attempt to carry out an ethnic cleansing (Chudziak 2019).

The European Parliament responded to Operation Peace Spring with a resolution calling the MS to a greater commitment to responsibility-sharing and resettlement of refugees fleeing Syrian war zones. Members of the Parliament across the political spectrum urged Turkey to withdraw its forces from Syrian territory under the threat of "economic measures". However, in the light of reiterated threats of retracting from the implementation of the EU-Turkey refugee deal made by the Turkish President Recep Tayyip Erdoğan, it is doubtful that the EU would decide to cut off Turkey's financial support and risk repeating the 2015 "migration crisis". This view is strengthened by the fact that on October 31 2019 the European Commission informed on its website about mobilising EUR 663 million in humanitarian aid to continue major projects under the EU Facility for Refugees in Turkey (European Commission 2019).

Due to the reported human rights violations not only should sending refugees to Turkey under the EU-Turkey statement be reconsidered, but continuing to provide any financial support for Turkey should be revaluated as well. In the third annual report on the EU Facility for Refugees in Turkey, the European Commission informed the European Parliament and the Council that the Facility has covered the return costs of 212 Syrians and 1,076 non-Syrians, as well as "logistical equipment and works for facilities for 750

people" (European Commission 2019). This financial support to facilitate the returns of Syrians to the war-torn country is not only, to say the least, doubtful from a human rights perspective, especially in the light of reports revealing that Turkish authorities might be coercing refugees to sign "voluntary return" forms, but, on top of that, it is very likely that the "facilities" mentioned by the Commission were, in fact, pre-removal detention centres, as detention capacity in Turkey has almost doubled in 2018 (AIDA 2018).

The concerns about the actual usage of EU funds are not groundless, either. In 2018, when the EU Facility for Refugees in Turkey had been audited by the European Court of Auditors, the inspectors were not fully satisfied with the efficiency of the humanitarian projects financed by the Facility. According to the auditors, the European Commission "did not consistently and comprehensively assess the reasonableness of the budgeted costs". The audit had also found that the indirect costs paid to the partners implementing large cash-assistance projects in Turkey were high and advance payments were not aligned with the actual cash outflows. Furthermore, it turned out that it was not possible to monitor all the humanitarian projects during the audit. Although the European Commission put appropriate measures in place for that purpose, the key limitation was the Turkish authorities' refusal to grant access to beneficiary data for some of the cash-assistance projects. As a result, neither the European Commission nor the European Court of Auditors could track project beneficiaries from registration to payment (European Court of Auditors 2018). In the light of these findings, there is no assurance that EU funds are not, at least to some extent, used to finance the ongoing military operation in north-eastern Syria and to facilitate detentions and forced returns of Syrian refugees in breach of international asylum law.

* * *

The EU is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of minorities (TEU, Art. 2). Returning asylum seekers, who came to the EU seeking protection from war and persecution, to a country which is not fulfilling obligations stemming from the international law is in clear denial of these values. In the light of the strong evidence confirming the human rights violations in Turkey, it might point to a breach of Article 3 ECHR and Article

4 Protocol No. 4 ECHR as well as Article 19(2) of the Charter of Fundamental Rights and Article 33(1) of the 1951 Geneva Convention in every single case of a returned refugee. The question remains: who should be held responsible for these violations as the EU-Turkey statement on refugees, according to the CJEU judgment, cannot be attributed to the EU?

Turning a blind eye to the human rights violations against people seeking international protection in Turkey is contradictory to one of the aims of the EU, which is to promote and protect human rights in a non-discriminatory manner. The externalisation of migration control, which is gaining more and more popularity in the EU asylum policy, cannot be perceived as the right response to the misery of thousands of people seeking protection from war and persecution. Considering recent developments in Turkey, it seems to be the right moment to review the EU-Turkey cooperation and look for a better solution addressing the issue of Syrian refugees than continuing to send them back to the country which is very likely to be involved in mass human rights violations and ethnic cleansing, possibly co-sponsored by the EU.

Abstract

In 2015, an unprecedented number of over 1.3 million asylum seekers applied for international protection in the EU. Most of them arrived at the shores of Greek and Italian islands by sea, from there making their way to other EU Member States (MS). In response to what has quickly been called a "migration crisis", the European Council informed about a deal made with Turkey, according to which any new irregular migrants crossing from Turkey into Greek islands were to be returned back to Turkey. In March 2019, marking the third anniversary of the EU cooperation with Turkey, the European Commission called the cooperation a great success: daily crossings of asylum seekers have gone down from over 10.000 in a single day in October 2015, to an average of 83 in 2018. Human rights organisations, however, are much less optimistic. It has been reported that Turkey had sealed off its borders with Syria while carrying out mass pushbacks, detaining and forcibly returning Syrians back to their war-torn country. This paper attempts to demonstrate that, in the light of the ongoing Turkish military offensive in north-eastern Syria, human rights violations frequently reported by independent organisations and unclear legal status of the EU-Turkey deal, MS should take immediate action to look for a better solution to the issue of Syrian refugees than continuing to send them back to Turkey.

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*Violetta Gul-Rechlewicz**

11.

Working towards inclusion of refugees: NGOs in the Netherlands – the case of the Dutch Council for Refugees

Integration of immigrants (including refugees) is not only a core policy of multicultural countries, but also an immanent part of programmes implemented by non-governmental organisations (NGOs) that work with people in need. The Dutch Council for Refugees (VluchtelingenWerk Nederland, VWN) is an example of a successful non-profit organisation that participates in the development of state immigration and integration policy in the Netherlands. In its reports, recommendations and action plans it suggests specific solutions and changes to the government strategy for dealing with the refugees living in the country. In addition, the VWN cooperates with the institution responsible for the reception of asylum seekers – Centraal Orgaan opvang asielzoekers (COA) and temporary accommodation centres for refugees who await asylum status decisions (Asielzoekerscentrum, AZC).

Refugees in the Netherlands have been and, as it is estimated, will probably continue to be a part of the country's population for a long time. Statistics Netherland (Centraal Bureau voor de Statistiek, CBS) predicts that migrants from the Middle East and sub-Saharan Africa will continue trying to reach the Netherlands in the decades to come. The data for 2018 shows that currently there are 20,353 asylum seekers in the Netherlands, which is a significant increase compared to 2017 (14,716 people). Most refugees come from Syria

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(2,956 people) and Iran (1869). According to the UNHCR, there were 101,837 refugees in the Netherlands at the end of 2018 (VWN 2019, 5-14).

Despite recent problems related to the refugee policy, NGOs operating in the Netherlands have acted as observers and experts on refugees/asylum seekers for many years. They perform key functions in the socialisation of immigrants and activate them in the public sphere and on the labour market (Lesińska 2013, 97). Counted among the largest in number and most active in Europe (Anheier, Daly 2007, 237), Dutch non-profit organisations are products of a centuries-old tradition that fill in the gaps in state aid systems addressed to migrants, with particular emphasis on two specific groups – refugees and asylum seekers. Forming highly developed assistance structures, which are widely supported by the state (including, but not restricted to, financial support), Dutch NGOs operate in the most favourable conditions in this part of the continent. Funded mainly from taxes and social security schemes, they play an invaluable role in all dimensions of immigrant integration, including the labour market, housing, education and civic participation (social and political).

According to the VWN, refugees in the Netherlands are very strongly motivated to be a part of the host society. However, certain flaws in the immigration policy, e.g. lack of transparent information on refugee status, complicated asylum procedures, stress and family problems are counterproductive to a successful activation of this group of immigrants. The aim of this article is to highlight the most significant errors in this area, which – as the VWN argues – result from the shortcomings of the Dutch refugee policy, and to use the experience of the VWN as the largest NGO in the Netherlands to suggest critical changes, in cooperation with the government, regarding the development of the state integration policy. The considerations presented below were inspired by a thorough research of relevant reports, statistical data, official documents and records provided by the VWN.

11.1. The VWN and its activities for refugee integration

Many non-profit organisations in the Netherlands have acted as important consultants for the state and international refugee institutions for reviewing

the effects of state immigration and integration policies. They fight against the exclusion of ethnic minorities, discrimination and xenophobia, emphasising the need for active social and political participation of immigrants, mutual understanding and respect for "other" cultures, traditions and customs, as well as acceptance of democratic norms and values. The VWN is the largest Dutch organisation that offers a multi-faceted assistance to refugees and has a significant impact on the country's asylum policy. Supported by an impressive – and constantly growing – number of volunteers (van den Berg 2016, 33), the foundation helps refugees find themselves in a new, often difficult reality.

The VWN provides support to individual refugees and asylum seekers as well as entire groups of people in need. It focuses mainly on guiding and advising refugees on matters related to the asylum procedure, adaptation in a new place of residence, integration with local community and looking for a job, while encouraging education and mediating in contacts with institutions, such as the Employee Insurance Agency (UVW, 2018) or housing cooperatives. Covering nearly all municipalities in the Netherlands, the foundation's activities focus on helping refugees to successfully complete the asylum procedure and integrate with the Dutch society relatively quickly.

Every refugee with the right to reside in the Netherlands is also entitled to unlimited access to legal advice in the nearest branch of the VWN and to assistance in contacts with municipal authorities and representatives of financial institutions. Refugee relocation is one of the VWN's main tasks. Possible solutions are discussed at meetings, conventions, conferences and congresses organised or co-organised by the foundation. Its activities include participation in international conferences held annually by the VWN, cooperation with the Ministry of Justice and the United Nations (UN) and taking part in meetings held in the Hague, addressed to non-profit organisations, government units and the UNHCR, dedicated to refugee relocation and their subsequent integration with the host society (van den Berg 2016, 5).

The VWN presents effective integration of refugees with the Dutch society as a common good, with the new citizens' full independence critical to their proper functioning in the Netherlands based on principles of freedom, security and knowledge of Dutch norms and values (VWN 2016). Its creative approach to the presence of refugees includes providing a comprehensive care to newcomers and preventing their marginalisation in Dutch society. To this end, the organisation constantly appeals to the country's inhabitants to engage in

contacts with refugees (e.g. learn about their history, listen to their emigration stories), show them kindness and acceptance, create space for socio-economic initiatives and jobs for them (VWN 2016). In addition, the VWN is the initiator of many interesting integration programmes that aim to eliminate stress in newcomers, increase their self-confidence and give them tools to navigate a culture that is foreign to them.

In order to improve refugee integration and provide newcomers with knowledge needed for full and lasting participation in their new society, particularly in the labour market, the VWN has implemented a project called "Vluchtelingen Investeren in Participeren", VIP/VIP2 ("Refugees Invest in Participation"). It focuses on promoting knowledge of the Dutch language, culture, local environment, labour market, and developing migrants' ability to find employment. It is an integrated approach that aims to empower refugees as much as possible, so that they do not have to rely on state assistance (VWN 2018a).

Many of these initiatives are targeted at young refugees. For example, the "Eigen-Wijs" project is addressed to children aged 7-17. It is based on three pillars: music, access to information and sharing knowledge. It is crucial that children in reception centres can relax and feel safe. As a part of the initiative, children are given interactive lessons of music in refugee centres, and thus prepare for performances in regional cultural centres and finally for a large concert, e.g. in the national theatre. Information (knowledge) acquisition programmes allow young refugees to learn not only about the asylum procedure and their rights in the new country, but also to fulfil their needs and boost their self-esteem (VWN 2018b).

Equally important are the organisation's projects addressed to refugees who leave the Netherlands (mainly due to rejected applications for residence permits). One of them is the "Projekten Terugkeer" ("Return Projects") dedicated to immigrants for whom returning to their homeland may be associated with trauma. The foundation helps such people prepare emotionally for leaving the Netherlands to minimise their suffering (VWN 2018c).

A number of initiatives have proven highly successful, including "Euro-Wijzer", "Start Baan" and "Werk-Woorden". The first had ended in 2017 and it aimed to help refugees become financially independent, preventing them from resorting to loans; the second enabled 789 people to find a job, which confirmed the effectiveness of investing in newcomers; and the last (learning

the Dutch language in practice, with individual teachers) was to raise their independence and thus strengthen their participation in the Dutch society (Gul-Rechlewicz 2017, 111-113).

As the VWN belongs to largest organisations of this type in Europe, one of its responsibilities is to share its experience with twin organisations ("NGO twinning") that operate in other countries. The foundation participates in projects including exchange of expert knowledge, conducting trainings, etc., which are implemented, for example, in Turkey, Greece and Italy. Subsidised by the Dutch Ministry of Foreign Affairs (Ministerie van Buitenlandse Zaken, BZ), the EU and NUFFIC, the VWN is one of 96 NGOs listed by the European Council on Refugees and Exiles (ECRE).

11.2. VWN's critical review of state refugee policy

The VWN has adopted a creative approach to the presence of refugees, ensuring that newcomers are provided care and not marginalised in the Dutch society. The organisation holds the ruling elites primarily responsible for the effects of the refugee integration process as people who have the power to make the integration endeavours effective or generate new problems. The VWN assumes refugees' will to become Dutch citizens and believes that this will help them find employment faster and thus integrate with Dutch society. Hence, any criticism of immigration and integration policy reported by the foundation is to help resolve refugees' most urgent needs.

The recommendation of the political elites to extend the period of waiting for naturalisation (granting citizenship) beyond the current five years is perceived by the VWN as unjustified and discouraging integration. The foundation believes that refugees should be naturalised as quickly as possible to become full members of the society (VWN 2014, 71-72). It should therefore be a priority to enable refugees to participate in all relevant areas of socio-political and economic life. The VWN argues that urgent changes are particularly necessary in the processing of asylum applications, which should be carried out quickly, carefully and fairly. Another priority is to provide a possibility of refugee accommodation in all Dutch municipalities (which applies in particular to increasing expenditure on housing

investments). The foundation never ceases to promote refugee reception policy, according to which state protection should be particularly extended over people who are exposed to specific difficulties and obstacles, including patients, people with disabilities, single women and children as well as those who do not feel safe in their temporary places of accommodation (refugee centres). For example, the VWN has called for an introduction of a fast-track asylum procedure for such people.

The VWN believes that it is necessary to strengthen the cooperation between the government and active local centres and other partner institutions. Studies have shown that refugees are making little progress in key areas of integration. One of them is the labour market which carries the primary responsibility for incorporation of newcomers. However, compared to native Dutch and other immigrants, refugees remain largely unemployed. If they have a job, their income is still lower than that of other groups of residents. They are also more frequent beneficiaries of social welfare, living closer to the poverty line than the rest of general population. As many as 78% of refugees have a much lower income than the average pay in the Netherlands, with 26% living on the poverty line and 46% working less than 12 hours a week (SER 2019).

The VWN also points to the law that came into effect in early 2015, obliging refugees to take mandatory exams (after three years of learning Dutch) in reading, listening, writing and speaking Dutch, as well as knowledge of Dutch society and of the labour market, criticising the exams for their complex nature. Until 2015, there was no exam in the knowledge of the labour market, and refugees were not required to seek a language course on their own. According to the VWN, these restrictions make refugees confused and their future uncertain. Newcomers are aware of the difference between temporary residence in the Netherlands and a full citizenship; however, due to said uncertainty they are reluctant to associate their future with the Netherlands permanently, which – as the VWN argues – does not help their integration.

The foundation also emphasises the importance of paying more attention to newcomers' education, which it says should become a vital part of the asylum policy. Although in recent years many refugee training facilities have been established, some problems have not been resolved well enough. In addition, the quality of the educational offer leaves much to be desired (MSZW 2016).

The VWN draws attention to yet another issue – the so-called "active waiting" of asylum seekers, i.e. the need to participate in Dutch society during

the asylum procedure, which would precipitate their subsequent integration and provide a solid foundation for it. As the VWN argues, mastering the Dutch language as soon as possible is a primary element of the inclusion programme. The Dutch government shares this position and it has finally decided to enable asylum seekers to work on their language skills sooner, while they are still in the refugee centres.

The VWN addresses the problems of individual refugees as well as those of their specific groups. For example, it has criticised the requirement according to which refugees that reside in the Netherlands have to submit relevant documents to prove family connections with people applying for the possibility to join their relatives. This applies particularly to refugees from Eritrea, for whom contact with the authorities of their country of origin may be extremely dangerous. After the foundation drew attention to this serious matter, the ministry adapted its policy by modifying the restrictive requirements of the programme. In 2016, owing to the support of the VWN, a number of refugees from Eritrea and Somalia, whose nationality was questioned by the Immigration and Naturalisation Service (Immigratie- en Naturalisatiedienst, IND) obtained residence permits and received protection in the event of repercussions from their country of origin (DCR/VWF 2017).

* * *

Integration of immigrants has been one of the central principles of the Dutch immigration policy. Besides immediate assistance, activities of organisations that offer support to refugees and asylum seekers are also focused on their integration as soon as possible. The Dutch Council for Refugees is an example of an institution that adheres to the Dutch principle of "multicultural coexistence". In its manifesto entitled *Samen maken we het verschil!* ("Together We Make a Difference"), the foundation calls for a strengthening of cooperation through coordinated actions of citizens, government authorities, enterprises, media, social institutions, as well as refugees and asylum seekers themselves. Similarly, the organisation's motto "Inclusion instead of exclusion; investing instead of rejection" (in Dutch: *Insluiting in plaats van uitsluiting; investeren in plaats van afweren*) clearly refers to Dutch philanthropic traditions and expresses the belief that refugees are, and – as plenty of evidence shows – will continue to be a permanent part of the Dutch society. It is the institutions'

role to create opportunities for them, so that they can build their lives anew, learn a new language, find themselves on the labour market and build new friendships. Effective integration of refugees with the Dutch society, presented as a common good, should primarily be based on their independence as well as on the principles of freedom, security and the knowledge of Dutch norms and values. "It is in the interest of refugees – as well as Dutch society – for them to build a new and independent life in freedom and safety as fast as possible, with respect for our values and standards" (VWN 2016).

According to Dorine Manson, the director of VWN until February 2019, opening up to refugees is the best decision that the Netherlands can currently make with nearly 60,000 of them applying for asylum – even if some of them decide to leave the country in the future. Due to the fact that the number of asylum seekers arriving in the Netherlands has risen in recent years, their prospects of getting a paid job and thus enjoying a full participation in the society do not look good.

The VWN's criticism of state policy towards refugees, as shown in this article, is both constructive and based on many years of experience in working with refugees and asylum seekers. The number of volunteers working for the VWN has almost doubled, and that of donors has increased by 35% in the last four years, which reveals how much institutions of this profile are needed and how many people in the Netherlands – despite the society's strong divide into supporters and opponents of accepting refugees – still have a positive attitude towards newcomers.

Abstract

Non-governmental organizations play an important role in many multicultural countries. In the Netherlands, several various organizations focused on migration and refugee issues play the leading role in implementing the values of a civil society. The Dutch NGOs offer important insights into the causes of migration and resolve social problems that accompany the settlement and integration of immigrants and refugees. The aim of this paper is to analyze the Dutch NGO (VluchtelingenWerk Nederland) that focuses on refugees, and to highlight its impact on building bridges and breaking down stereotypes and prejudices among different ethnic groups.

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*Edina Lilla Mészáros**

12.

The refugee crisis, the illiberal populist challenge and the future of the EU: is illiberal democracy on the march? The case of Hungary

Although the term "illiberal democracy" was coined in the 1990s by Fareed Zakaria in a highly intriguing essay published in *Foreign Affairs*, it gained prominence in Europe following the Hungarian PM, Viktor Orbán's speech delivered at Băile Tuşnad in 2014. In his view, democracies do not necessarily have to be liberal and liberalism is not a precondition for the formation of some form of democracy, citing countries like Singapore, China, India, Russia and Turkey as role models for future competitive societies. Since then, we have seen various attempts on the government's part to establish this "new form of democracy" in Hungary, by turning away from political liberalism, restricting constitutional rights and consolidating governmental prerogatives. The V4 countries (but mainly Poland) seem to embrace this new ideology, denoting a deliberate willingness to shift towards illiberal democracy. Accordingly, the main objective of this article is to shed light on the motivations behind this transition, putting a special emphasis on the refugee crisis, as it became the leitmotif of Hungary's backlash against Brussels. We argue that this transition towards illiberalism was a lengthy process fuelled by deeply rooted discontents and personal/party ambitions, while the ostensible disillusionment over the

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management of the refugee crisis served as the perfect pretext or *casus belli* to question the policies and the competence of Brussels and its shared EU vision. We wish to analyse this transition by applying the world-systems theory, placing Hungary's shift in political ideology in the context of the enduring presence of illiberal tendencies across the modern world-system.

12.1. Fareed Zakaria and the prognosis of a transition towards illiberalism

Back in 1997, when Fareed Zakaria wrote his impactful study entitled *The Rise of Illiberal Democracy*, he presented a gloomy prognosis concerning the future of liberal democracy, arguing that based on various developments taking place across the globe, democracies will end up surrendering to illiberal aspirations. He further contented that the centuries-old bond between democracy and liberalism had begun to erode, as more and more democratically elected regimes were depriving their citizens of basic rights and freedoms, also disregarding the principles enshrined within their constitutions. As noted by Zakaria, "from Peru to the Palestinian Authority, from Sierra Leone to Slovakia, from Pakistan to the Philippines, we see the rise of a disturbing phenomenon in international life – illiberal democracy" (Zakaria 1997, 22). In his essay, Zakaria emphasized that even though they are frequently conflated, (constitutional) liberalism and democracy are actually two different concepts. While democracy is about popular participation, described as a political system based on fair, free elections and on the separation of power, liberalism is more like a conception promoting political freedom, norms and practices. Humankind received the gift of democracy from the ancient Greeks, which meant the rule of the people; however the rule of the people, namely free elections, often consolidated governments that turned out to be corrupt, narrow-minded, populist and personal/party-interest oriented. Undoubtedly, these qualities do not make a government appealing, but they do not make it undemocratic either, as democracy is only one of the many public virtues (Zakaria 2003; Zakaria 1997, 24-25). On the other hand, unlike democracy, constitutional liberalism does not refer to the process of electing a government, instead primarily focusing on the aims and the *modus operandi*

of that government, which is liberal because it cherishes individual freedom and dignity over any type of coercion, and constitutional due to the choice to prioritize the rule of law and equal treatment for all under law. Constitutional liberalism upholds the supremacy of the natural rights of human beings which are inalienable and must be secured by governments (Zakaria 2003).

As noted in the essay, the ethos of liberalism had coincided with the rise of democracy, but their deliberate coupling in the Western hemisphere had proven to be short-lived and ill-suited in the rest of the world. Namely, while democracy was thriving, constitutional liberalism was in decline at the end of the 20th century (Zakaria 1997, 23), and this trend has also continued in the 21st century, with more and more countries embracing illiberal ideologies. The prominent journalist stressed that democracy, as it is grounded in the practice of free elections, could also pave the way for dictatorships and authoritarian, intolerant, reactionary, anti-Western or even for anti-Semitic regimes. Sadly, history abounds with cases when newly democratic countries turned into fake democracies, producing "disenchantment, disarray, violence, and new forms of tyranny" (Zakaria 2003). Twenty-two years ago, Zakaria ascertained that half of the so called "democratizing" countries were illiberal democracies, labelling illiberal democracy as a "growth industry" (Zakaria 1997, 24). He discussed Russia and China as two of the most illustrious examples of non-liberal democracies; however, he pointed out their reverse transition towards market economy and democratic reforms. Whilst China quickly effectuated reforms in its economic system, liberalizing its markets, it has proved to be sluggish on democracy-related issues. By contrast, Russia initiated political reforms in the first place (after the fall of communism, by organizing free and fair elections), only later revising the economic sector. Nevertheless, the great aspirations of envisioning a Western-type of liberal democracy and capitalism quickly withered away.

The main conclusion that can be drawn from this theoretical analysis is that liberty/liberalism does not necessary go hand in hand with democracy. The recognition of this fact played a crucial part in Orbán's speech delivered at the Student Camp in Romania, when the audience got a close look at the PM's new community- and state-building agenda.

12.2. Hungary, democratic backsliding and the choice of illiberalism: the Bálványos speech

The 25th Bálványos Summer Free University and Student Camp held on the 26th of July 2014 in Băile Tuşnad, Romania got widespread international attention, after the Hungarian Prime Minister Viktor Orbán decided to launch his new political programme, pointing the way forward to a regime change. During his speech he highlighted the prominence of three major groundbreaking moments in the history of the 20th century, namely the end of the First and of the Second World Wars and the dissolution of the Soviet Union. Within his rhetoric, these three events were regarded as life-changing, as they triggered global regime rearrangements. According to Orbán, the magnitude of these moments was so profound that everyone immediately felt that the world that they previously lived in had come to an end. In his view, similar changes with the same value and importance are taking place in the world today, however with a different intensity and a different public perception. Apparently, what sparked this evolution was the 2008 financial crisis, but initially, its consequences were not considered to be as severe as those of the previous critical junctures. However, according to the PM, this crisis also revealed the decay of the liberal world order as a symbol of freedom, which instead became a henchman of large multinational corporations, prompting the premonitory signs of a new regime change. Without disregarding the salience of the fierce competition among countries, power groups and alliances over resources, position and power in the global sphere, Orbán stressed the ubiquity of a race in successful nation-building between states. The ultimate prize in this race is finding the best state-building formula, i.e. the kind of community organization that could enable the consolidation of internationally competitive nations and communities. According to the Hungarian Prime Minister, the states that have developed such formula and will also function as trendsetters in the upcoming decades "are not Western, not liberal, not liberal democracies and perhaps not even democracies" (PM Viktor Orbán's speech 2014). Singapore, China, India, Russia and Turkey were given as positive examples to follow in the future, by virtue of having the capacity to make their nations booming. Orbán urged the repudiation of the dogmas and ideologies adopted and imposed by the West on Hungary, instead embracing a novel form of community- and state-building which could ensure long-term

competitiveness in the great global contest. Furthermore, Orbán forecasted the rise of a new era, that of the *work-based state*, leaving behind the already known three models of state organization, namely the *nation state*, the *liberal state* and the *welfare state*. This work-based society envisaged by the PM is not liberal in character, casting away the prevalent understanding of social organization, which is based on the non-infringement of the freedom of the other party. In Orbán's view, the greatest weakness of the liberal type of social organization lies within the haziness of appointing an entity responsible for acting in case of infringing individual freedoms. In the absence of such an entity, its duties are taken over successively and in an ad-hoc manner by the stronger party, the stronger neighbour, or by the bank etc. Accordingly, the Prime Minister's new community-organizing tenet could be summarized in one sentence, "[…] one should not do unto others what one does not want others to do unto you", repudiating the principle that argued "[…] that everything is allowed that does not infringe on the other party's freedom" (Prime Minister Viktor Orbán's speech 2014). On the other hand, the PM gave assurance to the public that this work-based society would not reject the basic principles of liberalism, such as freedom and the respect of human rights; only the balance would shift in favour of the nation and of national interests. This smooth transition was being motivated in his rhetoric by the "blatant failure" of liberal democracy to protect the community assets necessary for self-sufficiency. Apparently, regimes based on liberal democracy do not have the instruments that would defend citizens or the country from sinking into debt (Hungarian Government, 2014). Moreover, a serious backlash against nongovernmental organizations could also be detected within his discourse, labelling some of their representatives as paid political activists financed by foreign interest groups. At the same time, Orbán emphasized that the newly envisioned national state does not intend to be against nongovernmental organizations, it will only oppose those NGOs that are financially sustained by foreign powers that wish to exert pressure on the Hungarian government. Precisely in order to prevent foreign interference in domestic affairs, the PM urged the setup of a parliamentary committee mandated to monitor, register and share with the citizens any foreign interference in state affairs. In continuation, the head of the Hungarian government pointed out that EU membership is not incompatible with the setting up of an illiberal national state, despite the existent ideological divergences between the two entities.

12.3. Can Immanuel Wallerstein's world-systems theory explain the headway of illiberal democracy in the world, and, implicitly, also in Hungary?

Before the advance of capitalism, the so-called world-empires made up the system, by subjugating and exploiting people all around the world. At the beginning of the 16th century, innovations in the field of transportation and the decay of the feudal system enabled the emergence of capitalism. However, its development was not uniform in every part of the world, precisely due to the advantages ensured by the progress in transportation and military technology (Steans et al. 2010, 84). This uneven growth allowed some towns, cities and regions to develop faster than others, creating a line of separation between the so called "core" (formed of prosperous cities, with manufacturing, technologically advanced agriculture and well-remunerated jobs) and the "periphery" (supplying the necessary raw materials, primary goods for the manufacturing of products in the core). Compared to the core, working conditions in the periphery were rather poor and the wages low, and those who had money, technology and skills relocated to the core, further deepening the gap between the core and the periphery (Steans et al. 2010, 84; Hopkins 1982, 19-20).

Besides the periphery, Wallerstein also introduced another level to the modern world-system, that of the semi-periphery. The semi-periphery represented the middle course between the two extremes, encompassing, on the one hand, countries from the core in decline, and on the other hand, countries from the periphery trying to move to the core by upgrading their place in the world-economic system. Consequently, the semi-periphery acted as a buffer between the core and the periphery, also adopting protectionist policies, undertaking serious efforts for the protection of their production processes vis-à-vis that of stronger companies from the core (Wallerstein 2006, 29).

Wallerstein argued that these three different zones in world economy are the result of the axial division of labour (Wallerstein 2011, 98). He emphasized that as a consequence of imperialism and the continuous quest for new markets, Western Europe and North America became part of the core, as they were importing raw materials and primary goods at a low price from the

periphery, while exporting manufactured products to the periphery at a higher price. Thus, the core countries became the main beneficiaries of the world-system through unequal trade relations with the periphery. At the beginning, Eastern Europe and Latin America formed part of the periphery, later being joined by the newly colonized territories in Asia and Africa. Eastern Europe was dominated by aristocratic landowners, with a feudal mentality, who, by exploiting their poorly paid rural workers, exported mainly grains to the core. Overall, the level of industrialization and imperialism influenced the evolution of the world economy, enabling some countries to move from the periphery to the core, or simply to fall back from the core, sinking into the periphery (Mansbach, Taylor 2012, 465).

An analysis of the position of Hungary within the world-system illustrated by Wallerstein demonstrates that historically, the country was part of the periphery, dominated by powerful landowners with poorly paid rural workers, mainly exporting agricultural products to the core. After the fall of communism, just like its fellow post-soviet countries, Hungary was struggling with the transition from a centralized type of economy to a capitalist one, based on competitiveness, the accumulation of capital, and private property. When it became a member of the European Union in 2004, together with other post-communist countries, this also signified Hungary's promotion from the periphery to the core. However, this transition was not easy, with many challenges to overcome, starting with the legacy of the authoritarian regimes, the sudden impact of a great level of interdependence and mutual vulnerabilities, exposure to external forces, living up to the requirements of the modern finance- and competition-driven market system, etc. There were worries in case of Central Eastern and Eastern European countries that the celerity of transition and the uneven socioeconomic development could easily culminate in a financial disaster. Additionally, even if Raúl Prebisch's core-periphery model and Wallerstein's world-systems paradigm give valuable insights concerning the global economic order where every member plays by the same rules imposed by the system, one must not forget that states acting on their own as individual agents do not retain the same amount of power in their relations with others. Some are creating the rules of the game, while others are the followers and simple executors. Their position within the world-system influences this capacity: states in the core shape policies (from economic to political, social, cultural, technological and even ideological) and

are trendsetters, while the periphery is supposed to simply acknowledge, obey and align with the expectations and the legal/belief system established by the core (Bod 2015).

Thus, within this study, we could consider embracing a nonliberal type of state- and community-building on the one hand, as a sign of revolt against (dissatisfaction with) the prevalent modern world-system, understood as a structural relationship building dependent relations between the core, semi-periphery and periphery, and on the other hand, a consequence of their place occupied within that system. We also argue that when Hungary acceded to the EU, it was more likely a part of the semi-periphery, and according to various scholars, this status continues even today, namely, through the Council of Europe, OECD, NATO, and EU membership, Hungary is associated with the core and its rules and values, but in reality, it still belongs to the semi-periphery. The feeling of always playing second fiddle to the affluent and rich Western neighbours, members of the core, influences the psyche of Central Eastern and Eastern European countries, and implicitly that of Hungary or Poland, causing a permanent state of irritation, friction and inferiority. On the other hand, passing through different developmental stages within the world-system, being more advanced than Low-Income Countries Under Stress or developing countries also distinguishes Central Eastern and Eastern European countries from postcolonial Asia, Africa and Latin America. Accordingly, countries like Hungary may not understand the problems, conditions and struggles of postcolonial Asia, Africa and Latin America, but they share one common frustration of not being part of the core, and one common goal, to be part of the core (or even form a new core) and thus establish the rules of the game (Bod 2015).

Nonetheless, given the direct consequences of the 2008 economic crisis, many core countries and those from the immediate vicinity, i.e. the semi-periphery, suffered an economic decline, while the BRIICS (Brazil, Russia, India, Indonesia, China and South Africa) have managed to register a positive output performance. Growth in the economic sector is also paired with increased global political aspirations. The crisis, sometimes labelled as the Western economic crisis, unveiled the vulnerabilities within the existent Western economic and political system, but also the hidden potential and growth advantages of non-Western governmental and social models (Bod 2015; Desai 2013). It is certainly an interesting question whether these non-

Western governmental and socioeconomic models promoted by the BRIICS countries, bound by a clear rejection of the neoliberal development model (and also of liberal democracy), could represent an alternative to the existent status quo in matters of global structural relationship.

In conclusion, it may be stated that the main rationale for developing this theoretical analysis was to show the reader the transition of Hungary towards illiberalism, as an outcome of its position (allied with its own national political cultural traditions) occupied within the existent modern world-system, and also that of a constant juggling of liberal and illiberal tendencies. Rather than treating Hungary or the other Visegrad countries as "patient zero" meant to be quarantined, or the "black sheep", we should see the greater picture and asses the rise of illiberal populist tendencies as part of "broader trends across the world-system that foster intolerance and other anti-enlightenment and socially divisive tendencies" (Wilkin 2018, 1).

12.4. Hungary, illiberal populism and the refugee crisis

Peter Wilkin undertook an in-depth historical analysis, assessing the evolution of Hungary's political culture throughout the centuries. As a major finding of this investigation, he concluded that a wide variety of political, economic, social and cultural factors have dominated the country's evolution since the 1848 revolution, combining both liberal and nonliberal elements. This means that democracy and liberalism have never had a clear path in Hungary, constantly facing resistance from illiberal, authoritarian and reactionary social groups. Moreover, nonliberalism, i.e. illiberalism, has always been present within the world-system, being one of its persistent features (Wilkin 2018, 13).

Thus, in the following sections, we shall attempt to assess the background of Hungary's slipping into illiberalism and the current state of affairs.

The overwhelming two-thirds majority secured in 2010 allowed Fidesz to pass through any legislative initiatives without major opposition, and at the same time, to change the constitution. Among the major constitutional and legislative changes since 2010, we find (Freedom House, The Rise of "Illiberal Democracy"):

- the revision of the Constitutional Court, enabling representatives loyal to Fidesz to form a majority, thus limiting the Court's jurisdiction, combined with the enforcement of early retirement (from 70 to 62 years) among Supreme Court judges. However, the European Commission initiated an infringement procedure against Hungary on the forced retirement of judges, coercing the government to change these provisions and to bring its legislation under EU law. The new law was adopted by the Hungarian Parliament on 11 March 2013, lowering the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year as before (Bozóki 2015, 18, 24; Frey 2019, 9; EU Commission 2013);
- the modification of the criminal code, allowing the incarceration of underage citizens for minor retail theft or the painting of graffiti (Bozóki 2015, 24);
- the elimination of an independent fiscal council, mandated to oversee budgetary policy, and its replacement with a different, party-controlled entity;
- the elaboration of a new election law, allowing Fidesz to gerrymander legislative districts, thus granting the leading party an unfair advantage;
- the granting of voting rights to ethnic Hungarians from the former Hungarian territories, with the aim of increasing Fidesz's voter base;
- the formation of a new press authority with Fidesz loyalists as its members, with monitoring duties, invested with powers to fine media outlets.
- the creation of incentives, through tax breaks, for popular team sports, such as football, and the building of expensive stadiums (Bozóki 2015, 25);
- the introduction a bank levy of 0.6% on financial assets, directed against Western banks (Frey 2019, 9)
- the promotion of economic nationalism and the rejection of IMF loans meant to resolve government debt and deficits
- the nationalization of private pensions funds, using the money to ease the budgetary vacuum created after the premature repayment of the IMF loan, etc.

Besides the provisions stipulated earlier, the triggering of the influx of more than 1 million third-country nationals by the refugee crisis of 2015 created a propitious background for the government to elaborate policies that, under normal conditions, would not have been possible. The Hungarian PM used the migration crisis to start a rhetorical battle with Brussels, also intended to consolidate his powers within domestic circles. Already in the spring of 2015, the government launched a *National consultation on immigration and terrorism*, calling for the support of Hungarian citizens for the introduction of stricter rules on immigration opposed to the seemingly more indulgent approach promoted by Brussels. Through the subtle formulation of the questions in the questionnaire, the government also attempted to convince the Hungarian electorate that Brussels had failed on immigration and terrorism related policies, somehow implying that only the government (representing the nation/work-based state) was capable of coming out with viable solutions for the well-being of the people. (National Consultation 2015). The 2016 migrant-quota referendum served as an instrument meant to justify a refusal to share the burden and to accept refugees under the mandatory relocation scheme. However, despite presenting it as a megaphone bringing to Brussels the voice and will of the Hungarian people, due to criticism concerning the low turnout and its subsequent invalidity, the referendum proved to be a doubled edged sword (BBC 2016). In 2017, the Hungarian government symbolically "declared war" on Brussels, organizing another national consultation, entitled "Let's stop Brussels!" In the questionnaire, the policies of Brussels were labelled as dangerous to national interests. According to the government, the elites from Brussels wanted to force the Hungarian government to reverse its utility cost cuts so that large corporations, and not the government, would determine utility costs. The aversion towards nongovernmental organizations denounced in the Bálványos speech could also be detected within the consultation, as the government attempted to raise awareness of the alleged risks of foreign interference in domestic affairs, which could endanger the independence of the country. After deliberately linking immigration to the headway of terrorism in the EU, within the questionnaire, the government asked the opinion of the electorate on the seemingly ill-suited decision of the supranational decision-makers to let in illegal immigrants, further emphasizing that human traffickers and certain international organizations were inciting immigrants to commit illegal activities in Hungary (The Budapest Beacon 2017). The National consultation on the Soros plan was also put forward in 2017, launching the

hypothesis of a conspiracy theory, namely that George Soros, an American billionaire with Hungarian origins, together with Brussels, was planning to resettle one million migrants to the EU every year, in order to dismantle the border fences in EU Members States, and to open up the border fences for immigrants. Moreover, the government issued a warning, stressing that Soros' hidden plan was to push the languages and cultures of Europe aside so that the integration of illegal immigrants could happen more quickly, thus subtly alluding to the possibility of the denationalization of the EU. Within this rationale, Hungary was depicted as a victim, with the last question from the consultation referring to the imminence of political attacks from Brussels against those countries which severely oppose immigration, additionally allowing the adoption of punitive measures for disobedience (Mészáros 2019; Budapest Business Journal 2017).

As the competitive work-based state foreseen by Orbán in the Bálványos speech will require fresh workforce in the future, and Hungary is also facing major setbacks due to the low birth rates, just like the rest of Europe, in 2018, the government gave green light to another national consultation, this time for the promotion and protection of families with children. The 10 questions within the questionnaire addressed topics such as the introduction of full-time motherhood for women raising the minimum of four children, the protective requirement of a two-thirds legislative majority before any laws regarding grants for families raising children may be changed, and the provision of support for family members looking after sick children at home. But the most important item was the first question, in which the electorate was again put to choose between the solutions offered by the EU or the Hungarian government; this was presented as the latter endeavouring to resolve the problem of low birth rates and population decline through governmental support programmes for families raising more children and for young couples starting their families, while Brussels was depicted as envisaging a permanent resettlement mechanism, resolving the ageing population problem through immigration (The national consultation 2018).

The multitude of national consultations, the political rhetoric disseminated on multiple media platforms, the scapegoating of Brussels, and the accompanying billboards all enabled the Hungarian government to launch a successful appeal for securitizing migration, gaining legitimacy from the citizens to introduce exclusionist populist policies. Thus, the refugee/migration

crisis served as the perfect opportunity for further enhancing governmental prerogatives.

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In 2019, according to Freedom House, the situation was alarming in matters of freedom and democracy, with a global erosion of democratic norms, starting with a decline of the electoral process, of the freedom of expression, of the safety of expats and of the rights of migrants, etc. Hungary is listed among the countries registering a negative status change over the past decade, shifting from the position of "Free" democracy (earned in 1990) to that of "Partly Free" (Freedom House 2019, 13). Looking at the current global trends it can be ascertained that the illiberal tendency observed by Zakaria more than two decades ago has not lost its impetus, snapping into an accelerated mode in 2019. The truth is that, nowadays, the Western world is not producing less democratic regimes, but it is producing less liberal ones. Moreover, revisiting his famous tenet in an interview given to Vox, in 2017, Zakaria argued that Western liberal democracy might not be "the final destination on the democratic road, but just one of the many possible exits" (Illing 2017).

According to Freedom House, in 2019, Hungary's freedom rating was 3.0, and "Prime Minister Viktor Orbán has presided over one of the most dramatic declines ever charted by Freedom House within the European Union" (Freedom House 2019, 11). According to the representatives of Freedom House, since 2010, he has been systematically trying to curtail critical voices from having a platform in the media or in civil society. Moreover, the poignant victory following the 2018 parliamentary elections enabled the government to continue its illiberal policies, demanding also the closure of the Central European University, thus prompting major backlash from the citizens, causing mass protests on the streets of Budapest.

Abstract

At the summer camp held in Romania in 2014, the Hungarian Prime Minister presented to the audience his groundbreaking political programme, foreseeing the setup of a new state model, that of the work-based state, based on illiberal democratic community organizing tenets. His announcement was accompanied

by heavy criticism in the EU and also outside the community. Analysing and understanding the path towards illiberal democracy in Hungary is the main objective of the current research. By using the world-systems theory of Wallerstein, we endeavour to assess the transition of Hungary towards illiberalism, as an outcome of its position occupied within the existent modern world-system and also that of a constant juggling of liberal and illiberal tendencies. Furthermore, we contend that the recent refugee crisis masterfully engineered as an existential threat by the governmental apparatus to the reference object (citizens), was deliberately used to consolidate domestic political power.

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13.

Accommodation of non-nationals in Luxembourg

The Grand Duchy of Luxembourg, within its current borders, was established in the end of the 19th century. In the space of less than 150 years, the population of this state more than doubled, which is largely attributable to immigration. Today, 45% of the population are foreigners. We would like to argue that the current immigration policy of Luxembourg is based on a strategy of accommodation. We can identify three major pillars of this strategy. The first pillar creates conditions favourable to adaptation with the host society. The second pillar brings liberal provisions for naturalization, and the third offers an open and generous admission of refugees.

13.1. The strategy of accommodation

Already in the 19th century, John Stuart Mill acknowledged that there are benefits to social diversity, but that these depend on the existence of a fundamental consensus. He wrote that the only freedom which deserves the name is that of pursuing one's own goal in one's own way, so long as one does not attempt to deprive others of theirs, or impede their efforts to

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achieve them (Mill 1859, 16). As Jason Tyndal argues, a Millian society could be composed of numerous cultural groups – each offering its set of values and goals – that constitute a single political community, which means that cultural heterogeneity is compatible with political homogeneity (Tyndal 2013, 103). This indicates that the accommodation of social diversity is possible and beneficial for the host society, but it requires a consensus.

Thanks to immigration, many European states have become more socially diverse. The share of immigrants has increased, especially during the last 50 years. Host societies perceive differently the economic and social consequences of immigration, applying diverse policies toward immigration. They can be inclusive, exclusive, based on empathy or hostility, but to a great extent, immigration policies in democratic states are more open and generous.

Canadian psychologist John W. Berry distinguishes four strategies of acculturation[1], which are assimilation, separation, integration and marginalisation (Berry 1997). These strategies can be applied to identify the types of migration policies adopted by a state. Based on these distinctions, one can identify policies that emphasize separation by introducing a mechanism of ghettoization. Most countries employ policies leading to assimilation. Two approaches emerge in this category: voluntary assimilation (Melting Pot) and forced assimilation (Pressure Cooker). Marginalisation is a rarely chosen option (Berry 1997). An integration policy can only be "freely chosen" and successfully pursued by nondominant groups when the dominant society is open and inclusive in its orientation towards cultural diversity (Berry 1991). Therefore, mutual accommodation is required for integration to be achieved. The nondominant group should adopt the basic values of the host society while the host society adapts its state institutions to the needs of the new group. As Berry points out, this strategy can only be introduced in multicultural societies which accept the value of cultural diversity, which means that they demonstrate a low level of prejudice, accept different cultures and identify with the larger society (Berry 1997, 11). Arend Lijphard used the term of "accommodation of differences" in his 1968 analysis of Dutch democracy. He emphasized a peaceful coexistence of differences within a common and shared entity. The concept of accommodation can be linked to the idea of mutual accommodation as one of the strategies of acculturation.

[1] Acculturation is defined as the process of cultural change that occurs when individuals from different cultural backgrounds come into prolonged, continuous, first-hand contact with one another.

One of the means of accommodation is the inclusion of non-nationals in the political decision-making process. As Tomas Hammar (1990, 12-14) rightly noted, a new status group – denizens – has emerged who are not full members of the society they reside in because of their lack of citizenship. Additionally, as Carlos Flores Juberias and Pedro Ten Alonso (2008, 158) argue, not recognizing the right to political participation of a large percentage of individuals in full possession of their civil rights questions the legitimacy of power. There are two main ways to secure political representation for immigrants. The first is to provide foreign nationals with voting rights, the second is a liberalization of the naturalization procedure. The former model of providing national enfranchisement of foreign residents is rather limited[2], but it was introduced on the local level in the EU, as an important part of integration. The second way of providing political rights to non-nationals is the naturalization procedure. Citizenship allows an individual to be a member of a political unit with the right to participate in political processes. Citizenship, recognized as an irreversible process of increasing inclusion, is acquirable by descent (*jus sanguinis*: right of blood), by an individual's place of birth or adoption (*jus soli*: right of the soil), or a combination of the two. Most European states use *jus sanguinis* as the principle for determining citizenship. Each state defines a set of conditions for acquiring citizenship. The criteria are usually specified by naturalization laws that vary from country to country. Data indicate that immigrants who are citizens appear to have more favourable labour-market outcomes than immigrants who are not. Generally, immigrants who have acquired citizenship have higher employment rates, a greater likelihood of working in a higher-status occupation, and higher earnings (Picot, Hou 2011).

13.2. The population of Luxembourg

Luxembourg or the Grand Duchy of Luxembourg is one of the smallest European countries, with an area of 2,586 sq. km and 619 thousand inhabitants, among them 280 thousand foreigners (Le portail des statistiques 2019). Within its current borders, this state was established at the end of

[2] According to MIPEX, only four countries, Chile, Malawi, New Zealand and Uruguay, grant equal voting rights to foreigners.

the 19th century. Prior to becoming a sovereign state, Luxembourg was a separate political entity, assigned to the king of the Netherlands. It was a poor agricultural region struggling to feed its growing population. This triggered several waves of emigration. From 1825 onwards, Luxembourgers emigrated first towards Brazil and Argentina, and then primarily to the United States of America. Between 1841 and 1891, approximately 72 thousand Luxembourgers left their country, amounting to approximately a third of the total population at the time. This all changed when iron ore was discovered in the south of the country. From 1870 onwards, large-scale steel works were erected. This led to a transformation of Luxembourg from an agrarian state to a coal and steel region. A great number of foreign workers arrived, mainly from Germany and Italy. Numerous industrial sites contributed to the development of the economy and the wealth of the country (Kreins 2015). During the 20th century, immigrants, predominantly form Italy and Portugal, contributed to the economic development of Luxembourgian industry (Murdock 2016, 34). After the oil crisis of 1973, Luxembourgian economy turned to services, especially in the financial sector. Now it is one of the major international centres of banking, investment fund, private-asset management and insurance sectors. Additionally, due to the stability, security and quality of life in Luxembourg, more international companies have been settling in the country. Moreover, there are quite a few European institutions located in Luxembourg.

Due to the economic transformation, Luxemburg has undergone a tremendous social change. The industry sector required a foreign workforce. Part of the demand for labour has been supplied by the neighbouring countries (*frontalier*), and part of it through immigrants to Luxembourg. Later, the financial sector became appealing to international specialists. The European institutions located in Luxembourg additionally influence the flow of population[3].

Today, nearly half of the population is foreign-born in Luxembourg. Additionally, this country recorded the second highest number of immigrants per capita in the EU: 40.9 immigrants per 1,000 persons (Eurostat Database). Most of the foreign-born inhabitants of Luxembourg come from another EU country. Portuguese nationals represent the largest foreign-born nation

[3] Around 10,000 international EU civil servants work in Luxembourg, and they constitute more than 5% of the resident working population.

represented in Luxembourg (15.5%), followed by the French, Italians and Belgians (Table 13.1). Portuguese workers were invited to Luxemburg during the boom in the steel industry. Most of them settled in the country. The other EU nationals work predominantly for the European institutions and in the banking sector.

Table 13.1. Luxembourgish population by nationality, January 1, 2019

Nationality	Number	Percent
Luxembourgish	322,000	52
Portugal	96,000	15.5
French	47,000	7
Italians	23,000	3.5
Belgians	20,000	3.5
Germans	13,000	2
British	6,000	1
Other EU citizens	42,000	8
Non-EU	45,000	7.5
Total population	614,000	100

Source: Le portail des statistiques 2019.

13.3. The policy of accommodation in Luxembourg

The number of foreigners living in Luxembourg has grown steadily since the 1970s. They have been greatly contributing to Luxembourg's economic success. First of all, due to the net migration and natural increase of younger foreigners, Luxembourg has experienced a very healthy population growth of around 2.0% yearly since 2010, in stark contrast to other European countries (Le portail des statistiques 2019). Secondly, foreigners significantly prevail in private economy sectors, so they contribute greatly to sustaining the Luxembourgian socioeconomic model.

Generally, the integration of new immigrants has not been a political issue in the country and Luxembourg's main political parties have a generally welcoming approach towards immigrants. The government of Luxembourg recognizes and acknowledges foreigners' input to the economy. The business-friendly legislation and administration and the country's multilingualism create favourable conditions for foreign workers. Those with citizenship

in the EU and EEA countries, as well as Switzerland, do not need a work permit or work visa to work or apply for jobs in Luxembourg[4]. Non-EU nationals coming to Luxembourg for employment, self-employment, study, research, or joining a family member for longer than 90 days require a residence permit. It can be issued on the basis of potential employment. Multi-lingual work environments are common, and French, German, Luxemburgish, and English are the languages of business correspondence. Additionally, Portuguese language is also present.

Until the 21st century, despite the sizeable presence of foreigners, few decided to naturalize, because of restrictions to the access to Luxembourgish citizenship. One of the barriers reducing access to this citizenship was active knowledge of Luxembourgish. Additionally, the lack of recognition of double citizenships was a major obstacle. In 2009, this obstacle was eliminated. Allowing for the principle of dual citizenship can be considered a profound change compared to previous legislation, and a factor conducive to developing a more consolidated foreigner accommodation policy. Consequently, there was a rise in the acquisition of Luxembourgian citizenship.

Nevertheless, with the beginning of the 21st century, the stronger migratory flows contributed to widening the gap between the number of inhabitants of the country without political rights and the number of its citizens. This noticeable contradiction between using the potential of non-nationals on the labour market while excluding them from participation in democracy was articulated by various organizations[5]. The government acknowledged it and supported the idea of voting rights expansion for non-nationals. As the prime minister of Luxemburg, Xavier Bettel pointed out that "no other country in the world, apart from Dubai has our level of democratic deficit" (The Telegraph 2015). The government determined that granting non-nationals the right to vote required strong public support. It called a national consultative referendum. In the national referendum, Luxembourgers voted against granting foreign nationals full voting rights. The failure of the referendum put pressure on the government to further liberalize the naturalisation law in order to address the "democratic deficit" emphasised during the referendum debates.

4 Some restrictions apply to Croatian nationals.

5 Association de Soutien aux Travailleurs Immigrés (ASTI); the Luxembourg Chamber of Commerce; the Greens Party; Democratic Party (DP).

Consequently, a revision of the law on Luxembourg nationality entered into force in April 2017 (Loi du 8 mars 2017). The aim of the bill, as Justice Minister Félix Braz advocated, was to grant access to Luxembourgian nationality in a fair manner that encourages changes to social cohesion. (Luxembourger Wort 2016). First of all, it simplified and harmonised the naturalization process.[6] Secondly, the new provisions have fundamentally changed the naturalization process by applying rules of *jus soli*, enabling people born in Luxembourg to non-native parents to obtain Luxembourgian nationality when they turn 18, provided they have resided in Luxembourg for at least five years before their 18th birthday (Loi du 8 mars 2017, Art. 30). Children born to foreign parents but who have one parent who was born in Luxembourg will automatically have access to Luxembourgish nationality.

Overall, the law gives everyone a chance to apply for Luxembourgian nationality provided that they have lived in Luxembourg for the past five years, passed a Luxembourgian language test and passed the course "Living together in the Grand Duchy of Luxembourg". The law also simplified application procedures, especially for those who resided legally in Luxembourg for at least 20 years (Loi du 8 mars 2017, Art. 28). Additionally, citizenship can be acquired through marrying a Luxembourger or having studied at a state school in Luxembourg for at least seven years, while residing in Luxembourg. It also upholds the principle of dual nationality, meaning that receiving Luxembourgian nationality does not require the renouncement of one's nationality of origin. Refugees, stateless people and anyone with subsidiary international protection may also apply, if they resided legally in Luxembourg for at least five years, passed the language test and completed course on the knowledge of Luxembourg (Loi du 8 mars 2017, Art. 31).

The 2017 revision further enhanced the number of acquisitions of Luxembourgian citizenship. According to figures provided by Statec[7], a total of 11,876 people acquired Luxembourgish citizenship in 2018, compared to 9,030 in the previous year. Portuguese citizens accounted for the largest

[6] Naturalization became an administrative procedure rather than a legislative one. It is more transparent, and in case of denial, applicants have the right to appeal. A timeframe of eight months for the decision by the Minister of Justice has been set. The cost of the procedure is minimal and amounts essentially to the cost of official stamps (EUR 12).

[7] Statec is the National Institute of Statistics and Economic Studies of the Grand Duchy of Luxembourg which produces statistics. Data are available through Le portail des statistique – https://statistiques.public.lu/fr/index.html.

share, followed by French, British, Italian and Belgian citizens (Le portail des statistique 2019). In 2017 Luxembourg had the highest naturalisation rate in the EU (Eurostat Database).

The government of Luxembourg also generously fulfils its obligations towards refugees. It ratified the 1951 UN Convention Relating to the Status of Refugees and acceded to both Protocols of 1967 and 1971. In 1996 the law regulating asylum was introduced[8]. Today beneficiaries of international protection in Luxembourg receive an "international protection" residence permit with a 5-year validity. They have access to social security benefits, accommodation, education and health care. They have also the right to work and access to employment training.

Luxembourg accepted several thousand refugees since the 1990s. The first large wave of refugees originated from the Balkans. The refugee crisis of 2015 made Luxembourgian government officials and NGOs more active in accommodating refugees. Since then Luxemburg has been receiving around 2,000 asylum applications per year (MAEE 2019, 3). Most of the applications are submitted by Eritrean, Syrian and Iraqi individuals. According to the Ministry of Foreign and European Affairs a total of 3,792 positive decisions granting the applicants their protected status were issued from 2015 to 2019. (MAEE 2019, 7). Overall, Luxembourg has one of the highest admission rates of refugees per capita. (Eurostat Database). Currently, there are around 3,000 refugees residing in Luxembourg (RTL Today 2019).

Additionally, Luxembourg has consistently been one of the countries willing to accept refugees in order to lessen the burden on those countries bordering the Mediterranean Sea. Since the summer of 2018, Luxembourg has taken in 41 migrants who were rescued by NGO ships (Everling 2019).

* * *

Today, the phenomenon of migration has intensified. This process is evident in the so-called "old European Union" and applies particularly to Luxembourg. This country has the most demographically mixed society, with almost half of the population being foreign born. As indicated above, in Luxembourg, the dynamics of the migration process interacted with political, economic and

[8] Droit d'asile, Memorial, Recueil de legislation A-N 30, 7 mai 1996.

social development towards a more inclusive conception of accommodation based on three major interrelated pillars. The first one creates conditions favourable to adaptation to the host society, the second introduces legislation that significantly eased the naturalisation requirements, and finally, the third pillar offers open and generous admission of refugees.

Abstract

In the space of less than 150 years, the population of the Grand Duchy of Luxembourg, more than doubled, which is largely attributable to immigration. Today, almost half of the population are foreigners. The authors argue that that the current immigration policy of Luxembourg is based on a strategy of accommodation. They identify three major pillars of this strategy. The first pillar creates conditions favourable to adaptation with the host society. The second pillar brings liberal provisions for naturalization, and the third one offers an open and generous admission of refugees

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EAN 9788381023702 ISBN 978-83-8102-370-2