





## MIGRANTS' RIGHTS, POPULISM AND LEGAL RESILIENCE IN EUROPE

Bringing together scholars of migration and constitutional law, this volume analyses the problematic relationship between the rise of populism, restrictions of migrants' rights and democratic decay in Europe. By offering both constructive and critical accounts, it creates a nuanced debate on the possibilities for and limitations of legal resilience against populist erosion of migrants' rights. Crucially, it does not merely diagnose the causes of restrictions of migrants' rights but also proposes how the law might be used as a solution. In this volume, the law is considered as both a source of resilience and part of the problem at three distinct levels: the legal-theoretical, the European and the national level. It is a major contribution to the literature on migrants' rights, offering a nuanced account of how legal resilience might be used to safeguard migrants' rights against further erosion in populist times. This book is available as Open Access.

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# Migrants' Rights, Populism and Legal Resilience in Europe

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We hope the analyses presented in this edited volume can bring us closer to securing better protection for the human rights of migrants in Europe.



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## Abbreviations

AMS	Labour Market Service in Austria
B-VG	Federal Constitutional Law in Austria
BBU-G	Federal Agency for Care and Support Services in Austria
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESIFs	European Structural and Investment Funds
CAT	Committee against Torture
CD&V	Christian Democratic and Flemish
CEAS	Common European Asylum System
CERD	Committee on the Elimination of Racial Discrimination
CEU	Central European University
CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
FPÖ	Freedom Party of Austria (Freiheitliche Partei Österreichs)
FrÄG	Aliens' Law Amendment Act in Austria
MFF	Multiannual Financial Framework
N-VA	New Flemish Alliance (Nieuw-Vlaamse Alliantie)
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
ÖVP	Austrian People's Party (Österreichische Volkspartei)
PiS	Law and Justice (Prawo i Sprawiedliwość)
PR	proportional representation
SAR	International Convention on Maritime Search and Rescue
SD	Sweden Democrats
SOLAS	International Convention for the Safety of Life at Sea

SPÖ	Social Democratic Party of Austria (Sozialdemokratische Partei Österreichs)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees



# Introduction

## *Migrants' Rights, Populism and Legal Resilience in Europe*

STIJN SMET AND VLADISLAVA STOYANOVA

We live in an age of populism, with a troubling impact on migrants' rights and on liberal constitutional democracy.<sup>1</sup> Migrants are detained *en masse*, while border walls are erected in Hungary and the United States; migrants lose their lives at sea, while politicians in Europe advocate for the 'Australian model' towards 'boat refugees' in the Mediterranean; and migrants' rights to be reunited with their families are gradually taken away, while a host of countries – including Italy and Austria in Europe – pull out of the Global Compact for Safe, Orderly and Regular Migration.

At the same time, a steady decline in the quality of democracy has spread across the globe.<sup>2</sup> In 2020, one in three persons in the world lived in a country in which democracy is decaying.<sup>3</sup> A decade earlier, in 2010, this was only six per cent of the world's population.<sup>4</sup> On a global scale, democracy is in crisis.<sup>5</sup> Or, put differently, we are in the midst of a third wave of autocratization.<sup>6</sup> Authoritarian populism is an important causal factor in this democratic decline, including in Europe. In countries like Poland and Hungary, authoritarian populists have packed the highest courts with government-friendly

<sup>1</sup> Cf. Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Dangers and How to Save It* (Harvard University Press 2018) 3 ('we are going through a populist moment. The question now is whether this populist moment will turn into a populist age').

<sup>2</sup> See the data produced by the V-Dem Institute, EIU's Democracy Index, and International IDEA's Global State of Democracy Indices.

<sup>3</sup> V-Dem Institute, 'Autocratization Turns Viral: Democracy Report 2021', [www.v-dem.net/media/filer\\_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr\\_2021\\_updated.pdf](http://www.v-dem.net/media/filer_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr_2021_updated.pdf).

<sup>4</sup> *Ibid.*

<sup>5</sup> Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

<sup>6</sup> Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) *Democratization* 1095.

judges, rewritten electoral rules to sustain (super)majorities, and silenced critical voices through media buyouts and legislation targeting NGOs and universities.<sup>7</sup>

In short, three forces – populism, restrictive migration policies, and democratic decay – have been on the rise in Europe, and the world at large.<sup>8</sup> There are, moreover, clear linkages between these forces. As the Secretary General of the Council of Europe notes, populists exploit public anxieties over migration by depicting migrants as the dangerous ‘other’, while criticizing ‘the corrupt elite’ for failing to protect ‘the pure people’ from the threat posed by migrants.<sup>9</sup> Migrants are, in the populist narrative, excluded from ‘the pure people’ that populists claim to *exclusively* represent. As such, the populist turn in European politics appears to have paved the way for ever-more restrictive migration policies, whose compliance with human rights law is questionable.<sup>10</sup>

In at least some European countries, the populist turn also presents an immediate threat to liberal constitutional democracy. Some authoritarian populists have seized the momentum created by the confluence of three crises – an economic crisis (post-2008), a terrorism crisis (ongoing since 2001, but accelerated in Europe since 2015) and a ‘migration crisis’ (since 2015) – to undermine structural features of liberal constitutional democracy, including judicial independence, the separation of powers, and the rule of law.<sup>11</sup> An opposing force to liberal constitutional democracy – Viktor Orbán’s ‘illiberal democracy’ dubbed ‘Christian democracy’<sup>12</sup> – is gaining ground in Europe.<sup>13</sup>

<sup>7</sup> See for instance Kim Lane Scheppelle, ‘Autocratic Legalism’ (2018) 85 *University of Chicago Law Review* 545.

<sup>8</sup> We define the central concepts – populism, democratic decay and legal resilience – further on in this introductory chapter.

<sup>9</sup> Council of Europe, ‘State of Democracy, Human Rights and the Rule of Law. Populism How Strong Are Europe’s Checks and Balances?’ (2017); Council of Europe, ‘Ready for Future Challenges – Reinforcing the Council of Europe’ (2019). See also Neil Walker, ‘Populism and Constitutional Tension’ (2019) 17 *International Journal of Constitutional Law* 515.

<sup>10</sup> See also T Alexander Aleinikoff, ‘Inherent Instability: Immigration and Constitutional Democracies’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 485.

<sup>11</sup> Rogers Brubaker, ‘Why Populism?’ (2017) *Theory and Society* 369. The precise nature of the interrelationship between populism, migration and democratic decay is one of the central research questions of this edited volume and is discussed at length below.

<sup>12</sup> Gabor Halmai, ‘Populism, Authoritarianism and Constitutionalism’ (2019) *German Law Journal* 296, 307–308.

<sup>13</sup> Scheppelle (n 7).

### 1.1 CONTEXT, OBJECTIVES AND RESEARCH QUESTIONS

Against this complex and troubling backdrop, this edited volume seeks to analyse the interrelationship between populism, democratic decay and the restriction of migrants' rights in Europe. The need for such analysis is evident from the tragic trajectory in Hungary,<sup>14</sup> where anti-migration discourse and policies have sustained support for Fidesz during and after the 'migration crisis' of 2015, in turn emboldening the populist party to further undermine liberal constitutional democracy to consolidate Orbán's hold on power.<sup>15</sup> Poland has been on an analogous, albeit somewhat different route towards democratic decay, in which the perceived or constructed threat of migration has also played a predominant role.<sup>16</sup>

It is tempting to dismiss Hungary and Poland as isolated cases. To assume that 'we' (i.e. the rest of Europe) can somehow quarantine 'them' so they will not infect 'us'.<sup>17</sup> In resisting that urge, this edited volume seeks to consider – in earnest – to what extent the 'we' are also at risk of suffering from democratic decay, what role populism and restrictive migration laws and policies play in this regard, and what – if anything – can be done to avoid this trajectory.

In the past few years, disquiet has grown over potential onset of democratic decay in countries like Romania, Bulgaria, Slovakia, Italy and Austria. Similarly, concern has increased about the resurgence of radical-right parties in countries like Germany, France, Belgium, the Netherlands and Sweden. Aside from populism, migration is a central theme running as a red thread through these processes, which occur across the entire European continent.<sup>18</sup> Yet unlike populism, the precise role of migration remains underexplored. The contributors to this edited volume, therefore, tug on the red thread of migration in an attempt to unravel the interrelationship between populism, democratic decay, and migrants' rights. But they do not stop at the level of diagnosis. Instead, they also seek solutions by identifying strategies of legal resilience against restrictive migration laws and policies, in particular.

<sup>14</sup> See for instance Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 243.

<sup>15</sup> This autocratization process has accelerated further under the guise of the need for extensive emergency powers to combat COVID-19. See [Chapters 6 and 8](#) by Wouters and De Ridder and by Kovacs and Nagy.

<sup>16</sup> See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). See also [Chapter 9](#).

<sup>17</sup> The activation of the article 7 TEU mechanism against Poland and Hungary could be understood in this sense.

<sup>18</sup> See, for instance, Mounk ([n 1](#)); Aleinikoff ([n 10](#)).

To achieve the above objectives, we have brought together scholars of migration law and scholars of constitutional law. The first group of scholars has been analysing ever-growing restrictions of migrants' rights for a long time.<sup>19</sup> Scholars of migration law have drawn attention to how curtailment of migrants' rights has become 'the new normal' in Europe, as well as to how such restrictions are often incompatible with fundamental legal principles, including human rights and the rule of law. In doing so, they have noted a link with the rise of populism in Europe. Scholars of constitutional law, by contrast, have – with important exceptions – only started focusing on the threat of populism to liberal constitutional democracy over the last few years, once authoritarian populists began using the law to incrementally dismantle constitutional structures in countries like Hungary and Poland.

Thus far, however, scholars of migration law and constitutional law have not engaged in concerted dialogue on these issues, which is remarkable since they are studying closely related phenomena. More important, dialogue is also necessary because examining separately (as has been done so far) migration and restriction of migrants' rights, on the one hand, and constitutional democracy and its stability, on the other, can keep us from identifying and understanding the actual problems. At the same time, dialogue can better equip both migration law and constitutional law scholars to contextualize the phenomena that they study.

To address the existing gap in the literature, we have gathered scholars representing both sub-disciplines and from across Europe at a two-day workshop at Lund University, organized in February 2020. We were, and remain, convinced that these scholars have much to gain from sharing each other's perspective, in terms of diagnosing problems, identifying lasting implications and finding possible solutions. Our shared objectives at the workshop, and in this volume, have been to piece together a nuanced picture of the interrelationship between populism, democratic decay and the restriction of migrants' rights; as well as to identify strategies of legal resilience against (overly) restrictive migrations laws and policies.

Further on in this introductory chapter, we briefly explain the origins and structure of the edited volume (Section I.4). The bulk of the Introduction,

<sup>19</sup> See, for example, Gregor Noll, *Negotiating Asylum. EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000); Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016); Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System' 53 (2016) *Common Market Law Review* 607.

however, is intended as a road map to contextualize the volume's objectives and explain its research questions (Sections I.2 and I.3).

### I.1.1 *Research Questions*

The burgeoning literature on democratic decay has been dominated by scholars of constitutional law and political science. This has brought with it a somewhat skewed perspective on the role of migration, which is often considered to be 'merely' a contributing factor to democratic decay, in the sense that (authoritarian) populists have seized on the 'migration crisis' to further undermine liberal constitutional democracy. Yet, in our estimation the relationship between the three forces is likely to be more multifaceted and complex. We, therefore, put these two research questions to our contributors:

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?
2. What are the possibilities for and limitations of legal resilience to safeguard migrants' rights against (further) erosion in populist times?

Throughout this introduction, we explicate both research questions. We first define and explain the central organizing concepts: populism, democratic decay, and legal resilience. Having defined the organizing concepts, we discuss the state of the art in relation to each research question, before deducing potential positions on each question from the literature. We finally identify, in broad terms and general categories, the different approaches our contributors have taken to each research question.

### I.2 POPULISM, DEMOCRATIC DECAY AND MIGRATION: THE INTERRELATIONSHIP

Our first research question concerns the interrelationship between three forces – populism, democratic decay and migration – that are exerting enormous pressure on Europe's liberal constitutional democracies.

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?

In conceptual *and* empirical terms, there are undeniable linkages between populism and restrictive migration policies, on the one hand, and between (authoritarian) populism and democratic decay, on the other hand.<sup>20</sup> But do systemic restrictions of migrants' rights introduced by populist parties – or by mainstream parties in an effort to 'outbid' the populists – inevitably follow Hungary's tragic trajectory towards democratic decay? Put differently, might the drastic curtailment of migrants' rights act as a sort of 'canary in the coalmine' that foreshadows future attacks on democratic structures?

It is tempting to reject this suggestion as overly reductive, but we should arguably not dismiss it out of hand. Across Europe, authoritarian and nativist populists have taken to criminalizing migrants *and* targeting those who resist restrictive migration policies. Migrants are often a primary target, but courts, civil society and the media are a close second. Populists attack the media for being 'leftist' or bringing 'fake news' on migration, brandish judges who rule in favour of migrants as being 'estranged' from the will of the people and undermine NGOs and independent agencies by labelling them 'biased' in favour of migrants at best and 'enemies of the people' at worst. This worrying pattern is not confined to just a few countries. It is replicated in a wide range of constitutional democracies in Europe.<sup>21</sup>

Could, in that respect, a confluence of *all three forces* be posited, in the sense that systemic restrictions of migrants' rights, introduced by or under the influence of populists, could be considered a mark of democratic decay? Or are both phenomena – the undermining of migrants' rights and the decay of liberal constitutional democracy – conceptually and empirically distinct? Moreover, what is the exact relationship between populism and restrictive migration laws and policies? Is populism a causal factor in systemic breaches of migrants' rights or 'merely' an accelerant in processes that were well under-way before the populist surge?

These are some of the questions that preoccupy the contributors to this volume (see [Section I.2.3](#)), as they seek to untangle the complex relationship between populism, democratic decay and migration (see [Section I.2.2](#)). But before we are in a position to unpack these questions, a clear understanding of the structuring concepts of populism and democratic decay is in order (see [Section I.2.1](#)).

<sup>20</sup> These linkages were discussed (briefly) in Section 1 and are explained further on in this section, on the basis of a literature review and the contents of the volume's chapters.

<sup>21</sup> See [Chapters 8–13](#) in [Part III](#) of this volume.

### 1.2.1 Defining Populism and Democratic Decay

Two central concepts in our first research question – populism and democratic decay – require a definition and initial explanation. It could be argued that the same holds true for the third central concept: migration. Patricia Mindus, however, takes on the difficult charge of pinpointing what migration is, exactly, in [Chapter 2](#). We, therefore, leave that concept aside here. As to restrictions of migrants' rights, we understand this to not only include limitations of human rights as guaranteed in a relatively general way in the European Convention on Human Rights and the EU Charter of Fundamental Rights, but also curtailment of rights as formulated more concretely in EU law (e.g. the EU instruments forming the Common European Asylum System) or national legislation.

#### 1.2.1.1 Populism: Simpliciter, Authoritarian or Nativist?

Populism, so it is said, is an essentially contested concept.<sup>22</sup> Ordinarily, this qualification implies deep-seated 'contestation at the core' about the 'content and implications' of the concept at issue, with 'people advancing and defending (and criticizing and modifying) rival conceptions of the concept'.<sup>23</sup> Yet in the case of populism it is not so much its *content* that is contested, but the *form* it takes.<sup>24</sup> Some view populism as a discursive practice,<sup>25</sup> others claim that it is a political strategy,<sup>26</sup> and others still consider it to be a (thin) ideology.<sup>27</sup> But regardless of how populism is understood – as a discourse, strategy or ideology<sup>28</sup> – there appears to be widespread agreement on its

<sup>22</sup> Brubaker (n 11), 358; Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 2.

<sup>23</sup> Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) *Law and Philosophy* 137, 149–150. See also, and originally, Bruce Gallie, as cited in David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 *Journal of Political Ideologies* 211, 214 (stating that the essentially contested nature of concepts 'inevitably involve[s] endless disputes about their proper uses on the part of their users').

<sup>24</sup> For an overview, see Mudde and Kaltwasser (n 22).

<sup>25</sup> Benjamin De Cleen, 'Populism and Nationalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 342, 345; Jan-Werner Müller, 'Populism and Constitutionalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 590, 591.

<sup>26</sup> See Mudde and Kaltwasser (n 22) 4 (describing this 'more recent approach' as being 'particularly popular among students of Latin American and non-Western societies', without endorsing this conception of populism themselves).

<sup>27</sup> *Ibid.*, 6.

<sup>28</sup> Other viewpoints may exist. Yet these are probably the most pertinent ones for our purposes.

constitutive elements: populism relies on a constructed image that divides society, in antagonistic terms, between ‘the (pure) people’ and ‘the (corrupt) elite’.<sup>29</sup>

How does one get from this general understanding of populism to describing its role in the incremental undermining of liberal constitutional democracy, on the one hand, and its contribution to the enactment of evermore restrictive migration laws and policies, on the other hand? In making that bridge, legal scholars often find it useful to draw on one of the most widely endorsed conceptions of populism: the ideational approach of Cas Mudde and Cristóbal Rovira Kaltwasser.<sup>30</sup> In the ideational approach, populism is understood as

a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.<sup>31</sup>

Some contributors to this edited volume clearly draw on this understanding of populism, either explicitly<sup>32</sup> or implicitly.<sup>33</sup> As will become clear, however, a ‘thicker’ understanding of populism as inherently anti-pluralist, proposed by Jan-Werner Müller, might actually be more pertinent in the migration context, given that most contributors seem to consider anti-pluralism a highly salient factor in their analyses.<sup>34</sup>

Under the ideational approach favoured by some contributors to this edited volume, populist parties and politicians can hardly be populist and nothing more, since as an ideology populism is too thin to support an electoral programme. It, therefore, tends to be combined with other ideologies such as nationalism or xenophobia, and lends itself extremely well to such combinations.

<sup>29</sup> See Mudde and Kaltwasser (n 22) 5–6; Cas Mudde, ‘Populism: An Ideational Approach’ in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 27, 32; De Cleen (n 25) 345.

<sup>30</sup> Mudde and Kaltwasser (n 22) 2; Mudde (n 29) 28.

<sup>31</sup> Mudde and Kaltwasser (n 22) 6.

<sup>32</sup> See, for instance, Chapter 1 by Stoyanova.

<sup>33</sup> See, for instance, Chapters 6 and 12 by Wouters and De Ridder and by Desmet and Smet.

<sup>34</sup> See, among others, Chapters 2, 8, 9 and 13. A minority of authors favours a somewhat looser understanding of the concept. In Chapter 11 on Austria, Ammer and Kirchmair, for instance, view populism ‘as a phenomenon constituting an important challenge to discursive and institutional pluralism’. This suggests an understanding of populism as a political strategy or practice intent on undermining democratic essentials, which seems to be particularly instructive to understand the peculiarities of the Austrian case (see also 2.2).



In Western, Northern and Southern Europe, populism indeed tends to go hand in hand with nationalism and/or xenophobia.<sup>35</sup> It thus takes the form of *right-wing* or *nativist* populism. Some contributors to this edited volume seem to understand populism in these terms.<sup>36</sup> They note that populists construe the people as a 'bounded collectivity' that is being threatened by the 'other'.<sup>37</sup> Mindus, for instance, notes that '[p]opulism exploits the blurring of the [...] distinction [between People-as-a-part and People-as-a-whole]: the populist framing of anti-migration policies pitching "them" versus "us" is a case in point'. Migrants are, on this understanding, depicted by populists as the enemy of the people, threatening the homogenous collective.<sup>38</sup> This explains why, in the populist imagination, migrants are *excluded* from the bounded collectivity. Kovacs and Nagy seem to rely on a similar understanding of populism, when they claim that

today's populist authoritarian nationalists concentrate on the concept of identity as a tool for determining who belongs to the mass that may be defined in ethnic, religious or linguistic terms. They use the language of the malign 'other', in which the other is a group considered not to belong to the mass because it differs in some key characteristics.

The understanding of populism favoured by Mindus and by Kovacs and Nagy, among others, appears to bake the relationship between populism and migration into the very concept of populism itself, thereby potentially conflating

<sup>35</sup> See De Cleen (n 25) 348–349. Since we are interested in the relationship between populism, on the one hand, and democratic decay and migration, on the other, we leave aside left-wing varieties of populism in this introductory chapter and throughout much of the edited volume. The reason is that left-wing populism tends to be linked to economic recession and claims of distributive justice. As such, it does not come within the purview of our analysis. This is not to say that these are unimportant instances of populism, nor to claim that they cannot pose dangers to liberal constitutional democracy. The case of Venezuela shows that they can. See David Landau, 'Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 161; Steven Levitsky and David Ziblatt, *How Democracies Die* (Broadway Books 2018) 4–5; Günter Frankenberg, *Authoritarianism: Constitutional Perspectives* (Edward Elgar 2020), *passim*.

<sup>36</sup> See, apart from the example discussed in the text, also Chapters 3, 7 and 10 (the latter chapter analyses the Italian case through the lens of what the authors call 'PopSovism', a contraction of populism and sovereignty, in which '[t]he populist component [...] puts itself on the side of "the people", defined as a country's native ethno-cultural group(s), which must be defended against both national and transnational "elites" and against other "outsiders" such as immigrants.').

<sup>37</sup> Brubaker (n 11) 363.

<sup>38</sup> Mudde and Kaltwasser (n 22) 34.

populism and nationalism.<sup>39</sup> Benjamin De Cleen has claimed, in this regard, that labelling the construction of an insider-outsider perspective of society as a core feature of populism *simpliciter* ‘misses the point [...] for these parties [which propagate this view] cannot be understood through the notion of populism alone’.<sup>40</sup> It is, by contrast, their right-wing or nativist ideology that is doing the work of constructing the insider-outsider dichotomy.<sup>41</sup> Strictly speaking, on a narrow understanding of the concept, populism *exclusively* targets ‘the elite’ – not just the political elite, but also the media, the academy and the cultural elite – for instance chastising these elites for choosing the plight of migrants over the concerns and the will of ‘the people’.<sup>42</sup>

Yet, somewhat ‘thicker’ understandings of populism, such as proposed by Jan-Werner Müller, accommodate the seeming conflation of nationalism and populism by insisting that populists are *per definition* anti-pluralist.<sup>43</sup> Since populists label a constructed homogenous collective as ‘the people’, Müller notes, they inevitably draw insider-outsider boundaries in plural societies (which all European countries are to a greater or lesser extent).<sup>44</sup>

Mindus, in [Chapter 2](#), draws on Müller’s understanding of populism ‘as an exclusionary form of identity politics’. Thorburn Stern and Lind do the same when they identify two common denominators of populism: criticism of elite and anti-pluralism. At least some contributors to this volume thus seem to consider ‘thicker’ understandings of populism more germane to understanding the interrelationship between populism and migration in Western, Southern and Northern Europe. Thorburn Stern and Lind, for instance, emphasize that

Another factor central for populism is *crisis*, real or perceived, which acts both as a hotbed for populism, creating a space for its emergence [...] and as a tool for populists to create a situation in which ‘the people’ can be united against a threatening Other, and be more susceptible to arguments in favour

<sup>39</sup> De Cleen (n 25) 342. Note that Stoyanova at times seems to do the same in [Chapter 1](#), for instance when she claims that ‘[p]opulists who perceive membership as static and the polity as culturally homogeneous, not only tip the balance as to how migrants are treated, but also compromise more generally democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging.’ (internal citations omitted) and argues that ‘[t]his compromises the values of the community because “identitarian assumptions” about who belongs to the “the pure people” quickly lead to the targeting of other groups who do not fit within these assumptions’. See [Chapter 1](#).

<sup>40</sup> De Cleen (n 25) 349.

<sup>41</sup> Brubaker (n 11) 363; Mudde (n 29) 33; De Cleen (n 25) 344.

<sup>42</sup> Mudde and Kaltwasser (n 22) 14; Mudde (n 29) 33. Cf. also Brubaker (n 11) 364.

<sup>43</sup> Müller (n 25) 590.

<sup>44</sup> *Ibid.*

of strong leadership and fast political action in order to prevent the crisis from getting worse.<sup>45</sup>

Although Thorburn Stern and Lind write about Sweden, their understanding of populism appears to fit the circumstances in Central and Eastern Europe (CEE) more snugly. In CEE countries, nativist strands of populism have long struggled to gain traction, largely due to the limited number of migrants that choose to remain in CEE.<sup>46</sup> This has, however, not stopped populist leaders from seizing upon the 'migration crisis' of 2015 to paint an image of a wave of migration, especially from Muslim countries, threatening to sweep away the majority's culture and population.<sup>47</sup> In these instances, the threat of migration is arguably deployed as a discursive strategy to prop up support for the incumbent populist leader.<sup>48</sup> In that sense, the link between nativism and populism is weaker, or at least more contingent, in CEE countries than in other parts of Europe.

Indeed, populism in CEE is often described as *authoritarian* populism, a variety intent on undermining democratic essentials to secure the populist's hold on power.<sup>49</sup> The threat of migration is, in this narrative, *instrumentalized* to strengthen the authoritarian populist's grip on the state apparatus. In Chapter 8, Kovacs and Nagy construe the role of populism in this sense. In discussing the Hungarian case, they consistently speak of 'populist authoritarian nationalist' who rely on Schmitt's understanding of 'an indispensable, unitary sovereign, who, at the moment of an unpredictable crisis, can break free of the rule of law and assert his pre-legal authority'. Here, the linkages to democratic decay are evident, in contrast to what is the case for nativist populism, which need not undermine the structures of liberal constitutional democracy.

<sup>45</sup> Emphasis in original.

<sup>46</sup> Ben Stanley, 'Populism in Central and Eastern Europe' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 140, 146–147.

<sup>47</sup> See Chapter 9 by Mikolajczyk and Jagielski ('In contrast to Western and Southern Europe, the migration crisis of 2015–2016 largely bypassed Poland. This is a kind of paradox because, despite the low risk of waves of migrants from Syria and Africa arriving in Poland, Law and Justice managed to skillfully exploit the migration crisis in Europe').

<sup>48</sup> Halmi (n 12) 310 ('The populist approach to constitutionalism [in CEE countries] appears as an instrumental one that uses nationalist and religious definitions of the nation to promote an ultimately authoritarian project.')

<sup>49</sup> Bojan Bugarič, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' (2019) *International Journal of Constitutional Law* 597, 599 ('While ethnonationalism is present in most of Western European cases, it is [...] authoritarianism, which sets the ECE type of populism apart from other European cases').

At the same time, it is striking that, in the broader literature, the term *authoritarian* populism is generally used to describe those instances of populism that have already led to democratic decay (e.g. in Hungary and Poland), whereas *right-wing* or *nativist* populism tends to be reserved for instances that entail drastic curtailment of minority rights – including migrants’ rights – but do not target the structures of democracy as such (e.g. in Belgium and Sweden).<sup>50</sup> In other words, there seems to be an element of contingency in the qualifiers we add to the label ‘populism’. Populism is labelled authoritarian once democracy is being undermined, whereas it is called right-wing or nativist if that is not (yet) the case.

This dichotomy can also be observed in this volume. Whereas Kovacs and Nagy speak of authoritarian populism in discussing the Hungarian case, Desmet and Smet as well as Thorburn Stern and Lind write about right-wing or radical right populism in [Chapters 12](#) and [13](#) on Belgium and Sweden. What is to say, however, that right-wing or nativist populists in Sweden and Belgium would not pursue the same avenue as their authoritarian cousins in Hungary, if given the opportunity? This makes it all the more pressing to evaluate the precise linkages between populism, democratic decay, and migration as well as to identify strategies of legal resilience. First, however, we need to be clear on what we mean by ‘democratic decay’.

### 1.2.1.2 Democratic Decay: Incremental But Purposive

Unlike populism, the concept of democratic decay is not essentially contested.<sup>51</sup> There exists, in fact, widespread agreement on its definition and core elements. If anything, the literature includes an abundance of concepts that more or less describe the same thing. Democratic decay, democratic backsliding, democratic erosion, democratic decline and other cognate terms all refer to an incremental, yet deliberate process of undermining the fundamental principles, basic structures and central institutions of liberal constitutional democracy.<sup>52</sup> We will expand on *what precisely* is being eroded – or what

<sup>50</sup> Cf. Stephen Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (2020) *Columbia Journal of Transnational Law* 1, 3 (distinguishing between two types of populism, one of which operates within the structures of constitutional democracy whereas the other assaults these structures).

<sup>51</sup> Tom Gerald Daly, ‘Democratic Decay: Conceptualising an Emerging Research Field’ (2019) *Hague Journal on the Rule of Law* 9.

<sup>52</sup> *Ibid.*, 17; Nancy Bermeo, ‘On Democratic Backsliding’ 2016 *Journal of Democracy* 5, 14–15; Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press 2018) 39; Aziz Z. Huq, ‘A Tactical Separation of Powers Doctrine’ (2019)

exactly is decaying – further on, when we unpack the state of the art on the interrelationship between democratic decay, migration and populism. For now, a general understanding of democratic decay suffices.

Processes of democratic erosion or democratic decay are often explained in contradistinction with the 'traditional' coup d'état, in which democracy is overthrown by a sudden violent event, following which an authoritarian form of government – generally a dictatorship or military junta – is immediately installed in democracy's stead.<sup>53</sup> As the term indicates, democratic decay is a process (not an event) that takes place much more gradually (not suddenly).<sup>54</sup> The means used also differ from those of a coup d'état, in that liberal constitutional democracy is no longer overthrown by use of force, but incrementally undermined through legal means by – generally populist – politicians who have been democratically elected.<sup>55</sup>

Democratic decay is the most prominent form of autocratization today.<sup>56</sup> Democracy is much less often overthrown in our populist times than it is slowly, yet steadily, eroded. The ultimate aim, however, remains the same as in a coup d'état: securing the populists' hold on state power, which they concentrate in the executive branch of government.<sup>57</sup> Hence, Nancy Bermeo identifies 'executive aggrandizement' as a core feature of democratic erosion.<sup>58</sup>

In Europe, Hungary and Poland are the prime examples of countries suffering from democratic decay at the hands of authoritarian populists bent on executive aggrandizement. In both countries, authoritarian populists have 'weaponized the law' to undermine the independence of courts; rewrite electoral rules to make it (much) more difficult for the opposition to win elections; silence the media; effectively ban a university; suppress critical

*Supreme Court Review* 19, 24; Mudde and Kaltwasser (n 20) 91; Melis G Laebens and Anna Lührmann, 'What Halts Democratic Erosion? The Changing Role of Accountability' (2021) *Democratization* 3; Scheppele (n 7) 547.

<sup>53</sup> See, for instance, Bermeo (n 52) 10.

<sup>54</sup> *Ibid.*, 14–15; Daly (n 51) 17; Ginsburg and Huq (n 52) 39; Huq (n 52) 24; Mudde and Kaltwasser (n 22) 91; Laebens and Lührmann (n 52) 3; Scheppele (n 7) 547.

<sup>55</sup> Bermeo (n 52) 15.

<sup>56</sup> Anna Lührmann and Staffan I Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) *Democratization* 1095, 1105 (stating, with reference to data from the Electoral Democracy Index of V-Dem, that democratic erosion accounts for 70% of all cases of autocratization in the world over the past decades).

<sup>57</sup> Scheppele (n 7).

<sup>58</sup> Bermeo (n 52) 10.

NGOs; and drastically curtail a range of minority rights.<sup>59</sup> To both countries, a separate chapter is dedicated in [Part III](#) of this volume, along with countries that seemed to be heading on a similar trajectory towards democratic decay but have avoided reaching terminal velocity (Austria and Italy), as well as countries in which liberal constitutional democracy appears secure but in which right-wing populism is nevertheless a force to be reckoned with (Belgium and Sweden).

### I.2.2 *State of the Art*

As the preceding discussion indicates, it would be farfetched to insist that all six countries analysed in [Part III](#) of this volume – Poland, Hungary, Italy, Austria, Belgium and Sweden – are experiencing democratic decay. It would also go too far to suggest that liberal constitutional democracy in each of these countries is or was equally vulnerable to executive aggrandizement by authoritarian populists. Clearly, there are salient differences between the six countries. But they also share commonalities: in each of these countries, populists have seized upon the ‘migration crisis’ of 2015 to expand their support base and, more significantly, each country has adopted evermore restrictive migration laws and policies over the past decade (or more). These commonalities are what has prompted us to ask: what is the precise nature of the interrelationship between populism, democratic decay and migration?

As stated earlier, there are clear linkages between these forces: between populism and restrictive migrations laws and policies, on the one hand, and between populism and democratic decay, on the other. In respect of the first relationship, *nativist* or *right-wing* populism has contributed to evermore drastic curtailment of migrants’ rights in Europe (see [Section I.2.3](#)). Its contribution has been direct in countries where nativist populist parties have been in government (e.g. in Italy), whereas it is indirect in countries where the electoral pressure of nativist populist parties has pushed mainstream parties to co-opt some of their policies in a bid to cut off their electoral support (e.g. in Belgium).<sup>60</sup> In some countries, both phenomena can be observed simultaneously (e.g. in Austria). In further countries still, authoritarian populists have

<sup>59</sup> Scheppele ([n 7](#)); Ginsburg and Huq ([n 52](#)), Ch 4 in particular; Wojciech Sadurski, ‘Populism and Human Rights in Poland’ in Gerald L Neuman (ed) *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press 2020) 60. See also [Chapters 8](#) and [9](#).

<sup>60</sup> Cf. Brubaker ([n 11](#)) 379 (‘Both substantive themes and stylistic devices from the populist repertoire are routinely appropriated by “mainstream” political actors’, a political strategy Brubaker labels ‘poaching’). Cf. also Rosalind Dixon and Anika Gauja, ‘Australia’s Non-Populist Democracy? The Role of Structure and Policy’ in Mark Graber et al (eds)

instrumentalized the constructed threat of migration as part of their strategy to undermine liberal democratic structures and further entrench power in their hands (e.g. in Poland and Hungary). In these countries, the second relationship – between populism and democratic decay – becomes evident as well.

Scholars of migration law and scholars of constitutional law have taken note of different linkages between restrictive migration laws, populism and democratic decay. Migration law scholars have by and large failed to engage more profoundly with the relationship. Their engagement has been limited to the observation that populism has led to (or has posed the risk of leading to) further restrictions of migrants' rights.<sup>61</sup> As a response to the populist threat, migration law scholars have tried to demonstrate that populist attacks on human rights law as applied to migrants are unfounded since human rights law actually acknowledges and accommodates states' entitlements to control borders. In this sense, in many respects human rights law accommodates the restrictions advocated for by populists.<sup>62</sup> At the same time, and ironically so given its acknowledged limitations, human rights law is constantly invoked as a source of solutions.<sup>63</sup>

But by focusing primarily on the relationship between populism and the restriction of migrants' rights, migration law scholars might have overlooked wider structural problems, including the problem that we have framed as

*Constitutional Democracy in Crisis?* (Oxford University Press 2018) 395, 397 and 412 (discussing the same phenomenon in the Australian context).

<sup>61</sup> See for example, Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68(1) *Current Legal Problems* 143, 148 ("Migration exceptionalism" is a dangerous political move: non-citizens usually cannot vote, it is all too easy for populist anxieties about the negative consequences of immigration and misunderstandings about refugee protection to hold sway; xenophobic reflexes easily become entrenched, and the government's strongly perceived need to demonstrate control over migration to their electorates can lead to all manner of repressive reactions. When we place the resultant practices in a category of their own, we create a space for exceptional, repressive practices.)

<sup>62</sup> Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Vladislava Stoyanova, 'Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights' (2018) 10(2) *European Journal of Legal Studies* 83; Marie-Bénédicte Dembour, 'The Migration Case Law of the European Court of Human Rights. Critique and Way Forward' in Başak Çalı, Ledi Bianku, and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press 2021) 19.

<sup>63</sup> See also Helena Hofmannová and Karel Řepa, "'Othering" in Unconcerned Democracies and the Rise of Anti-liberal Political Divisions' in Moritz Jesse (ed), *European Societies, Migration and the Law* (Cambridge University Press 2020) 43, 44 (arguing that since restrictions of migrants' rights might be contrary to human rights law, such restrictions endanger 'the core normative structures of modern post-war constitutionalism').

democratic decay. This may appear logical, since the will of the majority expressed through democratic procedures (procedures in which migrants cannot take part due to their status as non-citizens) is often viewed with suspicion by scholars of migration law, which explains the resort to non-majoritarian fora to defend migrants' interests. Yet, the possibility of decay of these very democratic procedures, as caused by the impact of populism on constitutional structures, seems to have largely escaped the radar of migration law scholars.

As this volume shows, scholars of migration law have every reason to worry about the state of liberal constitutional democracy in Europe. This is so, because the relative health of liberal constitutional democracy influences a number of pertinent factors: (i) whether authoritarian populists are able to seize power and begin to systematically undermine migrants' rights (as well as the rights of their supporters); (ii) the extent to which restrictive migration laws and policies can be adopted under the direct or indirect influence of nativist populism; and (iii) the room there is for legal resilience against ever-growing restrictions of migrants' rights, regardless of whether they are introduced by populists or mainstream parties (see [Section I.2.3](#)).<sup>64</sup>

Scholars of constitutional law, by contrast, have largely focused on the relationship between populism and democratic decay.<sup>65</sup> This, as well, appears logical, given that these scholars are preoccupied with the extent to which populists are responsible for the incremental dismantling of liberal constitutional democracy (or threat thereof), not with their impact on migrants' rights. Impact on concrete rights is considered to be of minor significance when constitutional structures are crumbling under the weight of populism. Scholarship in constitutional law is also, and increasingly so, focused on finding ways to make liberal constitutional democracy more resilient against the threat of authoritarian populism, either through constitutional design or by instilling democratic norms.<sup>66</sup> But constitutional law scholars have paid little attention to the implications of populism and democratic decay for migrants' rights.

What is thus largely missing in the literature, at present, is concerted analysis of the interrelationship between *all three* forces: populism, democratic decay *and* migration.

<sup>64</sup> See Sadurski (n 59) 60 (explaining that in Poland, the main challenge to human rights is that "the legal environment" important for the protection of human rights is being eroded').

<sup>65</sup> See, for instance, Scheppele (n 7); Ginsburg and Huq (n 52); Huq (n 52); Graber et al (n 5); Daly (n 51).

<sup>66</sup> Gardbaum (n 50); Bugarič (n 49); Sadurski (n 59); András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) *Constitutional Studies* 5.



Although the literature in constitutional law focalizes on just part of this interrelationship, it nevertheless has some pertinent insights to offer. From this literature, broadened to include political science, a number of baseline positions have been deduced for our contributors to engage with. When constitutional lawyers and political scientists analyse democratic decay, they naturally begin by identifying what, exactly, is decaying. Democratic decay itself may not be an essentially contested concept, but democracy very much is.<sup>67</sup> Most constitutional lawyers and political scientists agree that it is not so much 'minimalist' or 'procedural' democracy that is the target of authoritarian populists, but the liberal constitutional accretions to thin conception of democracy.<sup>68</sup> In other words, the primary targets of authoritarian populists are not elections or majority rule, but liberal constitutional structures such as the separation of powers and institutions like independent courts.<sup>69</sup>

Constitutional lawyers and political scientists agree that incremental dismantling of the separation of powers and systemic undermining of judicial independence are symptoms of democratic decay.<sup>70</sup> By contrast, the extent to which violations of human or fundamental rights can be considered a symptom of democratic decay is contested. When assessing the existence of democratic decay, most constitutional lawyers and political scientists define liberal constitutional democracy with reference to a rather limited set of essentials.<sup>71</sup> Apart from free and fair elections and the rule of law, these include freedom of association and freedom of expression but generally do not extend to other human rights.<sup>72</sup>

Guided by a narrow understanding of democratic decay, most scholars consider systematic targeting of opposition parties and the free press as

<sup>67</sup> See, among others, David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) *Journal of Political Ideologies* 211, 212 (discussing two applications of Gallie's framework on essentially contested concepts: democracy and the rule of law).

<sup>68</sup> Mark Graber, Sanford Levison and Mark Tushnet, 'Constitutional Democracy in Crisis? Introduction' in Mark Graber et al (eds) *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 1, 6; Mudde and Kaltwasser (n 22) 81; Mounk (n 1) 8–9.

<sup>69</sup> Mudde and Kaltwasser (n 22) 91; Neil Walker, 'Populism and Constitutional Tension' (2019) *International Journal of Constitutional Law* 515.

<sup>70</sup> See, for instance, Gardbaum (n 50); Jakab (n 66); Ginsburg and Huq (n 52); Walker (n 69).

<sup>71</sup> See, for instance, Gardbaum (n 50) 9; Jakab (n 66) 11.

<sup>72</sup> See, for instance, Ginsburg and Huq (n 52) 43 (defining democratic erosion as 'a process of incremental, but ultimately still substantial, decay in the three basis predicates of democracy – competitive elections, liberal rights to speech and association, and the rule of law' and stating it is 'only when substantial change occurs across all three necessary institutional predicates of democracy that the system-level quality is likely to be imperilled').

symptoms. But other human rights violations, even when they occur systematically and target minorities, are generally considered beyond the purview of a narrow understanding of democratic decay.<sup>73</sup> Drastic curtailment of migrants' rights is thus regarded as a matter of 'ordinary' constitutional law and politics, at least by a majority of scholars.<sup>74</sup>

For most scholars of constitutional law and political science, migration thus remains but one of several causal factors in the global spread of populism and concomitant crisis of democracy.<sup>75</sup> In that sense, populism, democratic decay and migration *are* interrelated, but only contingently: migration is an empirical reality on which populists have seized to gradually undermine democratic decay, but nothing more.

In other words, the majority position in the literature insists that democratic decay and the systemic undermining of migrants' rights are separate phenomena.<sup>76</sup> Taken on its own, the systemic targeting of migrants' rights cannot constitute democratic decay, it is intimated, for otherwise most countries in Europe would be suffering from democratic decay.<sup>77</sup> Indeed, as almost all contributors to this edited volume point out, systemic violations of migrants' rights have become a core feature of liberal constitutional democracies – the 'new normal' – regardless of whether these democracies are governed by mainstream parties or being eroded by authoritarian populists.

A minority position in the literature, however, employs a somewhat broader conception of democratic decay that also includes *systemic* violations of human rights.<sup>78</sup> On this broader conception, systematic targeting of migrants by drastically curtailing their rights could be considered a distinct form or

<sup>73</sup> *Ibid.*, 108 ('horrific and gross violations of human and constitutional rights [do not] necessarily [constitute] a failure of democracy per se').

<sup>74</sup> Graber, Levinson and Tushnet (n 68) 6; Aleinikoff (n 10) 485.

<sup>75</sup> See, for instance, Graber, Levinson and Tushnet (n 68) 3; Brubaker (n 11) 374 and 377; Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) *The Oxford Journal of Legal Studies* 435, 444; Samuel Issacharoff, 'Democracy's Deficits' (2018) *The University of Chicago Law Review* 485, 507.

<sup>76</sup> Aleinikoff (n 10) 485. Cf. also Stefan Rummens, 'Populism as a Threat to Liberal Democracy' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 554, 561.

<sup>77</sup> Ginsburg and Huq (n 52) 184 (discussing the example of the Netherlands and arguing that co-optation of populist rhetoric and policies by mainstream parties 'can lead to morally despicable policies, but seems unlikely to conduce to democratic erosion').

<sup>78</sup> Michaela Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 277, 279–280.

symptom of democratic decay.<sup>79</sup> This remains, however, a marginal position in constitutional law scholarship.<sup>80</sup>

### 1.2.3 *Different Approaches to the Interrelationship*

The preceding literature review has revealed two main positions on the interrelationship between populism, democratic decay and migration.

The majority position views migration as one of several contributing factors to processes of democratic decay, in the sense that populists intent on undermining liberal constitutional democracies instrumentalize 'migration crises' to drum up electoral support for their 'cause' (couched in terms of 'the will of the people'). Yet both phenomena – democratic decay and restrictions of migrants' rights – should be distinguished, since the relationship does not operate in the opposite sense. Instead, restrictive migration laws and policies are part of 'ordinary' law and politics. Such laws and policies may be morally loathsome, but since they reflect 'common' understandings of international law principles, they should not be equated with erosion of democracy. Even systematic targeting of migrants and drastic curtailment of their rights do not, in the absence of other measures such as capture of the judiciary, constitute democratic decay.

A minority position in the literature, by contrast, employs a broader understanding of democratic decay, which does include systemic human rights violations. On the minority approach, systematic targeting of migrants and drastic curtailment of their rights could thus be considered a distinct form of democratic decay. If adopted, this broader understanding of democratic decay inevitably leads to the conclusion that (even) more countries are suffering from democratic decay than is currently assumed to be the case.

All contributors to this volume were asked to indicate their favoured approach to the interrelationship between populism, democratic decay and migration: the majority or minority position (or a third/fourth position). Since contributors were given the freedom to focalize their chapter around one *or*

<sup>79</sup> Cf. also Müller (n 25) 592 (claiming that 'populism and normative constitutionalism – understood as pluralism-preserving and rights-guaranteeing do *not* go together' without stating, in so many words, that undermining fundamental rights *ipso facto* undermines constitutionalism as well).

<sup>80</sup> Cf. also Bugarič (n 49) 607 ('The third plank of liberal democracy that comes under populist attack are civil rights and liberties.') Compare Veronika Bilková, 'Populism and Human Rights' (2018) *Netherlands Yearbook of International Law* 143, 144 (arguing that '[p]opulists usually do not reject the concept of human rights expressly [but] embrace a rather selective and instrumental approach to it, seeking to adjust human rights to their needs').

both research questions (see Section I.1.2), some have chosen not to take sides in this particular debate, electing to focus on the legal resilience question instead (see Section I.2.3). But most chapters do evaluate whether restrictions of migrants' rights might constitute (a form of) democratic decay. The answers diverge. They are also, broadly speaking, formulated at two distinct levels: the conceptual and the empirical.

Contributors who present general or theoretical arguments in their chapter tend to view the interrelationship between populism, democratic decay and migration in conceptual terms. They also provide nuanced perspectives on the interrelationship. Both Stoyanova and Mindus argue that migration law is a key factor that influences the constitutional nature of a given political community. Both authors focus on the interdependence between constitutional identity and migration policies to determine who is included and excluded from the community and how welcoming that community is to outsiders.

In explaining this interdependence, Stoyanova's focus is on diversity. She argues that migration is an important constitutional matter since it is linked with how the political community responds to diversity and how it treats any group that might express different opinions. Diversity is also of concern for Mindus, who explains that under populism 'People-as-a-part is taken to embody the People-as-a-whole [by which] the irreducible pluralism of individuals [...] is muted'. Mindus considers the anti-pluralism inherent in populism as an 'important expression of democratic decay', to the extent that it is given effect in migration law. Both authors thus seem to agree that restrictions of migrants' rights can be considered as a form of democratic decay. Therefore, constitutional law scholars have good reasons to expand their scope of concern. Instead of viewing restrictions of migrants' rights as normal and inherent to liberal democracy, such restrictions should be rather considered as constitutive for the political community.

Gregor Noll in Chapter 3 goes even further in explaining the relationship between restrictions of migrants' rights and democratic decay. Such restrictions are not simply constitutive, he claims, they are in fact *destructive* for the foundations of European societies. European societies are decaying not only in terms of breaches of the rule of law (a problem that has traditionally been the focus of constitutional law scholars). In light of migration policies pushed by populists, these societies are also decaying in economic terms, through depletion of their own demographic resources. On Noll's account, ageing populations trap European countries in a vicious cycle of economic decline that results in the introduction of evermore restrictive migration laws and policies. This is ironic, to the extent that migration could be part of the

solution but is unlikely to be favoured in the current political climate dominated by populism. '[A]dd population ageing to the consideration of migrant rights', concludes Noll, 'and see how the diagnosis of *democratic decay* is pushed far beyond the rule of law alone':

Democracy is decaying not only as a particular way of organizing politics (with a loosening of the self-restraint built into it), but also as a depletion of the demographic and economic resources on which any such politics rests. Seen as such, restrictions on migrant rights reach their apex at a moment when the resource base on which democracy rests in ageing societies is giving way.

By explaining the links between ageing, growth and migration, Noll establishes a close relationship between restrictions of migrants' rights and democratic decay. As to populism, while he sees its role as a catalyst and 'an indicator of a deeper crisis,' he is clear that *populism is not the cause*: 'Indicating it as the primary culprit of this failure would be to make too much of it'. The basis of the failure predates populism, since historically European societies have been following the exclusion rationale in their migration policies.

Spijkerboer in [Chapter 4](#) helps us to understand this historical background further. He explains the deep historical origins of how migrants have been denied legal protection, offered diminished protection or legally governed through emergency powers, even under human rights law. With these historical insights, Spijkerboer seems to indicate that current-day linkages between populism, democratic decay and restrictions of migrants' rights are of less relevance than the origins of the problem, which he locates in the law as such. [Chapter 4](#) could thus be read as an attempt at historicizing the law to better understand and critique the current situation.

The interrelationship between populism, democratic decay and restrictions of migrants' rights can be examined not only at the national level of the political community organized as a nation state. It can also be analysed at the supranational level, which is important given the close integration of migration policies within the structures of the EU and the EU's competence in the area of migration governance. An important starting point, as Loxa and Stoyanova explain in [Chapter 5](#), is acknowledgment of the distinctiveness of the EU as a form of governance beyond the nation state. At the EU level, the interrelationship between migration and democratic decay, therefore, must be of a different nature. While this relationship might not be straightforward at the level of the nation state, the position of the EU is different:

because if the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States

must be assumed, Member States will resort to self-help [which] ultimately defeats the purpose of having a Union.

Loxa and Stoyanova argue that the EU's failure to uphold the rule of law in the area of migration and asylum – as evident from the myriad instances of non-compliance, non-enforcement and informalization of the *acquis* – indicates that the Union *itself* is in the midst of a constitutional crisis. The authors, therefore, see a linkage between democratic decay at the EU level and restriction of migrants' rights across the Member States, since the latter has led to undermining the core foundations of the EU as a project. As to populism, similarly to Noll, Loxa and Stoyanova view it as a core feature of the current political climate, which hinders solutions that can respond to the empirical reality.

While Loxa and Stoyanova approach the restriction of migrants' rights as an indication of a wider constitutional crisis within the EU, in [Chapter 7](#) Grabowska-Moroz and Kochenov rather refer to a vicious circle: they argue that the EU has been suffering from a more general constitutional crisis due to the undermining of the rule of law, which in turn has led to deterioration of migrants' rights. Upholding these rights, the authors posit, is necessary to successfully handle rule of law backsliding in EU Member States.

Contributors to the country studies in [Part III](#), in contrast to the preceding authors, consider the interrelationship in empirical terms. Some favour the majority position in the literature. Desmet and Smet as well as Thorburn Stern and Lind insist that the Belgian and Swedish cases, respectively, show that restrictive migration laws and policies are not a symptom of democratic decay *per se*. 'Even when restrictions of migrants' rights are widespread and far-reaching, this phenomenon does not amount, in and of itself, to a dismantling of the constitutional-democratic order', claim Desmet and Smet.

Other contributors, by contrast, align with the minority position in the literature. Kovacs and Nagy, for instance, find direct links between democratic decay and restrictive migration policies in Hungary. They explain how, in the wake of the 2015 'migration crisis', 'a genuine international commitment [on migration] gave way to an exclusionist, ethnicist position' in Hungary. 'This development', they go on to state, 'has been coupled with [a] discourse of the "threatening other" [which in turn] enables the oppression of various democratic actors, including human rights defenders and NGOs helping refugees'. Here, Kovacs and Nagy locate a distinctive trait of the Hungarian case: authoritarian populists have pushed the envelope further than in other European countries by criminalizing civil society organizations that operate in the area of migration. The authors thus identify important synergies in

Hungary between restrictive migration laws and policies, on the one hand, and other legal measures aimed at undermining constitutional democracy, on the other. Rather than disentangle both, Kovacs and Nagy clearly consider this to be part of an overall populist strategy to destroy liberal constitutional democracy.

In [Chapter 9](#) on Poland, Mikolajczyk and Jagielski in essence arrive at the same conclusion. The authors view democratic decay and restrictive migration laws and policies as complementary phenomena: '[t]hey seem to interact with each other'. Mikolajczyk and Jagielski explain:

The populist attitude to the migration crisis and asylum seekers [by PiS] appeared to be a litmus test of the resilience of democratic values and human rights. It was used to check how far the policy of division into 'us' and 'them', 'nation' and 'aliens', 'common welfare' and 'betrayal of national interests' would catch on in society, and whether it could be pursued in further politics. Unfortunately, this policy and model of narration has come to be seen as a successful tactic in elections and has been continued with other minority groups (e.g. LGBT).

In other words, on Mikolajczyk's and Jagielski's conception of the relationship between populism, democratic decay and migration,

decline in the level of protection for individuals under the rule of Law and Justice and problems with the treatment of migrants cannot be separated. These are phenomena that function simultaneously, two sides of the same coin.

The authors conclude by advocating for 'a "strong" relationship between populism, the crisis of constitutional democracy and migration policies', on which 'restrictive migration policies [are] an element of democratic decay'.

Other contributors, still, adopt a more nuanced position, situated somewhere in between the previous approaches. In dissecting the case of Austria, Margit Ammer and Lando Kirchmair argue that restrictions of refugee rights introduced by the ÖVP-FPÖ coalition in the period of 2017–2019 'show elements of populism and are thus interlinked with the phenomenon of democratic decay', thereby decreasing 'the functionality of Austrian democracy and the rule of law'. Ammer and Kirchmair point out, among others, that

civil society, the media, as well as human rights activists and to some extent even the prestigious Constitutional Court, were verbally attacked, in particular by the FPÖ, which shows a clear disrespect for important pillars of institutional pluralism

These authors thus perceive stronger linkages between the three forces of populism, democratic decay and migration than the authors on Belgium and Sweden do.<sup>81</sup> Yet, they also resist the conclusion, posited in the chapters on Hungary and Poland, that restrictive migration laws and policies *equate to* (a form of) democratic decay. In other words, Ammer and Kirchmair adopt a middle ground between both ‘extremes’:<sup>82</sup>

in the Austrian case a clearcut, black or white answer to the question as to whether the restriction of refugee rights accelerates democratic decay or whether it is the other way round, cannot be provided. Both phenomena are more likely part of a symbiotic and constantly amplifying process.

It is striking – but perhaps not surprising – that the different empirical interrelationships identified in *Part III* of the volume correlate to the relative absence/presence of democratic decay, understood in the *narrow* sense that dominates the literature, in the studied countries.

In relation to countries that are *not* experiencing a narrow form of democratic decay, Belgium and Sweden, contributors insist on a more attenuated relationship between populism, democratic decay and migration. This makes sense, for otherwise these contributors would be forced to conclude that these countries are experiencing democratic decay even though they are generally regarded as robust liberal constitutional democracies.<sup>83</sup> Thorburn Stern and Lind for instance conclude that

because the restrictive migration laws and policies [in Sweden] are not mirrored by excessively restrictive rights limitations on other groups, or attacks on the independence of the courts [...] restrictions on migrant rights and democratic decay thus do not seem to be directly linked [in the Swedish case].

In relation to countries that *are* experiencing democratic decay, by contrast, contributors view the three forces as inherently intertwined. This, as well, is a

<sup>81</sup> See *Chapter 11* (‘a lack of concern among voters for the restriction of refugee rights can be exploited by populist parties like the FPÖ. Additionally, this is unlikely to be counteracted by mainstream parties like the ÖVP since they have nothing to gain and much to lose if they would be seen as “altruistically” refugee-friendly. This is what causes the (informal) elements of democracy to crumble and lead to – or fail to prevent – further restrictions of refugee rights’).

<sup>82</sup> See also *Chapter 10* (in which the authors do not, however, fully explicate their position).

<sup>83</sup> See also *Chapter 12* (‘In Belgium, mainstream political parties are not attempting to capture the courts, control the media or shut down universities. There is, in short, no genuine risk of rule of law backsliding. Nevertheless, [...] we reveal a pattern of restrictive migration laws and policies that has caused migrants’ rights to crumble in Belgium’).



logical position to adopt, given that democratic decay and migration are clearly correlated in Hungary and Poland. It is thus tempting to view both as part of a broader populist project rather than treat them as distinct phenomena. Mikolajczyk and Jagielski for instance indicate that they

realise that this concept of a link may not be seen so clearly from the perspective of most Western European countries, where populist politicians are only aspiring to take over power, but in the case of Poland, a country where populists have already come to power, it is based on fact.

In relation to countries that at some point were at risk of sliding towards democratic decay, but ultimately avoided the threat, contributors adopt a more nuanced position. This may be due to the fact that these countries, Austria and Italy, share features with both other sets of countries: they are relatively robust liberal constitutional democracies that have, nonetheless, experienced important cracks in their constitutional armour under the influence of (nativist and/or aspiring-authoritarian) populists.

Austria, for instance, was governed from 2017 until 2019 by a coalition that included the radical-right populist FPÖ, but it is since led by a coalition of ÖVP and the Greens (*Die Grünen*). A similar scenario unfolded in Italy in recent years. Somewhat understandably, authors analysing these countries are more apprehensive of the suggestion that even systemic and drastic curtailment of migrants' rights cannot amount to a form of democratic decay. They have seen what the populist threat might lead to and choose to be nuanced in their assessment of the interrelationship between populism, democratic decay and the restriction of migrants' rights. Ammer and Kirchmair for instance conclude that the state of refugee rights in Austria discloses 'some, isolated, but nevertheless important cuts into the blueprint of liberal democracy which is generally present in Austria'.

#### 1.2.4 *Relationship between Populism and Restrictive Migration Policy*

A salient question that emerges from this volume is: what, exactly, is the impact of populism on the restriction of migrants' rights? The *similarity* in the restrictions of migrants' rights across all country studies (see [Part III](#)), regardless of the political circumstances in which these restrictions were introduced, is striking. The salience of populism, by contrast, is clearly *different* across the jurisdictions. It ranges from an indirect influence, at best, of nativist populist parties on government policy (Belgium, Sweden), to a direct influence either through temporary participation by nativist populist in

a coalition government (Italy and Austria) or caused by long-term solitary rule by authoritarian populists (Hungary and Poland).

Given that these different contexts have produced (seemingly) similar results, we are prompted to ask: what, precisely, is the causal connection between populism and the restriction of migrants' rights? Our contributors seem to agree on the answer: populism is *not* the cause of restrictive migration laws and policies. Many contributors note that ever-increasing restrictions of migrants' rights had become 'the new normal' in Europe long before the recent surge in (nativist or authoritarian) populism.

As Vladislava Stoyanova explains in [Chapter 1](#), growing restrictions of migrants' rights flow almost inevitably from the logics of migration law, as it seeks to respond to central tensions inherent in liberal constitutional democracy. Stoyanova discusses two such tensions, in particular: universality *versus* statism and inclusion *versus* exclusion. She argues that the balance between both pairs of values in Europe's constitutional democracies has tipped in favour of exclusion, to safeguard bounded national communities, and of statism, to protect states' right under international law to control entry to their sovereign territory. As such, Stoyanova claims, populism cannot be held responsible for the fact that migration law is increasingly skewed against the rights of migrants. This process was long underway before populism arrived on the scene. At the same time, however, the rise of populism does *exacerbate* existing problems.<sup>84</sup> As Stoyanova puts it: '[i]n light of the populist trends, the concern emerges that the problem will no longer be framed as one of balancing at all, since the exclusion side might completely take over'.

This general analysis is confirmed by the country studies in [Part III](#). A strikingly similar range of restrictions of migrants' rights is replicated across all country studies, regardless of whether the countries at issue are suffering from democratic decay at the hands of authoritarian populists (Hungary and Poland), have seen nativist populists shape migration policy in coalition government (Austria and Italy) or have witnessed, at worst, an indirect influence of nativist populist discourse on government policy (Belgium and Sweden). This leads us to conclude – or at least suggest – that the distinction between these six countries is one of degree, not in kind. In none of these countries is populism the cause of restrictive migration laws and policies, as such. At the same time, in each country populism does seem to be a catalyst, making already far-reaching restrictions of migrants' rights even

<sup>84</sup> Exacerbation is also suggested in [Chapters 3](#) and [5](#).



‘resilient by preventing autocratization altogether’ (the authors cite Switzerland and Canada as examples).<sup>87</sup> When onset resilience flounders, Boese et al explain, ‘democracies experience an episode of autocratization’ against which they may nevertheless ‘exhibit breakdown resilience by avoiding democratic breakdown’ (the authors cite South Korea and Benin as examples).<sup>88</sup> It is only when *both* stages of democratic resilience fail, that countries slide towards full-on democratic decay (the authors cite Hungary and Venezuela as examples).<sup>89</sup>

Recent empirical research show that many liberal constitutional democracies are robustly resilient against *initial* assaults.<sup>90</sup> But the troubling cases of Venezuela, Turkey, Hungary and Poland (to name the most salient examples) remind us that liberal constitutional democracies can and do break down. Worryingly, empirical studies indicate that, once democracy has broken down, it takes on average twice as long to rebuild as it took to dismantle.<sup>91</sup> These data are discouraging for the future of democracy in Hungary and Poland.<sup>92</sup> They also disclose a pressing need to (further) strengthen liberal constitutional democracy against the populist onslaught, lest countries like the Czech Republic, Romania and Slovakia join their cousins in CEE. Or, for that matter, Italy, Austria, Belgium and Sweden.

In an attempt to (further) strengthen liberal constitutional democracy against populist assaults, constitutional law scholars have begun to put together a ‘counter-playbook’ of constitutional resilience against democratic decay.<sup>93</sup> Most pages in this ‘counter-playbook’ focus on elements of constitutional design: make key constitutional principles and structures unamendable (especially by inserting eternity clauses in constitutions); introduce federalism to disperse power within the state (between the federal level and the subunits); introduce compulsory voting and use an electoral system based on proportional representation to disperse power within legislatures (and thereby also the executive in parliamentary systems); ensure robust

<sup>87</sup> *Ibid.*, 2.

<sup>88</sup> *Ibid.*, 2.

<sup>89</sup> *Ibid.*, 4.

<sup>90</sup> *Ibid.*; Laebens and Lurhmann (n 52).

<sup>91</sup> Zachary Elkins, ‘Is the Sky Falling? Constitutional Crisis in Historical Perspective’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 49, 57–58.

<sup>92</sup> See also Stephen Gardbaum, ‘Comparative Political Process Theory’ (2020) *International Journal of Constitutional Law* 1429, 1442 (‘once it [i.e. executive aggrandizement] has occurred, the institutional basis for resistance and accountability, including but not limited to the courts, may have disappeared’).

<sup>93</sup> Gardbaum (n 55) 6.

constitutional review (preferably through a system of diffuse review to avoid capture of the single constitutional court in the country); set term limits for political leaders (including for prime ministers and party leaders); develop a network of independent fourth or fifth branch institutions (including election commissions, human rights commissions, ombudspersons, public protectors); etc.<sup>94</sup>

The primary aim of these constitutional design measures is to develop an 'anti-concentration principle',<sup>95</sup> (further) dispersing state power to thwart populist attempts at executive aggrandizement.<sup>96</sup> In other words, the aim is to provide for constitutional resilience against democratic decay. Qualitative studies provide some support for these efforts, indicating that a combination of horizontal, vertical and diagonal accountability mechanisms has 'effectively halted erosion' in several countries experiencing the onset of democratic decay.<sup>97</sup> Quantitative empirical research also finds that '[j]udicial constraints on the executive and a country's past experience with democracy (democratic stock) are positively associated with onset and breakdown resilience'.<sup>98</sup>

Some constitutional lawyers, however, argue that the survival of liberal constitutional democracy is more dependent on a country's 'democratic stock' and diagonal accountability mechanisms than on constitutional design elements.<sup>99</sup> The experience of countries like Poland and Hungary, they claim,

<sup>94</sup> See Gardbaum (n 50); Ginsburg and Huq (n 52); Jakab (n 66); Dixon and Gauja (n 60); Issacharoff (n 75); Rainer Grote, 'The Role of Institutional Design in Preventing Constitutional Decline: The Radically Different Approaches in Germany and France' (2020) *Constitutional Studies* 107. This is a recent development. In what is arguably the leading edited volume on the subject, the editors (in 2018) still avoided the 'what is to be done?' question, 'believing that at this stage diagnosis is far more important, and not having any ready-made cures to offer'. See Graber, Levison and Tushnet (n 68) 8. See also Gardbaum (n 50) 5 ('Only recently has the literature begun to focus on an all-important fourth question, which is Lenin's: what is to be done? This is now, rightly, becoming the central question').

<sup>95</sup> Gardbaum (n 50) 6.

<sup>96</sup> See Boese et al (n 85) 10 ('Recent trends suggest that attacks on democracy are often driven by a concentration of power in the executive, even in parliamentary democracies. [...] The extent to which the executive is constrained de facto varies considerably, and executive aggrandizement affects both presidential and parliamentary systems').

<sup>97</sup> *Ibid.*, 2. Laebens and Luhmann (n 52) (studying Benin, Ecuador and South Korea). Horizontal accountability refers to the principle of separation of powers (e.g. parliamentary and judicial oversight of the executive branch of government). Vertical accountability refers to electoral design (e.g. electoral competition by opposition parties leading to a turnover in rule). Diagonal accountability refers to the presence of non-state actors promoting democracy and monitoring abuse of state power (e.g. civil society and the media).

<sup>98</sup> *Ibid.*, 2.

<sup>99</sup> Bugarić (n 49); Wojciech Sadurski, 'On the Relative Irrelevance of Constitutional Design: Lessons from Poland', Sydney Law School Research Paper No. #19/34 (2019), available at <https://ssrn.com/abstract=3403327>. Most scholars agree that constitutional design elements

shows that the primary problem – at least in CEE countries – is lack of a strongly embedded democratic culture and robust civil society, not a failure of constitutional design.<sup>100</sup>

Nevertheless, the ‘anti-concentration principle’ – and the constitutional resilience it seeks to provide – holds potential for several contributors to this edited volume. These contributors rely on the separation of powers, especially the presence of robust and independent courts, to provide for legal resilience against restrictive migration laws and policies (see [Section I.3.2](#)). Some of our authors put their trust in pre-existing constitutional frameworks, because they are not concerned with ‘saving’ liberal constitutional democracy as such. Instead, one of their aims – and of the volume overall – is to identify strategies of legal resilience against ever-growing restrictions of migrants’ rights. This aim is *narrower* than that of contemporary constitutional law scholarship (not preventing democratic decay, but counteracting systemic undermining of migrants’ rights), while the means used to reach the objective are *broader* (not just constitutional resilience, but legal resilience overall).

Since this volume aims to analyse the room for *legal* resilience – not *constitutional* resilience – against ever-growing restrictions of migrants’ rights – not democratic decay in the narrow sense – we need to reach beyond constitutional law scholarship for insights. We have found inspiration in the scholarship on environmental law, which has developed a relatively robust conception of legal resilience.

Scholars of environmental law have drawn on insights from the discipline of ecology to develop a (partially developed) legal theory of resilience.<sup>101</sup> Resilience is commonly defined in ecology as ‘the capacity of a system to absorb disturbance and still retain its basic structure and function’.<sup>102</sup> This definition reflects the difficulties in predicting the evolution and behaviour of ecosystems in future. Predictions not only need to factor in the individual components of the ecosystem and their interactions, but also ‘the feedbacks between the elements of the system and how those feedbacks in turn transform the component parts’.<sup>103</sup> The analogy to democratic decay is clear: as explained above, the stability of liberal constitutional democracy depends on

*alone* are insufficient to avert democratic decay. See Gardbaum (n 50) 7; Jakab (n 66) 15; Grote (n 94) 124; Huq (n 52) 23–24.

<sup>100</sup> Bugarić (n 49); Sadurski (n 99). See also Krygier (n 85) 211.

<sup>101</sup> Tracy-Lynn Humby, ‘Law and Resilience: Mapping the Literature’ (2014) *Seattle Journal of Environmental Law* 85, 89; Jaye Ellis, ‘Crisis, Resilience, and the Time of Law’ (2019) *Canadian Journal of Law and Jurisprudence* 305.

<sup>102</sup> C S Holling, as cited in Humby (n 101) 90. See also Ellis (n 101) 305.

<sup>103</sup> Humby (n 101) 90.

interaction and feedback between multiple accountability mechanisms (horizontal, vertical *and* diagonal).

But the analogy to democratic decay does not end there. The reason why environmental law began to focus on resilience has to do with the reality that ecosystems, when pushed off balance, can 'flip' to a different but nonetheless stable state.<sup>104</sup> 'The potential for multi-stable states', explains Tracy-Lynn Humby, 'means that a system will not necessarily "bounce back" after a shock or disturbance but may cross a threshold to a new state; i.e., undergo a "regime shift".'<sup>105</sup> Moreover, once the threshold has been crossed, Humby posits, it is difficult or even impossible to return to the previous state. As Gary Marchant and Yvonne Stevens explain, resilience thus covers two dimensions: (i) 'the capacity of the system to minimize the extent, severity, and duration of harm when something goes wrong' and (ii) 'the capacity to recover when harm occurs'.<sup>106</sup>

The analogy to onset and breakdown resilience against democratic decay – as well as their failure – should be clear. If onset resilience is successful, the harm is minimized and liberal constitutional democracy remains intact. If onset resilience flounders, but breakdown resilience is successful, liberal constitutional democracy 'bounces back' from a populist assault. If breakdown resilience also fails, however, a threshold is crossed and democracy shifts to a new state: autocracy. Moreover, once this shift has occurred, it can be difficult to restore liberal constitutional democracy. The clear analogy between ecological resilience and democratic decay makes it pertinent to explore resilience thinking in environmental law further.

Originally, the aim of resilience thinking in environmental law was to identify how the law could be adapted to – or cater to – the resilience of ecosystems. 'A resilience approach does not try to maintain stability or an equilibrium', explain Marchant and Stevens, but 'tries to manage and adapt' to the inevitable changes that will occur in complex systems.<sup>107</sup> Environmental law thus needed to become more flexible, dynamic and adaptable so as to respond effectively to potential harms to the resilience of ecosystems. Transposed to the context of democratic decay, it is *constitutional* law that needs to adapt to the new reality of (authoritarian) populism to ensure

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, 90 (with reference to the work of Brian Walker and David Salt).

<sup>106</sup> Gary E Marchant and Yvonne A Stevens, 'Resilience in Environmental Law: Existing Measures' (2017) *National Resources and Environment* 8.

<sup>107</sup> *Ibid.*

democratic resilience. Thus far, the analogy to environment law remains neatly aligned with the recent analyses in constitutional law discussed above.

But we had intended to move *beyond* that literature to propose a definition of legal (not constitutional) resilience and develop working hypotheses on the possibilities and limitation of legal resilience against restrictive migration laws and policy (not democratic decay). Particularly relevant, in this respect, is that the environmental law literature *also* provides a bridge between the constitutional resilience of liberal constitutional systems, on the one hand, and the relative (in)ability of such systems to safeguard migrants' rights in the face of populism, on the other.

The environmental law literature has not only sought ways in which law can contribute to safeguarding the resilience of ecosystems. It has also applied the theory of resilience to *law itself*, evaluating what is needed for legal systems to be resilient.<sup>108</sup> 'Because legal systems both govern and co-evolve with other systems', claim J B Ruhl et al, 'they can contribute to, or diminish, the resilience of these other systems'.<sup>109</sup> But to fulfil its function of safeguarding the resilience of other systems, law must itself be resilient as well. 'The idea', explain Niko Soinen and Froukje Platjouw, 'is that law's [own] resilience and adaptive capacity will support and maintain valuable resilience characteristics in social ecological systems the law seeks to steer'.<sup>110</sup>

A key feature that makes legal systems resilient, posit Ruhl et al, is the lack of a single point of control: 'systemic organization of law without a single master is one of the foundational elements of many legal systems'.<sup>111</sup> The authors go on to identify the separation of powers, procedural safeguards and the rule of law as core elements that ensure the resilience of law by ensuring that 'no one institution would have all the keys to control the development of law'.<sup>112</sup>

Legal resilience, in the sense of resilience of the legal system itself, can thus be defined as 'the ability of the legal institutions and the legal instruments they produce to experience shocks while retaining essentially the same function,

<sup>108</sup> See especially J B Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptation' (2011) *North Carolina Law Review* 1373; J B Ruhl et al, 'Resilience of Legal Systems' in Michael Ungar, *Multisystemic Resilience* (Oxford University Press 2021) 509.

<sup>109</sup> *Ibid.*, 509–510.

<sup>110</sup> Niko Soinen and Froukje Maria Platjouw, 'Resilience and Adaptive Capacity of Adequate Environment Law in the EU: An Evaluation and Comparison of the WFD, MSFD, and MSPD' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill 2019) 17, 20.

<sup>111</sup> Ruhl et al (n 108) 511.

<sup>112</sup> *Ibid.*



structure, feedbacks, and therefore identity'.<sup>113</sup> At the same time, however, the concept of legal resilience also refers to the capacity of the law to safeguard the resilience of *other* systems.

Transposed to our research questions – in which we are confronted with the confluence of populism, democratic decay and migration – we propose a two-stage analysis to evaluate the possibilities and limitations of legal resilience against (overly) restrictive migration laws and policy.

In the first stage, it should be determined how resilient the legal system itself has been in the face of populist onslaught. This stage of the analysis thus focuses on the relationship between populism and democratic decay. Has democratic decay at the hands of authoritarian populists affected the resilience of the legal system, for instance by undermining the independence of courts? Or have these efforts not yet materialized, so that the legal system remains robustly resilient? Or, finally, have these efforts failed, leading the legal system to 'bounce back' after attempts at shifting it in a more authoritarian direction?

In the second stage, once we know how resilient the legal system as a whole has proven to be, we can identify the extent to which it provides for legal resilience against restrictive migration laws and policies. Since we are now concerned with the impact of populism on migration law and policy, this second stage of the analysis evaluates the relationship between populism and restrictions of migrants' rights. If, and when, the resilience of the legal system has been pierced by authoritarian populists, the national legal system can hardly be expected to provide for legal resilience against even drastic curtailment of migrants' rights. It thus makes sense to look for solutions elsewhere, either at the supranational level or in extra-legal strategies of resistance. But where the legal system retains – or recovers – its resilience, national legal systems should be able to safeguard migrants' rights against populist assault, potentially in tandem with supranational and extra-legal mechanisms.

The environmental law literature finally confirms a risk that is also noted in this volume (see [Chapters 3](#) and [14](#)): instead of being a source of resilience against threats, law may *itself* constitute the threat. In other words, the law we reach for to secure legal resilience against restrictive migration laws and policy may well contain characteristics, biases and defects that exacerbate the problem instead of curing it. Law may even be at the root of the problem.

An instructive example from environmental law concerns the resilience of freshwater ecosystems. As Soinin and Platjouw explain, hydropower operations are responsible for the decay of migratory fish stocks in Finland, since

<sup>113</sup> *Ibid.*, 514.

all major rivers have been licensed for damming to generate electricity.<sup>114</sup> At the same time, Finnish law shields hydropower operations from strict application of administrative law, given that annulment of their licences would cause significant economic costs.<sup>115</sup> As such, Finnish administrative law actually stands in the way of ‘the restoration of ecological flows and migratory fish species to the Finnish rivers’.<sup>116</sup> Could the same be occurring in the migration context in Europe? Some of our contributors surely suggest so, while others do find sources of legal resilience within the law.

### 1.3.2 *Different Approaches to Legal Resilience*

From the preceding literature review, we have deduced a number of vantage points from which we invited our contributors to evaluate the potential for and limitation of legal resilience:

1. Identification of external factors that limit the ability of the law to provide for legal resilience against restrictive migration law and policies;
2. Evaluation of the ways in which the law is being harnessed – or could be harnessed – to provide for legal resilience against drastic curtailment of migrants’ rights;
3. Critical interrogation of law as a contributing factor to the incremental undermining of migrants’ rights, instead of a source of resilience.

These three vantage points roughly correspond to the working hypotheses presented in the preceding section, while being broad enough to cover contributions that range from the theoretical to the country-specific. The first vantage point includes, but is not limited to, instances in which national legal systems have been weakened by authoritarian populists (Section I.3.2.1). The second vantage point corresponds to instances in which legal resilience operates optimally, as well as those in which legal resilience *could* operate optimally in theory but does not in practice (Section I.3.2.2). The third vantage point, finally, refers to situations in which law is at the root of the problem, rather than being a source of resilience (Section I.3.2.3).

In what follows, we discuss the different approaches our contributors have taken to each vantage point by categorizing them into: (a) theoretical/general

<sup>114</sup> Soinen and Platjouw (n 110) 23.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, 24.

approaches, (b) approaches focalized on the supranational level and (c) approaches situated at the national level. We refer the reader to the individual chapters for full accounts.

### I.3.2.1 External Factors That Limit the Ability of the Law to Provide Resilience

At the general or theoretical level, some contributors claim there are inherent limitations to the resilience law can provide against restrictive migration policies, given the settings within which it operates. Noll, in particular, argues that the law may be 'a useful tool to remedy single cases of rights violations in the short term', but cannot provide for structural resilience since it 'emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics'. What Noll seems to indicate, here, is that law cannot escape from the vicious cycle of ageing populations, economic decline and restrictive migration policies that he identifies in [Chapter 3](#). Noll's claim aligns, to some extent, with findings from the country studies in which authors do locate specific elements of legal resilience but argue that these often remain limited ([Section I.3.2.2](#)).

At the supranational level, the primary problem seems to be either a failure to harness the full power of the law to provide for resilience ([Section I.3.2.2](#)) or even that supranational law is itself at the root of the problem ([Section I.3.2.3](#)). As Loxa and Stoyanova point out, however, the role of EU law is also restricted by an external factor: the framing of the 2015 'migration crisis' as an emergency. As a result of this framing, the EU Treaties framework has been sidelined in favour of 'informal cooperation and the adoption of soft law [to ensure] the necessary expediency and flexibility to address the situation on the ground'. Informal cooperation has in important respects 'become the governance paradigm', claim Loxa and Stoyanova, with the EU-Turkey agreement as the leading example. This has created 'spaces of liminal legality', argue the authors, which are picked up again by Thomas Spijkerboer. In [Chapter 4](#), Spijkerboer views EU law and ECHR law as part of the problem, even if they do provide remedies in certain situations (see [Section I.3.2.3](#)).

At the country-level, finally, [Chapters 8](#) and [9](#) on Hungary and Poland conclude that national legal resilience has largely been compromised as a result of the incremental undermining of liberal constitutional institutions by authoritarian populists. Kovacs and Nagy find, in relation to Hungary, that 'democratic decay and the dismantling of the rule of law leaves little room for legal resistance and resilience'. Mikołajczyk and Jagielski also state, in relation to Poland, that 'it is difficult to consider "legal resilience" as a mitigating

factor’, since once ‘populists take full power, no one can count on self-safeguards included in the internal law’.

Given that the resilience of the national legal system has been compromised in Hungary and Poland, all four authors put their hope in a combination of legal resilience at the supranational level and extra-legal means. In terms of the latter, Poland, Mikołajczyk and Jagielski retain faith in ‘the will of the people expressed at elections’ to cause a shift in political power, which may lead to restoration of legal resilience at the national level. Kovacs and Nagy, by contrast, engage in out-of-the-box thinking by proposing ‘unconventional’ mechanisms of resistance in Hungary: the feudal tradition of free cities and the socialist tradition of *samizdat*. We refer the reader to [Chapter 8](#) on Hungary for details on these important out-of-the-box solutions.

### 1.3.2.2 Harnessing (the Potential for) Legal Resilience

Although many contributors remain sceptical of the ability of the law to provide for legal resilience against drastic curtailments of migrants’ rights in populist times (see [Sections 1.3.2.1](#) and [1.3.2.3](#)), several authors do find sources of resilience in the law. Or at least the potential thereof.

In countries that have not (yet) suffered democratic decay in the narrow sense, our contributors locate *actual* instances of legal resilience at the national level. Given the dominance of anti-migration discourse, laws and policies in the executive and legislative branches of government, such legal resilience is often situated in the courts.

In analysing the Belgian case, for instance, Desmet and Smet adopt the two-stage analysis of legal resilience described above ([Section 1.3.1](#)). They first conclude that, since ‘the Belgian constitutional framework provides relatively robust protection against democratic decay’, the separation of powers remains intact. At the same time, they note, ‘most of the constitutional safeguards that prevent a *hypothetical* slide towards authoritarianism [in Belgium] only provide weak constraints, at best, against the *very real* and systematic undermining of migrants’ rights’. The authors then move to the second stage of the analysis to assess the room for legal resilience. ‘[U]nlike in countries like Poland and Hungary’, they find, ‘civil society actors [in Belgium] have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants’ rights in the face of restrictive laws and regulations’. In practice, however, this has led to mixed results, in the sense that courts have only safeguarded ‘minimal respect for migrants’ rights’ rather than adopting a ‘maximalist interpretation’.

These findings are by and large replicated in the Chapters on Italy and Austria. Ammer and Kirchmair argue that, although Austrian constitutional law may at first sight seem 'rather toothless' in that it is 'deeply influenced by Kelsenian positivism', in practice the Constitutional Court has delivered some important judgments, for instance by ruling that cutting social assistance for recognized refugees is unconstitutional. In relation to Italy, Zirulia and Martinico also discuss important instances of legal resilience provided by courts. Of particular note is a ruling by the Court of Cassation that has 'implicitly recognized a sort of "right of resistance"' for civil society actors against police activities that contravene the hierarchy of norms. In the case at hand, the captain of a vessel holding migrants rescued on the Mediterranean was found *not* to have committed a criminal offence by breaking a navy blockade to disembark at the port of Lampedusa. Instead, the Court of Cassation ruled, she had acted 'in fulfilment of the duty of rescue at sea'.

Among the country studies, Sweden is the odd one out, in that the Swedish courts do not seem to play a major role in providing for legal resilience.<sup>117</sup> This can be explained by the distinct constitutional model adopted in Scandinavia, which does not follow the Montesquieuan understanding of the separation of powers. Since 'all public power in Sweden proceeds from the people', explain Thorburn Stern and Lind, the country does not have a constitutional court, let alone one with strong powers of constitutional review. Although a Council of Legislation does scrutinize the constitutionality of legislation, its role is strictly advisory and plays out entirely during the legislative process. Even if its reports are 'usually accorded considerable weight by the government', the authors note, the Council's 'devastating criticism' of migration bills was often ignored during and after the 2015 'migration crisis'. The primary source of resilience in the Swedish system instead appears to reside in the independence of the public administration, which is 'closely linked to the ideal of *the public servant as the guardian of democracy*'.<sup>118</sup> We refer the reader to [Chapter 13](#) on Sweden for details.

Whereas several contributors locate *actual instances* of legal resilience at the national level, at the supranational level there instead seems to be a lot of *unharnessed potential*. Most contributors who analyse supranational law and mechanisms identify possible sources of legal resilience, but immediately conclude that these are not being used to their full potential.

<sup>117</sup> Even if the authors do discuss a notable judgment of the Migration Court of Appeal. See [Chapter 13](#).

<sup>118</sup> Emphasis in original.

Stoyanova for instance argues that (European) human rights law should at the very least respect the ‘fundamental right to justification’ of migrants *qua* moral agent. She claims that failure to provide a justification for measures that affect migrants, especially when their claims for inclusion in the bounded national community are rejected, misrecognizes the personhood of migrants. Stoyanova thus sees a lot of potential for human rights law to provide, if not substantive justice for migrants in all instances, at least a right to justification in each case. In practice, however, this potential remains largely unfulfilled. As Stoyanova explains, the European Court of Human Rights often fails to demand a (full) justification for restrictive migration measures adopted by states. Stoyanova discusses three situations in [Chapter 1](#): admission to territory, immigration detention and migrants’ right to family life. In respect of the former, for instance, she notes that ‘[s]tates are not required to offer any forms of justification’ since the ECtHR generally finds that territorial jurisdiction under article 1 ECHR has not been triggered. Without jurisdiction, no human rights law obligations arise. Spijkerboer argues, in [Chapter 4](#), that the interpretation of jurisdiction in human rights law is thus part of the problem, given that it pre-empts any attempt at providing for legal resilience against restrictive migration laws and policies (see [Section I.3.2.3](#)).

The problem of unharnessed potential for legal resilience at the supra-national level is not limited to ECHR law. It extends to EU law. Wouters and De Ridder for instance argue that, although EU law provides for a multitude of tools to address democratic decay and decline in migrants’ rights, EU institutions have by and large failed to use these tools to their full potential. The authors discuss, among others, the well-known problems with the rule of law framework of the European Commission and design flaws inherent in the article 7 TEU mechanism. Although Wouters and De Ridder are more optimistic about the use of infringement proceedings by the European Commission against Member States, they conclude that these ‘actions have mostly proven insufficient in improving migrants’ rights’.

Loxa and Stoyanova add an important critical perspective to the largely descriptive analysis by Wouters and De Ridder. ‘The problem is not that there are no enforcement mechanisms’ in EU law, note Loxa and Stoyanova, but that ‘there is often no interest in activating them’. In particular, they argue that the European Commission has not taken the constitutional crisis on migration afflicting the EU sufficiently seriously. In support of their claim, Loxa and Stoyanova refer to two findings: (i) the fact that the Commission waited until 2015 to initiate infringement proceedings against Southern and Eastern European states for failure to comply with EU law on migration, even though the countries at issue had ‘defied EU law in a systemic manner’ for years and

(ii) the complete failure to initiate any infringement proceedings against Western, Central and Northern European countries for breaches of the migration *acquis*.

Contrary to what some contributors writing at the country-level suggest, notably in relation to Hungary and Poland (see [Section 1.3.2.1](#)), the potential for supranational remedies to redress breakdowns of legal resilience at the national level may thus be more limited than hoped for. Worse, supranational law may even be part of the problem.

### 1.3.2.3 Law at the Root of the Problem

Whereas most contributors who analyse the supranational level conclude that EU and ECHR law fail to provide sufficiently robust legal resilience against the undermining of migrants' rights, Spijkerboer goes one step further by 'interrogat[ing] European law as actively contributing to such undermining since its inception'. Arguing against the common interpretation of recent CJEU and ECtHR judgments as 'constituting a state-friendly rupture with its earlier case law promoting the human rights of migrants', Spijkerboer views these developments in the case law as 'a *continuation* of a pre-existing characteristic – as new inflections of a more long-term tendency to privilege the interests of European states over those of migrants'.

Such privileging of state interests over the human rights of migrants, Spijkerboer argues, originates in colonial thinking about cross-border movements by non-Europeans. Under this thinking, migrants continue to be treated as former colonial subjects that must be excluded from full and equal application of human rights law by subjecting them to 'a split form of legality that was perfected at the end of the colonial era'. Former colonial subjects are thus relegated, concludes Spijkerboer, 'to sub-standard legal protection by either excluding them from the application of [the ECHR and EU] treaties altogether [...] or by lowering the standards [generally applicable under these treaties]'.

An analogous interpretation of law as part of the problem, rather than the solution, is offered by Bas Schotel. In reviewing all country chapters in [Part III](#) of this volume, Schotel finds that several contributors put excessive faith in the ability of administrative law to provide for legal resilience against restrictive migration policies. He argues that, in contrast to civil and criminal law, administrative law is 'distinctively well-suited to produce restrictive migration laws'. In other words, the legal architecture used to govern migration makes drastic curtailment of migrants' rights possible in the first place. To buttress his claim, Schotel discusses a number of examples, including wide-scale use of

alien detention. Unlike in the criminal law context, he explains, administrative detention of migrants is not surrounded by sufficient safeguards against abuse and takes place without efficient means of judicial review. This is ‘not merely a matter of the failure of human rights [law]’, Schotel argues, but ‘largely due to the fact that alien detention is a matter of administrative law [which is characterized by] limited judicial protection’. The root of the problem thus resides in the legal architecture itself. Legal resilience against drastic curtailments of migrants’ rights ‘will remain marginal and incidental’, concludes Schotel, ‘as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies, i.e. administrative law’.

Taking this critical argument to the most general level, that of legal theory, Mindus argues that the nature of the problem resides in the conflation of empirical facts and institutional facts in law. She explains that migration is not an empirical fact, but a legal construct (i.e. an institutional fact). In other words, migration does not exist as an empirical reality in the world out there, but is ‘merely’ a status generated by the law. Movement of human bodies in space, by contrast, is the empirical fact. What law does, posits Mindus, is attach a broad range of legal concepts to such movements: ‘national belonging, citizenship, residence, habitual dwelling, migration and population [are] institutional facts [attached to the empirical fact of movement, as] determined by particular constitutive rules [...] set up in the law’. *Qua* institutional facts, these legal concepts are ‘a question of convention, not of empirical necessity’. The law applicable to the empirical reality of movement of human bodies in space could thus have been very different from what it is today. Instead, a deliberate choice was made to ascribe or deny rights to individuals on the basis of their movement in space. In other words,

it is the law—our law—that we have designed in such a way that bans visa-free travel and prohibits asylum applications to be filed with the embassy. Mobility does not per se create a ‘migration crisis’, the law does.

The law is of course created under certain historical circumstances that imply particular socio-economic conditions and political structures of representation. Rights, including the rights of migrants, are contingent on these political circumstances.<sup>119</sup> As circumstances change, the rise of populism being one

<sup>119</sup> On the political contingency of human rights, see more generally Martti Koskeniemi, ‘Human Rights, Politics and Love’ (2001) 4 *Mennesker og Rettigheter* 33, 38; Gregor Noll, ‘The Exclusionary Construction of Human Rights in International Law and Political Theory’ IIS Discussion Paper 2003 10.



indication of such change, rights also seem to give in and the possibilities for legal resilience shrink. All of this might suggest that it is the political structures and procedures of representation that might be the problem. When these structures or procedures lead to obvious injustices,<sup>120</sup> and even possible self-harm,<sup>121</sup> it is not so much the case that democracy is being eroded, which can justify the phrase 'democratic decay'. It may rather be that democracy as we currently know it, with its exclusionary structures and limiting procedures of representation, is inherently rotten. If this diagnosis is accepted, central aspects of the organization of our societies would need to be rethought. This can be a future object of investigation, both for legal scholars and those in other disciplines.

#### 1.4 STRUCTURE OF THE VOLUME

This volume is divided in three substantive parts. The three parts are designed to move from the most general level (that is, theoretical), over a mid-level of analysis (that is, European), towards the most concrete level (that is, country-specific).

**Part I** 'Theoretical and Critical Perspectives on Resilience' evaluates the possibilities and limitations of legal resilience against restrictive migration laws and policies at the most general level. In this part, authors present arguments at the legal-philosophical level or from the perspective of entire branches of law (especially human rights law). From different angles, the authors identify empirical obstacles to and preconditions for the effective protection of migrants' rights.

**Part II** 'Resilience at the European Level' analyses the possibilities for and limitations of legal resilience at the mid-level of the supranational/regional legal orders of the Council of Europe and the European Union. Authors critically discuss both structural obstacles to and potential avenues for the effective protection of migrants' rights by EU and CoE institutions.

**Part III** 'Resilience at the National Level: Case Studies', finally, looks for elements of legal resilience at the most concrete level by analysing the situation in Hungary, Poland, Italy, Austria, Belgium and Sweden. These jurisdictions were selected for two interrelated reasons: (a) substantive representation (that is, they display varying levels of interlinkages between – and

<sup>120</sup> The harm inflicted upon migrants in terms of loss of life and family separations is just one illustration. Other examples can include food insecurity and exploitation of labour.

<sup>121</sup> See [Chapter 3](#). Inequalities within states can also be considered as an example of such self-harm.

intensity of – populism, democratic decay and restrictive migration laws and policies) and (b) geographical diversity (that is, the case studies represent varying parts of Europe). To ensure integration of perspectives from the two sub-fields of law that are brought together in this volume, each country-specific chapter is co-authored by a migration law scholar and a constitutional law scholar.

In what follows, we summarize the contents of each part of the volume.

In **Chapter 1** of **Part I**, Vladislava Stoyanova analyses the extent to which human rights law requires states to provide justifications for restrictive migration measures. Providing justifications to migrants is important, since this implies identification and evaluation of the empirical considerations behind decisions made. After finding that the space for such justification is currently limited, Stoyanova argues that restrictions of migrants' rights should raise more general concerns about liberal and constitutional values in our societies.

Still in **Part I**, Patricia Mindus takes Stoyanova's point about justifications further by offering a more philosophical analysis, based on the distinction between empirical facts and institutional facts. Mindus shares Stoyanova's point that drawing boundaries between inclusion and exclusion of migrants ultimately affects the position of everyone within the bounded community (i.e. the nation state). In **Chapter 2**, Mindus shows that the drawing of these boundaries is arbitrary to the extent that it is based on 'institutional facts' (e.g. citizenship) rather than empirical facts (mobility). This arbitrariness, Mindus shows, can be exploited by populists. The solution proposed by Mindus is better awareness of the empirical grounds that might justify the drawing of the above-mentioned boundary.

This suggestion is taken on board by Gregor Noll, who takes Mindus's broad-brush analysis further to expose a concrete and pressing empirical problem: ageing populations in EU Member States. This empirical reality, Noll explains, ultimately locks European societies into evermore restrictive migration policies. The 'demographics of ageing' create a paradoxical vicious circle, since what seems to be a reasonable solution – encouraging migration to counteract ageing – is in reality *resisted* for nationalist and protectionist reasons. This, in turn, further increases the economic fallout of the 'demographics of ageing', which ironically increases support for restrictive migration policies. Although it is sceptical in nature, **Chapter 3** can – like **Chapter 2** – also be read as an appeal for better awareness of this vicious circle and the underlying empirical reality. Noll shows how ignoring the empirical reality feeds populist anti-migration agendas.

**Part II** 'Resilience at the European level' starts off with a scathing analysis of the migration case law of both the ECtHR and the CJEU by Thomas

Spijkerboer. In reviewing the case law of the Strasbourg and Luxembourg courts, Spijkerboer argues that it relies on concepts of crisis and emergency. This not only leads to justifying more restrictive policies against migrants, but – worse – serves to keep migrants outside human rights law. In this sense, Europe's highest courts actually buy into the populist rhetoric through usage of the concepts of 'crisis' and 'emergency' within their argumentative framework. These developments evoke the spectre of colonialism and divisions along racial lines running through the case law. Spijkerboer's central argument is that a historical (i.e. a postcolonial) perspective on the exclusive features of the case law offers a possible way of both understanding and challenging the reasoning of Europe's highest courts.

**Chapter 5** by Alezini Loxa and Vladislava Stoyanova shifts the focus to the European Union, and the present and future of EU migration governance. In contrast to Spijkerboer, the authors do not pursue the argument that racial divisions are constitutive of EU migration policy. Loxa and Stoyanova rather aim to demonstrate that EU migration governance itself has a constitutive role to play in the EU project. In particular, the authors argue that if the EU fails to treat the migration crisis as a constitutional crisis, it might risk disintegration.

Jan Wouters and Maaike De Ridder focus on what the EU can do to counteract the wider constitutional crisis that it faces, that is the series of constitutional crises in Member States. Wouters and De Ridder describe the political and legal tools available to the EU to prevent and redress democratic decay, a key aspect of which is the undermining of migrants' rights. The authors also make suggestions as to how existing tools could be modified to be made more effective. It remains to be seen, though, whether these tools will imply any changes in the EU's and the Member States' approach to migration and migrants' rights.

In lieu of alternatives, the EU might continue the current approach, in which the interlinkages between migration policies and treatment of migrants, on the one hand, and populism and democratic decay, on the other hand, remain ignored. In contrast to the more descriptive account of EU law by Wouters and De Ridder, Barbara Grabowska-Moroz and Dimitry Kochenov adopt a much more critical and sceptical perspective on the tools that the EU has at its disposal to address constitutional crises, which the authors frame as rule of law crises. Grabowska-Moroz and Kochenov argue, in particular, that reinforcement of the rule of law is part of the answer to the migration crisis. But since the rule of law itself is in peril, the ineffectiveness of existing EU tools to address democratic decay does not bode well for legal resilience against restrictions of migrants' rights.

The chapters in **Part III** ‘Resilience at the National Level: Case Studies’ analyse the situation in national jurisdictions from different parts of Europe (Hungary, Poland, Italy, Austria, Belgium and Sweden). In these country-specific chapters, authors analyse the linkages between populism, democratic decay and restrictive migration laws and policies in specific settings. Collectively, these co-authored chapters reveal a consistent pattern of increasingly restrictive migration policies in European countries, driven not only by populism but also by protectionism and (ethno)nationalism. Any divergences in migration laws and policy across the case studies seem to be differences of degree rather than differences in kind. The joint reading of the country-specific chapters thus confirms that far-reaching restrictions of migrants’ rights have become the ‘new normal’ in Europe. This finding holds regardless of whether the country at issue is run by authoritarian populists bent on undermining liberal democracy (e.g. Hungary) or governed by mainstream political parties that otherwise fully uphold the rule of law (e.g. Belgium). To evaluate how ever-increasing restrictions of migrants’ rights could be counteracted, each country-specific chapter focalizes on identifying techniques for resilience and means of resistance. These chapters thereby enter into conversation, and build on, the chapters in Parts I and II.

In conversation with chapters in **Part II** that focus on the European level, Kriszta Kovács and Boldizsár Nagy evaluate the extent to which international and EU institutions can counteract democratic decay in Hungary. Kovács and Nagy find that the fictitious ‘crisis caused by mass immigration’, as constructed by Orbán, clearly contradicts EU measures and breaches international asylum law. But in terms of solutions, their argument is sceptical of the supranational level. Rather than hoping for solutions from the EU, the authors take a historical turn to propose *domestic* forms of resilience, whereby techniques of resistance developed during feudalism (e.g. the tradition of free cities or “passive resistance”) and socialism (e.g. samizdat) are mixed with the leftovers of the rule of law regime in Hungary (such as it is).

In **Chapter 9**, Barbara Mikołajczyk and Mariusz Jagielski argue that restrictions of migrants’ rights should be analysed in a broader pattern of democratic decay, given that a populist party has taken over all state institutions in Poland. Within this context, the authors struggle to locate means of legal resilience in domestic law, since the safeguards it contains have either been undermined or are under the control of authoritarian populists. The authors conclude that there is no such thing as inherent resistance of the law. Mikołajczyk and Jagielski instead put their hope in the supranational level, especially the European Court of Human Rights. At the same time, they identify elections

as a central *extra-legal* means to cause a shift in political power in Poland, which may ultimately lead to the restoration of domestic legal resilience.

In contrast to the chapter on Poland and Hungary, the authors of the chapters analysing Austria, Italy, Belgium, and Sweden do locate viable sources of resilience at the national level, albeit often limited.

In their chapter on Italy, Stefano Zirulia and Giuseppe Martinico seek to explore how recent populist waves in Italy have impacted on the management of borders at different levels (legislature, executive and judiciary). The authors focus their attention on the maritime border in the South of Italy, in particular, as this is the area in which the conflict between border protection and fundamental rights has reached the highest level of tension. Zirulia and Martinico suggest that the southern Italian border represents an ideal field of investigation to assess both the impact of populist policies on immigration law and the “resilience” of the legal system.

Margit Ammer and Lando Kirchmair analyse the lasting impact of the 2017/2019 government coalition in Austria on the state of refugee rights. They argue that migration laws and policies adopted by the ÖVP-FPÖ government feature elements of democratic decay and populism. The authors go on to examine how human rights guaranteed by the Austrian Constitution and interpreted by the Constitutional Court could provide relief. Ammer and Kirchmair ultimately suggest that a strong legal culture and support for the constitution are vital. In Austria this support is ensured by the most fundamental principles of constitutional law, which provides for a strong arsenal of legal resilience.

In [Chapter 12](#) on Belgium, Ellen Desmet and Stijn Smet adopt a two-stage analysis of legal resilience against far-reaching restrictions of migrants' rights. They first investigate the resilience of the Belgian constitutional system against a hostile take-over by right-wing populists, concluding that the constitutional framework remains robust. As a result, the separation of powers stays intact, unlike in Hungary and Poland. The separation of powers goes on to play a central role during the second stage of their analysis, when the authors assess the room for legal resilience against restrictive migration laws and policies. Desmet and Smet show that civil society actors have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants' rights in Belgium. In practice, the chapter concludes, this has only led to mixed results: the courts have safeguarded *minimal* respect for migrants' rights, rather than adopt a maximalist interpretation.

Sweden, finally, appears to be a somewhat idiosyncratic case since it has a powerful self-image as a country that protects and promotes human rights, which was also reflected in migration policy up until the middle of 2015, when

refugees were welcomed in the country. Yet, as Rebecca Thorburn Stern and Anna-Sara Lind explain, in the course of 2015 Sweden changed by adopting a more restrictive migration policy. Since then, restrictions have become the 'new normal' in Sweden as well. As radical-right ideas have become normalized, limitations on migrant rights appear to be regarded as much less problematic by mainstream political parties. At the same time, the Swedish constitutional system promotes a set of core values that, taken together, provide for legal resilience. The authors specifically identify the core values of independence of the administration and transparency of the legislative process as powerful tools to prevent anti-democratic and anti-pluralist parties from pushing through (all of) their ideas.

Overall, this last group of chapters confirms that in some European countries, faith in the ability of the rule of law and independent institutions to respond to restrictive migration laws and policies has not yet been abandoned. This indicates that, even if the pattern of restrictions of migrants' rights is *similar* across Europe, the available techniques of resilience *differ*, depending on how those restrictions intersect with forces of populism and democratic decay.

The volume, however, concludes on a pessimistic note with [Chapter 14](#), in which Bas Schotel draws extensively on the country studies to explain the empirical reality that the legal position of migrants is increasingly governed by administrative law, rather than civil and criminal law. He then warns that administrative law is distinctively well-suited to produce restrictive migration laws, whether enacted by populist or mainstream parties. In an important sense, the legal resilience identified in several country studies – judicial interventions by the ECtHR, CJEU and constitutional courts – signals and legitimizes the lack of legal resilience within administrative law itself. Resilience against restrictive migration laws will remain marginal and incidental, Schotel concludes, as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies: administrative law.

There thus remain central disagreements among the contributors to this volume. Nevertheless, with this book we hope to provide some answers to the difficulties that the interrelationship between populism, democratic decay and restrictions of migrants' rights poses in Europe.

PART I

Theoretical and Critical Perspectives  
on Resilience





# Populism, Immigration and Liberal Democracies

## *Inherent Instability or Tipping of the Balance?*

VLADISLAVA STOYANOVA

### 1.1 INTRODUCTION

This chapter investigates how challenging questions and tensions caused by migrants and their universalist claims for inclusion have been approached and resolved in liberal democracies. By regarding the development of populism as a real and dangerous political phenomenon that has significant traction, the chapter asks whether populism adds something new to how migrants' claims are approached in liberal democracies. More specifically, does populism add some distinctiveness that we should be more sensitive to?

To address these questions, I first describe some inherent instabilities in liberal democracies and accept that populism responds to these instabilities (Section 1.2). I then argue that the rights of migrants have been a site for contestation and tension, thereby exposing the instabilities in liberal democracies (Section 1.3). In particular, the question how inclusive or exclusive the bounded national community should be has always been contested. By zooming in on the case law of the European Court of Human Rights (ECtHR), the chapter examines three areas where migrants' universalist claims for inclusion have been addressed in human rights law (Section 1.4). With reference to the requirement that states have to provide justifications for measures that affect individuals, I analyze how the tensions between exclusion versus inclusion and particularism versus cosmopolitanism have been adjusted. The conclusion of Section 1.4 is that the adjustment has been tipped in favour of exclusion and particularism. The concern that arises in the current circumstances is that populism might further shape this adjustment to the point where the balance is completely tilted in favour of exclusion and statism.

Having set out the main descriptive argument, the chapter draws on Dora Kostakopoulou's work to explain that the question how inclusive or exclusive

the bounded national community should be concerns more than the demarcation of the external boundaries of the community (Section 1.5). The internal and the external are intertwined, which implies that exclusionary policies ultimately infect the ‘inside’ of the national community. As a consequence, anybody or any group can be framed as an ‘outsider’. The rise of populism has exposed this intertwining. This means that the tipping of the balance in favour of exclusion and statism as to how migrants are treated raises general concerns about the nature of the community and its organizing liberal values. These concerns relate to how the community responds to diversity and plurality more generally and, relatedly, how it draws lines between different social groups that might have ideas and values different from those that dominate. As a consequence, when migrants invoke universalist claims, the response necessary affects not only them (e.g. being kept in immigration detention or impossibility to enjoy family life) but also the political community that is the addressee of these claims.

## 1.2 INHERENT TENSIONS IN LIBERAL DEMOCRACIES

The growth of populist political actors has presented various challenges to liberal democracies, to constitutionalism and to the rule of law.<sup>1</sup> Political scientists have addressed populism and its manifestations.<sup>2</sup> As it emerges from their scholarship, while populism can be difficult to define,<sup>3</sup> two broad approaches can be identified in the efforts to explain it. The first one implies recognizing a series of characteristics running through different examples of populist governments and versions of populism.<sup>4</sup> The second approach, the one adopted for the purposes of this chapter, is more narrow and understands populism as ‘a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the general will of the people.’<sup>5</sup> It follows from this definition that

<sup>1</sup> Susanne Baer, ‘The Rule of – and not by – Law: On Constitutionalism’ 71(1) *Current Legal Problems* (2018) 335.

<sup>2</sup> For a useful overview, see Nicole Lacey, ‘Populism and the Rule of Law’ 15 *Annual Review of Law and Social Science* (2019) 79.

<sup>3</sup> Paul Taggart, *Populism* (Oxford University Press 2000) 2.

<sup>4</sup> For the identification of these two approaches, see Alison Young, ‘Populism and the UK Constitution’ 71(1) *Current Legal Problems* (2018) 17.

<sup>5</sup> Cas Mudde, ‘Are Populists Friends or Foes of Constitutionalism?’ (2013) *The Foundations of Law, Justice and Society Policy Brief* 3; Cas Mudde and Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 6. When discussing populism in this chapter, I largely draw on the definition proposed by Jan-Werner Müller: populism is as ‘a particular

populism is an ideology that homogenizes the will of ‘the people’ and promotes it against the will of the elites.<sup>6</sup> It operationalizes emotion over reason and promotes a binary choice between accepting and rejecting a particular position, which undermines the ability of deliberation to reach a solution that might protect a range of diverse interests.<sup>7</sup> Populism moves political debates away from rational discussion; it invokes emotional outbursts, oversimplifies complex issues, challenges expertise, and prevents democratic deliberation<sup>8</sup> and the possibility for compromising among different interests in society.<sup>9</sup>

Having clarified the definitional features of populism, it is important to note that constitutional scholars have warned against perceiving populism as completely foreign to liberal democracies. Constitutional scholars have rather maintained that populism responds to some inherent and ingrained instabilities and tensions in the structures of liberal democracies. This chapter aligns with this understanding: ‘populism’ is an ‘expression of deep-seated problems within existing democratic regimes’.<sup>10</sup> It is ‘a signifier of structural deficiencies and tensions within modern democracy, including in its constitutional design’.<sup>11</sup> According to Walker, populism is not ‘wholly anomalous within our political tradition’;<sup>12</sup> it is rather ‘a product of and response to a series of stress factors that are intrinsic to the modern constitutional condition’.<sup>13</sup>

With some risk of oversimplifying, these stress factors are reflected in three interrelated dichotomies that are a cause of inherent tension and instability in liberal constitutionalism: the collective versus the individual, the universal versus the particular, and, finally, plurality versus unity.<sup>14</sup> As to the first one, liberal democracies search for a balance between the interests of the collective

moralistic imagination of politics, a way of perceiving the political world that set a morally pure and unified – but . . . ultimately fictional – people against elites who are deemed corrupt or in some other way morally inferior.’ Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 20.

<sup>6</sup> Young (n 4) 43.

<sup>7</sup> Young (n 4) 36.

<sup>8</sup> Young (n 4) 43.

<sup>9</sup> Nicole Lacey, ‘Populism and the Rule of Law’ 15 *Annual Review of Law and Social Science* (2019) 79.

<sup>10</sup> Paul Blokker, ‘Response to “Public Law and Populism”’ 20 *German Law Journal* (2019) 284, 285.

<sup>11</sup> Blokker (n 10) 285.

<sup>12</sup> Neil Walker, ‘Populism and Constitutional Tension’ (2019) 17(2) *International Journal of Constitutional Law* 515, 519.

<sup>13</sup> Walker (n 12) 519.

<sup>14</sup> Walker (n 12) 529–30; see also Zoran Oklopcic, ‘Imagined Ideologies: Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism’ 20 *German Law Journal* (2019) 201, 215.

as a whole, on the one hand, and individual interests as protected by human rights law, on the other.<sup>15</sup> Human rights presuppose protection against excessive and disproportionate limitations in the name of collective interests. The questions how to find the right balance between competing interests (the collective versus the individual interests) and at which point individual rights are disproportionately burdened are not prone to easy answers.

As to the second dichotomy (i.e. the universal versus the particular), a balance is sought between aspirations in favour of some universal values that have global reach, on the one hand, and considerations of the specific conditions and distinctiveness of the particular political community, on the other. Universal values give a basis for human rights as enshrined in international instruments. At the same time, particularism and closure in defence of the interest of the particular political community might not be easily squared with universalist aspirations.<sup>16</sup>

The third dichotomy (i.e. plurality versus unity) implies a tension between the plurality of identities that individuals within a state might have (in terms of, for example, ethnicity, culture, language, religion, gender, etc.), on the one hand, and the need for social cohesion and integrity of the whole so that 'the people' constituting the nation state can be formed. As Dora Kostakopoulou has observed, arguments in favour of 'legitimate closure in order to preserve collective identity are [...] underpinned by a static conception of identity'.<sup>17</sup> These arguments tend to 'locate identity in some existing, inherent attributes of an entity, thereby overlooking the fact that identities (both personal and collective) are complex entities in process'.<sup>18</sup> Identities are complex since they 'evolve, develop, become negotiated and re-negotiated within a context and in response to that context'.<sup>19</sup> At the same time, some form of social cohesion is necessary:<sup>20</sup> 'To function well a constitutional democracy must also be underpinned by

<sup>15</sup> This can be also represented as a tension between the protection of human rights and the protection of democracy. This tension emerges when human rights law is allowed to override legislation adopted by the democratically elected parliament. Young (n 4) 29.

<sup>16</sup> Kim Lane Scheppele, 'The Party's Over' in M Graver, S Levinson and M Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 495, 496, where the social division between cosmopolitans/globalists and nationalists/localists, is also identified. See also Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publisher 2001)

<sup>17</sup> Dora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union. Between Past and Future* (Manchester University Press 2001).

<sup>18</sup> Kostakopoulou (n 17).

<sup>19</sup> Dora Kostakopoulou, 'Is There an Alternative to "Schengenland"?' (1998) XLVI *Political Studies* 886, 900.

<sup>20</sup> '[...] the success of popular or national sovereignty as an organizing principle of modern states owes much to presumptions about their organic unity: they have been portrayed as unitary, undifferentiated and integrated bodies lending an identity to their citizens and compelling

certain social conditions' that might imply 'relatively homogeneous societies'.<sup>21</sup> Achieving some level of homogeneity and unity while at the same time respecting the plurality of identities might not be an easy task.

As Walker explains, liberal democracies are in a constant search for answers on how to approach these dichotomies and the tensions that they produce. There are no easy answers to any of them.<sup>22</sup> The division between inside and outside, a division that implies a degree of national closure and boundedness, can ensure some form of stability in finding a balance. Transnationalism, on the other hand, can challenge the stability.<sup>23</sup> Transnationalism finds expression, for example, in the creation of transnational regulatory institutions (e.g. the EU),<sup>24</sup> which might undermine the capacity of states to regulate their own economies.<sup>25</sup> Transnationalism is also expressed in the work of international courts that make binding pronouncements as to whether, for example, the balance struck at national level between individual interests and community interests is compatible with human rights law.<sup>26</sup>

Another example of transnationalism that can strain the search for the delicate balance is migration: the movement of people who make claims to be included in another political community.<sup>27</sup> It is not surprising therefore that migrants and their rights have been one of the major targets of populists.<sup>28</sup> Rejecting migrants' claims for inclusion and limiting migrants' rights have been one of the flagship proposals of populism.

their unqualified allegiance.' Dora Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution' (2002) 22(1) *Oxford Journal of Legal Studies* 149.

<sup>21</sup> Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39(2) *Oxford Journal of Legal Studies* 435, 439.

<sup>22</sup> Walker (n 12) 519.

<sup>23</sup> Zoran Oklopcic, 'Imagined Ideologies: Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism' 20(2) *German Law Journal* (2019) 201, 216.

<sup>24</sup> Mark Dawson, 'How Can EU Law Respond to Populism?' (2020) 40(1) *Oxford Journal of Legal Studies* 183.

<sup>25</sup> Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' 39(2) *Oxford Journal of Legal Studies* (2019) 435, 442.

<sup>26</sup> Barbara Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20(3) *International Journal of Human Rights* 407; Jan Petrov, 'The Populist Challenge to the European Court of Human Rights' (2020) 18(2) *International Journal of Constitutional Law* 476.

<sup>27</sup> For a useful outline of the philosophical discussions on how to address the tensions between statism and cosmopolitanism, see Alex Levitov, 'Human Rights, Membership, and Moral Responsibility in an Unjust World' in Adam Etinson (ed) *Human Rights: Moral or Political?* (Oxford University Press 2018) 470.

<sup>28</sup> Speech by the CoE Secretary General, Understanding Populism and Defending Europe's Democracies, 27 January 2017.

### 1.3 THE TENSION BETWEEN INCLUSION AND EXCLUSION

As Section 1.2 suggests, with or without populism the rights of migrants are a source of tension in liberal democracies. Liberal constitutional democracies have been struggling with the question of how to accommodate migrants, who are not formally members of the host community (i.e. the nation state),<sup>29</sup> without forsaking liberal values.<sup>30</sup> Constitutional democracies are bounded communities of citizens with equal rights, and, on this account, the claims of migrants, as non-citizens, pose a challenge that destabilizes the construction of these communities. This construction presupposes some degree of closure and exclusion.<sup>31</sup> Migrants, on the other hand, by invoking universal values, make claims in favour of inclusion,<sup>32</sup> which would broaden the political community and affect its homogeneity. These claims feed the three tensions mentioned in Section 1.2.

Both the inclusion and the exclusion claims raised by migrants can find a basis in the applicable legal standards.<sup>33</sup> Appeals for strict anti-immigration policies are 'based on premises, and made with arguments, compatible with existing constitutional understandings and arrangements'.<sup>34</sup> Such appeals 'are made in the name of principles that are thought to undergird the idea of a constitutional democracy: security of territory, a self-governing demos, a rule

<sup>29</sup> Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 489. Noll explains that '[t]he effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens'. At the same time, however, imposition of immigration control and restrictions upon the rights of migrants can lead to severe human suffering (e.g. separating children from parents).

<sup>30</sup> Jürgen Bast and Liav Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) 19(7) *German Law Journal* 1587, 1587, where the authors ask '[h]ow can liberal states, or a supranational Union formed by such states, welcome immigrants and treat refugees as future denizens without fundamentally changing their constitutional identity, forsaking their liberal tradition, or slipping into populist nationalism?'

<sup>31</sup> On this account, exclusion is perceived as 'necessary for the creation and continuation of a political order (because it is constitutive).' See Bas Schotel, *On the Right to Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012) 54.

<sup>32</sup> These claims can have a different legal and moral basis, some more powerful than others.

<sup>33</sup> It suffices here to recall the pronouncement of the ECtHR that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.' *Abdulaziz, Cabales and Balkandali v. United Kingdom* App no 9214/80 (ECHR, 28 May 1985) para 67.

<sup>34</sup> A Alexander Aleinikoff, 'Inherent Instability. Immigration and Constitutional Democracies' M Graber, S Levinson and M Tushnet (eds) *Constitutional Democracy in Crisis* (Oxford University Press 2018) 477, 485.

of law'.<sup>35</sup> Although democracy and human rights have been in general regarded as a 'mutually reinforcing couple',<sup>36</sup> migrants who have no political membership and no political equality cannot benefit from this potential 'mutual relationship between human rights and democracy'.<sup>37</sup> They are not part of the demos and do not formally participate in the taking of decisions that might affect them.<sup>38</sup> This relates to Koskeniemi's observation that human rights do not exist outside the structures of political deliberation.<sup>39</sup> Similarly, Noll has explained how human rights are derived 'from the will representation of a particular political community organized in a nation-state with delimited territory'<sup>40</sup> and they are 'a by-product of the particular kind of society'.<sup>41</sup>

At the same time, international human rights law has a 'community-transcending validity',<sup>42</sup> and its application as a matter of principle is not contingent on membership in a particular political community. Accordingly,

<sup>35</sup> Aleinkoff (n 34) 491; Schotel (n 31) 32.

<sup>36</sup> Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4(1) *Ethics and Global Politics* 19.

<sup>37</sup> Samantha Besson, 'Human Rights and Constitutional Law. Patterns of Mutual Validation and Legitimation' in R Cruft, S Liao and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 279; Besson (n 36) 23. Besson wrongly assumes that a 'right to membership' includes a right to asylum and a right to *non-refoulement*. There is no right to asylum in human rights law. The right to *non-refoulement* is also very limited in its scope; it simply requires states not to send back individuals to ill-treatment. The latter might not imply access to territory, let alone 'a right to membership'.

<sup>38</sup> The structure of human rights and, in particular the proportionality analysis that they imply, presupposes decision-making within the specific political community, where there is a crucial element of sharing, commonality and interdependence of stakes. See Kai Möller 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709, 716. The proportionality framework rests on the existence of a democratic community. See Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 417–18; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) *Law and Ethics of Human Rights* 140, 143; Robert Alexy 'The Construction of Constitutional Rights' (2010) 4(1) *Law and Ethics of Human Rights* 20, 28; Aharon Barak 'Proportionality and Principled Balancing' (2010) 4 *Law and Ethics of Human Rights* 1, 3.

<sup>39</sup> Marti Koskeniemi, 'Human Rights, Politics and Love' (2001) 4 *Mennesker og Rettigheter* 33, 38.

<sup>40</sup> Gregor Noll, 'The Exclusionary Construction of Human Rights in International law and Political Theory' IIS Discussion Paper 2003 10.

<sup>41</sup> Chris Brown 'Universal Human Rights: A Critique' (1997) 1 *The International Journal of Human Rights* 41, 58–9. For an account that explains how human rights are political and at the same time justified by a natural-law approach based on dignity, see Laura Valentini, 'In What Sense are Human Rights Political?' (2012) 60 *Political Studies* 180.

<sup>42</sup> Seyla Benhabib *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 134.

commitment to human rights may require constraining the community's competence on immigration.<sup>43</sup>

Benhabib argues that this contradiction between particularism versus universalism should be openly acknowledged. Once we have done this, we should think how to negotiate and renegotiate the tension between inclusion and exclusion.<sup>44</sup> Benhabib thus maintains that this 'constitutive dilemma at the heart of liberal democracies'<sup>45</sup> can be calibrated, adjusted and reconstructed. She further recognizes that this contradiction cannot be easily resolved; however, she is optimistic that it can be mitigated through 'democratic iteration', including 'jurisgenerative politics'.<sup>46</sup> These imply 'deliberative processes in which universalist rights claims are contested and contextualized'.<sup>47</sup> In light of the tendency to view courts, especially courts with a mandate to adjudicate human rights law related issues, as important actors in these 'deliberative processes',<sup>48</sup> it is relevant to scrutinize the ECtHR's approach to this contestation. The concrete question to be examined is how the claim in favour of inclusion as opposed to exclusion has been adjusted in the case law of the Court. This claim complicates the three tensions identified in Section 1.2 as inherent in liberal democracies. An individual migrant, the applicant to the Court, formulates his/her claim with reference to the specific harm that he/she sustains, and an assessment needs to be made whether this harm is justifiable given any collective interests, which feeds the collective versus the individual tension. The applicant appeals to universal values, which feeds the universal versus the particular tension. Finally, the plurality versus unity tension is also complicated since inclusion

<sup>43</sup> Dora Kostakopoulou, 'Is there an Alternative to "Schengenland"?' *XVLI Political Studies* (1998) 886, 896; Evan Fox-Decent, 'Constitutional Legitimacy Unbound' in D Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 119, 120: the assertion that the state has the unilateral right to determine the conditions of entrance and memberships 'subverts the legitimacy of the state's constitutional order.' Fox-Decent argues that '[t]he state is entitled to restrict entrance and membership only if it offers a compelling and independently reviewable justification.'

<sup>44</sup> Benhabib (n 42) 134.

<sup>45</sup> Benhabib (n 42) 2.

<sup>46</sup> Benhabib (n 42) 176–81; Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' 103(4) *American Political Science Review* (2009) 691.

<sup>47</sup> Benhabib (n 42) 179.

<sup>48</sup> In the context of migration, see Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) and Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).



might imply enhanced plurality, thus affecting the homogeneity of the particular community that is the addressee of the migrant's claim.

By accepting that the above-described instabilities and tensions are not only ideological in their nature, but also pervade the applicable legal standards, this chapter attempts to respond to the question how the claim in favour of inclusion as opposed to exclusion has been adjusted by the ECtHR, by looking into three concrete circumstances (i.e. admission to territory, immigration detention and migrants' right to family life).<sup>49</sup> I approach these circumstances by asking the question whether human rights law requires the state to provide some form of justification for the restrictive measures taken in relation to migrants. Why this focus on justification? As moral beings, we at least have 'a fundamental right to justification'.<sup>50</sup> When public authority interacts with an individual, if he or she is considered as a person, he or she is owed reasons and justifications. There is thus a strong connection between personhood and justification.<sup>51</sup> It follows that although there is an instability in how inclusive or exclusive a bounded community should be and to what extent the state that represents this community should follow a universalist or particularist approach, recognizing the personhood of migrants is the very minimum that can be required. Providing some form of justification for measures affecting them is therefore the very minimum that can be demanded.

Providing justifications also creates a space where the different interests can be identified and arguments underpinning possible decisions exchanged. It also implies identification and evaluation of the empirical consideration behind the interests and the possible solutions.<sup>52</sup> Abstract invocation of sovereign entitlement does not suffice. Justification also requires taking into account the migrants' interests and balancing them against the national

<sup>49</sup> These circumstances reflect the main ways in which migrants' rights have been adjudicated under the ECHR. Admittedly, the right to *non-refoulement* under Article 3 raises issues other than admission to territory (e.g. non-removal, quality of the national procedure for assessing migrants' protection needs, the types and levels of harms that migrants might face upon removal and whether these are worthy of protection under Article 3). I have chosen to focus on admission to territory since it relates to circumstances where migrants' claims for inclusion are perceived to be the weakest due to the absence of physical contact with the authorities of the countries of destination.

<sup>50</sup> Benhabib (n 42) 133.

<sup>51</sup> '[a]uthority without reason is dehumanizing' Jerry Mashaw, 'Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance' (2007) *Yale Faculty Scholarship Series* 99, 101.

<sup>52</sup> Schotel (n 31) 25: Justification required 'not only the statement of reasons, but also their substantiation by data and analysis.'

interests. Therefore, Benhabib's proposal for negotiation and renegotiation of the tension between inclusion and exclusion can be realized in the context of such a framework of justification.

## 1.4 SITES OF CONTESTATION

### 1.4.1 *Admission to Territory*

The first context in which migrants' claims are examined concerns admission to territory. The concrete question here is whether states are required to provide some justifications for rejecting claims for admission. It is crucial to concretize the circumstances under which such claims are made. Here I have in mind asylum seekers who intend to apply for international protection. To formulate their international protection claims, they need to get in contact with the authorities of countries of asylum.

With *Hirsi Jamaa and Others v. Italy* it became clear that once asylum seekers get in physical contact with the authorities of the destination state the latter's obligations under human rights law, including the obligation not to *refoule*, are triggered.<sup>53</sup> The applicants in this case belonged to a group of individuals who left Libya in 2009 aboard vessels intended to reach Italy. They were intercepted, transferred to Italian military ships and returned back to Libya without examination of their international protection needs. The applicants argued that their transfer to the Libyan authorities was in violation of the prohibition on *refoulement* as implied under Article 3 ECHR. The ECtHR agreed and found Italy in violation of the ECHR.

In this case, Italy was under human rights obligations because the migrants were within Italy's jurisdiction in the sense of Article 1 of the ECHR. This provision stipulates that the State Parties 'shall secure to everyone within their jurisdiction the rights and freedom defined' in the ECHR. Jurisdiction in human rights law is an initial threshold that determines whether there is a relationship between the state and certain individuals so that the state can own these individuals' obligations under the ECHR.<sup>54</sup> In *Hirsi Jamaa and Others v. Italy*, this relationship was established since, as mentioned above, the asylum-

<sup>53</sup> *Hirsi and Others v. Italy* [GC] App no 27765/09 (ECHR, 23 February 2012) paras 123–6 and 131.

<sup>54</sup> Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in L Malcom (ed) *Global Justice, State Duties* (Cambridge University Press 2013) 153, 154; Samantha Besson 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25 (2012) *Leiden Journal of International Law* 857.

seekers could depart from Libya and get in physical contact with the Italian authorities.

Most asylum-seekers, however, are not able to depart and reach European states. The possibilities for movement and flight have been increasingly suppressed in their inception in and by countries of origin and transit.<sup>55</sup> This suppression of mobility is based on cooperation between countries of destination, on the one hand, and countries of origin and transit, on the other.<sup>56</sup> In particular, European states have enlisted the latter group of countries to apply exit and departure controls.<sup>57</sup> This has been part of the external dimension of the EU migration policy,<sup>58</sup> which has taken various forms: assisting countries of origin and transit to apply stricter border controls,<sup>59</sup> including pull-backs of migrants;<sup>60</sup> supporting and training, for example, the Libyan coast guards and navy;<sup>61</sup> providing border control equipment and intelligence to countries of origin and transit.<sup>62</sup> The demand to contain movement comes normally as part of a larger package of financial forms of assistance and other incentives, including development aid.<sup>63</sup>

When these measures are applied, there is no direct physical contact between the affected individuals, on the one hand, and the authorities and the agents of European states of intended destination, on the other. The

<sup>55</sup> James Hathaway, 'The Emerging Politics of *Non-Entrée*' 91 *Refugees* (1992) 40; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235; Mariagiulia Giuffrè and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

<sup>56</sup> Paula Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *Common Market Law Review* 157, 158.

<sup>57</sup> Establishing a New Partnership Framework with Third Countries COM(2016) 385 final, 7 June 2016. See also Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in this volume.

<sup>58</sup> Malta Declaration 3 February 2017, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route – Consilium (europa.eu)*.

<sup>59</sup> Progress Report on the Partnership Framework with Third Countries COM(2017) 471, 6.

<sup>60</sup> The term 'pull-back' means prevention of departure. See Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) *European Journal of International Law* 591.

<sup>61</sup> Progress Report on the European Agenda on Migration COM(2017) 669 8; Communication on Establishing a New Partnership Framework with Third Countries COM(2016) 385, 15.

<sup>62</sup> Article 1, Italy–Libya Memorandum Agreement, *MEMORANDUM\_translation\_finalversion.doc.pdf (eumigrationlawblog.eu)*.

<sup>63</sup> Nora El Qadim, 'The Funding Instruments of the EU's Negotiation on External Migration Policy. Incentives for Cooperation' in S Carrera et al, *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill 2019) 341.

jurisdictional threshold under Article 1 ECHR cannot be triggered and, accordingly, the European states do not own any human rights law obligations to the affected individuals. The ultimate result is that European states exercise powers that severely affect migrants (by preventing departures, movement and containing asylum-seeker in countries with notorious human rights abuses), without any possibility for scrutiny against human rights law standards.

The above situation prompts the question as to the role of jurisdiction in human rights law. In light of the jurisdictional threshold, asylum-seekers cannot invoke their rights against countries of destination whose interests dictate the measures of containment. The link between these countries' conduct and harm sustained by individuals is broken.<sup>64</sup> The jurisdiction threshold conditions the existence of human rights law obligations on some form of personal control that is practically not even relevant to the substance of the harm. In sum, the jurisdictional threshold in human rights law guarantees that the two competing interests never meet each other. The interests of the individuals as protected by human rights law cannot be opposed to the interests of the states that actually exercise powers in ways that seriously harm these individuals.<sup>65</sup>

In this way, questions of material justice are avoided.<sup>66</sup> States are not required to offer any forms of justification.<sup>67</sup> The universal does not even meet the particular. The claim for inclusion cannot even be formulated. In addition, countries of destination maintain that, in fact, the measures of containment are in the interest of the migrants since the latter are prevented from embarking on dangerous sea journeys and from becoming victims of unscrupulous human smugglers and human traffickers.<sup>68</sup>

The extraterritorial cooperation-based migration control measures reveal a situation where migrants are met with 'purely de facto acts of border

<sup>64</sup> The same breakage has been sanctioned by the ECtHR in the context humanitarian visas. See Vladislava Stoyanova, 'M.N. and Others v Belgium: no ECHR Protection from *Refoulement* by Issuing Visas' (EJIL:Talk!, 2020).

<sup>65</sup> Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2021) 32(3) *International Journal of Refugee Law* 403.

<sup>66</sup> 'Jurisdictional questions are termed as "preliminary", and considered quite literally *before* passing across the boundary of material justice.' Gregor Noll, 'Theorizing Jurisdiction' in A Orford and F Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 600, 601.

<sup>67</sup> There will be a justification, if the authorities of the destination state take into account the interests of the excluded migrants, provide reasons for the exclusion and balance the migrants' interests against the interests of the receiving state. Schotel (n 31) 17.

<sup>68</sup> Vladislava Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) *German Law Journal* 436.

control'.<sup>69</sup> Any possibility for placing these acts in a human rights law framework that implies justifications is removed and replaced with pure efficiency. Migrants are made objects of European states migration control measures to keep them out of the legal order.<sup>70</sup>

#### 1.4.2 Detention

How is the tension between the universal and particular addressed when asylum-seekers are fully within the destination state's physical powers? In particular, when the possibility is open for immigration detention, are justifications for this intrusive measure required?

Article 5(1)(f) of the ECHR allows for two forms of immigration detention: for preventing an unauthorized entry into the country or for taking actions with a view of deportation or extradition.<sup>71</sup> My objective here is not to survey all applicable standards, but to outline the major principles underpinning the legal reasoning in this area.<sup>72</sup> Two judgments in particular are pertinent: *Chahal v. United Kingdom* and *Saadi v. United Kingdom*. Despite the important nuances introduced after these two cases, their reasoning has not been overruled.

*Saadi v. United Kingdom* is a leading case on detention for preventing unauthorized entry.<sup>73</sup> The applicant was from Iraq; once arriving at Heathrow airport, he claimed asylum. He was allowed to leave the airport, but was asked to return to the airport immigration authorities, which he did on three occasions. After that, he was detained and transferred to a detention centre. As the facts revealed, the actual reason for his detention was facilitation of fast track processing of asylum claims. The ECtHR reasoned that the detention of Saadi served the purpose 'to prevent his effecting an unauthorized entry into the country'.<sup>74</sup> His status as an asylum-seeker was considered irrelevant in this

<sup>69</sup> Hans Lindahl, 'Jus includendi et excludendi: Europe and the Borders of Freedom, Security and Justice' (2005) 16(1) *King's College Law Journal* 234–47, 243.

<sup>70</sup> Referring to Agamben, Bas Schotel argues that in this way migrants create a state of exception. Schotel (n 31) 73. See Chapter 4 in this volume.

<sup>71</sup> I am not focusing here on the conditions of detention, on the legality requirement and the procedure that needs to be followed so that immigration detention is in accordance with human rights law. See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 285.

<sup>72</sup> EU law standards are not included in the analysis. Admittedly, EU law has enhanced the standards in this area.

<sup>73</sup> *Saadi v. United Kingdom* [GC] App No 13229/03 (ECHR, 29 January 2008).

<sup>74</sup> *Ibid.*, para 65.

context. The Court's reasoning is based on the fallacy that he is outside the national boundaries, when in fact he had already entered and was a participant in an administrative process, that is, refugee status determination.

The Court added that detention of 'unauthorized entrants' was the 'necessary adjunct' to states' 'undeniable right to control entry of aliens'.<sup>75</sup> The state is not required to show that the detention of this particular individual was necessary to achieve any specific aim; rather the general and abstract aim of immigration control suffices: 'once the migrant is classed as an "unauthorised entrant", she is detainable'.<sup>76</sup> Not only this, but the detention was framed as being in his interest, that is, it facilitated faster processing of the asylum claim. The dissenting judges in *Saadi v. United Kingdom* strongly objected against this stance: '[...] to contend in the present case that detention is in the interests not merely of the asylum seekers themselves "but of those increasingly in the queue" is equally unacceptable. In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end.'

*Chahal v. United Kingdom* is the leading case on pre-deportation detention.<sup>77</sup> The ECtHR established that Article 5(1)(f) ECHR 'does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing ...'.<sup>78</sup> The test of necessity was thus rejected.<sup>79</sup> This means that the purpose that the detention served does not have to be anything more specific than invocation of the state's general immigration control powers.

If immigration detention were to have a proper justification, it would have to serve a more concrete purpose. For example, if there is a risk that the person might abscond, the immigration detention would serve the purpose of effectuating the deportation. In this sense, there would be a link between the detention of the specific person, on the one hand, and a concrete purpose (i.e. the deportation). Instead, when immigration detention is made a 'necessary adjunct' of states' immigration control powers, the underlying justification does not have to go beyond invocation of these powers.

<sup>75</sup> *Ibid.*, para 64.

<sup>76</sup> Cathryn Costello, 'Immigration Detention: The Ground Beneath Our Feet' (2015) 68 *Current Legal Problems* 143, 151.

<sup>77</sup> *Chahal v. United Kingdom* [GC] App no 22414/93 (ECHR, 15 November 1996).

<sup>78</sup> *Ibid.*, para 112.

<sup>79</sup> The Court has raised other important safeguards in its case law under Article 5(1)(f) ECHR (legality, deportation proceedings pursued with 'due diligence' etc.).

1.4.3 *Family Life*

The right to family life has also provided a site of contestation between universalism versus particularism, inclusion versus exclusion. This right is protected by Article 8 of the ECHR. As the second paragraph of this provision suggests, the tension between the individual's interest to family life and state interests ought to be resolved through the application of the proportionality test.<sup>80</sup> This test demands an inquiry as to the aim pursued by the state with the deportation of the family member and the suitability and necessity of the measure. Already at this stage, it is clear that migrants are placed in a better position to support their claim for inclusion, in comparison with the circumstances discussed in the previous two subsections.

As to the actual performance of this inquiry, however, the following distinguishing features emerge. First, the state is not required to articulate the aim of the deportation measure beyond the general and abstract invocation of immigration control prerogatives. General deterrence against breaches of immigration legislation has been accepted in the ECtHR's reasoning as a legitimate aim.<sup>81</sup> When such an abstract aim is accepted, it becomes difficult to meaningfully scrutinize whether and how the concrete measure of deporting the migrant (that will lead to disruption of his or her family life) is suitable and necessary. The aim of immigration control pursued by the state is not subjected to any rational or factual scrutiny. No links are sought between the measure (i.e. the deportation of the particular migrant who might be, in fact, economically active and supporting his or her family) and any more concretely formulated objectives. Immigration control is accepted as the objective in itself.

In addition, the Court has framed the preservation of migrants' interests as an exception by applying the 'most exceptional circumstances' test. This implies that if there is a possibility for the family to move to another country, it is likely that no violation of Article 8 will be found. Disturbingly, the alternative of moving to another country needs to be only possible in theory,

<sup>80</sup> Article 8 has produced a rich body of cases in the area of migration and it is beyond the scope of this paper to investigate all the nuances. I will focus only on cases involving migrants (not accused of any criminal offences), who try to prevent their removal when they are already in the territory of the host state where they have a family.

<sup>81</sup> *Nunez v. Norway* App no 55597/09 (ECHR, 29 August 2011) para 71; *Antwi and Others v. Norway* App no 26940/10 (ECtHR, 14 February 2012) para 90; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2008) 46 EHRR 23, para 79.

and is not closely scrutinized as to its practical difficulties.<sup>82</sup> The assessment of the alternative by the Court is thus often ‘reality-disconnected’.<sup>83</sup> The option of moving to another country might imply severe costs for the individual; however, since ‘Article 8 does not guarantee a right to choose the most suitable place to develop family life’,<sup>84</sup> an alternative that is less protective for the individual is accepted in the Court’s reasoning.

In sum, the Court invokes the proportionality test when it adjudicates the rights of migrants to family life. This implies that migrants are offered justifications for measures that affect them. However, the space for these justifications is very narrow and the argumentative framework is biased in favour of exclusion.

#### 1.4.4 *From Renegotiation to Takeover*

The three sites of contestation examined above show a continuum from a complete absence of a requirement to offer a justification to a weakened requirement for a justification for measures affecting migrants. These sites expose degrees of exceptionalism when dealing with migrants: from total exclusion from the legal protection offered by human rights law (in the context of admission), to inclusion that is subordinated to the objectives of effective migration control (in the context of detention) and, finally, to inclusion but only in exceptional circumstances (in the context of family life). As Benhabib suggests,<sup>85</sup> there might be some scope for challenging this exclusion and renegotiating the balance. However, the balance is tipped in favour of statism and exclusion. How does the rise of populism impact on this (im)balance? In light of the populist trends, the concern emerges that the problem will no longer be framed as one of balancing at all, since the exclusion side might completely take over.

The examples described above to a certain degree also reflect the ‘hard on the outside – soft on the inside’ approach.<sup>86</sup> In particular, issues of admission

<sup>82</sup> Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty?* (Hart Publishing 2016).

<sup>83</sup> Dissent by Judge Kovler in *Omorieg v. Norway* App no 265/07 (ECtHR, 31 July 2008). See also *Useinov v. the Netherlands* App no 61292/00 (ECtHR, 11 April 2006), where the Court invoked the standard of ‘virtually impossible’. In this way, the Court has alluded that any contacts between the applicant and his children after his deportation will have to be ‘virtually impossible’ so that the deportation could be averted.

<sup>84</sup> *Ahmut v. the Netherlands* App no 21702/93 (ECHR, 28 November 1993) para 71.

<sup>85</sup> See Section 1.3.

<sup>86</sup> Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2008). It is questionable to what extent the ECtHR’s reasoning under Article



are within the sovereign sphere of destination states and excluded from scrutiny, while the treatment of migrants once on the inside in terms of migrants' detainability and family life, can be to a certain extent scrutinized. A version of the 'hard on the outside – soft on the inside' approach has also been proposed as a solution to populism: by strictly securing the external borders, it might be easier to gain popular support for more liberal policies in relation to migrants that are already on the territory of the state.<sup>87</sup> However, as Bosniak acknowledges, the inside and the outside are intertwined since 'national concerns with protecting the boundaries of territory and membership' might 'structure the status of noncitizens currently residing in the national territory and participating in national life'.<sup>88</sup> This type of intertwinement is evident in how the ECtHR adjudicates migrants' right to liberty and family life: states' immigration powers to control the outside boundaries have a serious impact on the rights of migrants who are already inside.

Crucially, however, the intertwinement between the inside and the outside can be looked at from a different perspective. The inside then will refer not only to the status of migrants, but to the status of all diverse groups within the national community. Concerns with protecting the boundaries of membership can then structure and affect the position of everybody. The rise of populism has exposed this additional dimension of the intertwinement, to which we now turn.

### 1.5 'THEY' DEFINES 'US'

Dora Kostakopoulou's work is the starting point for explaining this intertwinement. She has argued that restrictive immigration policies have an impact on the 'political community's scale of values'.<sup>89</sup> The way we treat migrants has a profound effect upon the principles on which European polities 'profess to be based, and upon the identity of their citizens. After all, admission and belonging are issues relating to "what kind of polity we wish to have" and

8 in migration-related cases, can be described as 'soft' given that the protection afforded is limited.

<sup>87</sup> 'all legal residence of a country be treated the same irrespective of their color and creed' but that 'secure border can help win popular support for more generous immigration policies.' Yascha Mounk, *The People versus Democracy. Why our Freedom Is in Danger and How to Save It?* (Harvard University Press 2018) 214.

<sup>88</sup> Bosniak (n 86) 38.

<sup>89</sup> Dora Kostakopoulou, 'Is There an Alternative to "Schengenland"?' (1998) *XVLI Political Studies* 886, 898. She also adds 'Critical exchanges and collisions enhance the possibility for reflective self-awareness by showing the limits and relativity of one's political culture'.

“who we choose to become” – not simple correlatives of the state’s power to exclude.<sup>90</sup> The way in which immigration control powers are exercised, including whether and what kind of justifications are offered for substantiating these powers, can compromise the internal process of democracy: “[i]mmigration is inextricably linked with how political communities respond to diversity itself.”<sup>91</sup>

Migrants are perceived as a danger to the order, welfare, culture and identity of the host community ‘only in relation to certain ideological conceptions as to what constitutes a member.’<sup>92</sup> Anybody who does not fit within this fixed conception of the identity that a member should have, is at risk of being silenced by a community that does not anymore value diversity. It follows that ‘the way we relate to Other becomes part of our identity.’<sup>93</sup> If this way is characterized by pure effectiveness, objectification and exceptionalism (as suggested in Section 1.4), ‘this cannot but affect citizens’ identity negatively.’<sup>94</sup> Accordingly, the pursuit of illiberal admission policies, fosters ‘an ugly identity’ and places ‘democratic achievements in jeopardy.’<sup>95</sup> It follows that decisions about external membership (i.e. migrants) and internal membership (various groups within the host society that might have different religious or ethnic backgrounds, different sexual orientation, etc.) are interrelated.<sup>96</sup>

Internal membership decisions that imply drawing distinctions between different groups within the society, are an object of constraints. Such constraints are reflected in the right to non-discrimination that demands *inter alia* that any distinctions are proportionate and justifiable. If not, they might constitute prohibited forms of discrimination. If there are no similar constraints in how migrants are treated, this ‘cannot but compromise the democratic culture of communities and the principles upon which they are founded.’<sup>97</sup>

<sup>90</sup> Kostakopoulou (n 89) 887. See also Hans Lindahl, ‘Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation’ (2003) 24 *Cardozo Law Review* 785: ‘[...] no legal community can call itself a “we” other than in relation to a “they”’.

<sup>91</sup> Kostakopoulou (n 89) 897–8.

<sup>92</sup> Kostakopoulou (n 89) 897–8.

<sup>93</sup> Kostakopoulou (n 89) 900.

<sup>94</sup> Kostakopoulou (n 89) 900.

<sup>95</sup> Kostakopoulou (n 89) 900.

<sup>96</sup> Dora Kostakopoulou, ‘The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration’ in Hans Lindahl (ed) *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU’s Area of Freedom, Security and Justice* (Hart Publishing 2009) 158, 200.

<sup>97</sup> Kostakopoulou (n 96) 201.

Populists who perceive membership as static and the polity as culturally homogeneous, not only tip the balance as to how migrants are treated, but also compromise more generally ‘democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging.’<sup>98</sup> The constructions of ‘the other’ and the treatment of non-members are ‘closely linked to internal definitions of membership, the quality of community relationships and the recognition accorded to diversity.’<sup>99</sup> In other words, the binary opposition between ‘us’ and ‘them’ infects and spreads to the inside of the community leading to the establishment of other binaries.

This compromises the values of the community because ‘identitarian assumptions’<sup>100</sup> about who belongs to the ‘the pure people’ quickly lead to the targeting of other groups who do not fit within these assumptions. When the boundaries of the community are aligned along ethnic, nationalist and nativists homogeneous lines, minority groups, women, LGBT people, people of colour, people with disabilities, and other groups that do not fit or have different opinions, find themselves in a precarious state. Pluralism is undermined and the multiple identifications and identities of individuals are ignored.<sup>101</sup> Any difference can become a target.<sup>102</sup> A useful illustration here concerns the rights of women that have also been an object of attack by populist government based on nativist and identitarian arguments.<sup>103</sup> As a consequence, anti-immigration policies serve wider regressive agendas.

<sup>98</sup> Kostakopoulou (n 96)202.

<sup>99</sup> Kostakopoulou (n 96) 202.

<sup>100</sup> Seyla Benhabib, ‘The Slippery Slope of Statist Cosmopolitanism’ in A Etinson (ed) *Human Rights: Moral or Political?* (Oxford University Press 2018) 490, 492.

<sup>101</sup> On the multiple identification and identities of citizens, see Dora Kastakopoulou, ‘Towards a Theory of Constructive Citizenship in Europe’ (1996) 4(4) *Journal of Political Philosophy* 337, 343. She explains that a citizen can be a black citizen, or a gay citizen, or an old age pensioner citizen and there are multiple and overlapping communities that a citizen can belong to at various levels and in relation to his or her different identities.

<sup>102</sup> See, for example, Christoffer Kølvråa and Bernhard Forchtner, ‘Cultural Imaginaries of the Extreme Right’ (2019) 53(3) *Patterns of Prejudice* 227, where the ways through which populist parties present ‘an “ideal extreme-right subject” with whom comrades and potential followers might identify’, are examined.

<sup>103</sup> Katarzyna Sękowska-Kozłowska, ‘The Istanbul Convention in Poland: Between the “War on Gender” and Legal Reform’, in J Niemi, L Peroni and V Stoyanova (eds) *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge, 2020); see also D Francesca Haynes, ‘Sacrificing Women and Immigrants on the Altar of Regressive Politics’ (2019) 41(4) *Human Rights Quarterly* 777, 795: ‘[...] nativism is both blatantly racist, and, though perhaps more subtly, gender oppressive. [...] nativists of all shades share a penchant for limiting the freedoms of women, perhaps because women whose freedoms are limited can be controlled. If women are controlled, then ultimately so is reproduction.’ In this way, Haynes illustrates the links between restrictive immigration policies and restrictions upon the rights of

## 1.6 CONCLUSION

Migration law scholars have for a long time discussed the tendency towards more restrictive and more oppressive measures against migrants. In their reaction to populism two aspects can be identified. First, migration law scholars have in detail demonstrated that the rights of migrants have been shaped by statism and exclusion. In this sense, the standards applied to detention of migrants or to their right to family life, seriously diverge from the standards applied more generally to situations where migration is not an issue. As a consequence, migration law scholars have maintained that any populist attacks against human rights law or institutions mandated to apply it, like the ECtHR, have little basis since human rights law accommodates states' migration control interests.<sup>104</sup>

At the same time, migration law scholars perceive the danger of populism since often there is a delicate balance to be made and under the influence of populism, states might want to demonstrate strong control over migration to the public, which can lead to expansion of repressive measures.<sup>105</sup> While migration law and the rights of migrants have always been in the realm of the exceptional in liberal democracies, populism can lead to further expansion of this space of exceptionality. As a consequence, the risk arises that migration control interests will not simply be accommodated in a balanced way, but rather the balance will be tipped, and exclusion will reign.

Constitutional law scholars have started to understand and explain populism and its dangers since relatively recently. Restrictions upon the rights of migrants are mentioned in this growing body of scholarship. However, the main focus of concern has been elsewhere (attacks on courts, rule of law, tactics of decision-making, etc.). As a consequence, there has not been much sustained dialogue between the fields of migration law and constitutional law. Treatment of migrants has received comparatively little attention apart from immigration and asylum specialists, the reason being the acceptance that liberal democracies are in principle entitled to impose restrictions and this in itself does not affect their constitutional nature.

women. See also Nials Spierings, Andrej Zaslove, Liza M Mügge and Sarah L de Lange, 'Gender and Populist Radical-Right Politics' (2015) 49(1–2) *Patterns of Prejudice* 3.

<sup>104</sup> Marie-Benedicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Vladislava Stoyanova, 'Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights' (2018) 10(2) *European Journal of Legal Studies* 83.

<sup>105</sup> See for example, Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) *Current Legal Problems* 143, 148.

This chapter aims to demonstrate that a conversation between the two fields is useful for better understanding the challenges posed by populism. This conversation exposes the intertwinement between the internal and the external, the inside and the outside, between the question how inclusive or exclusive the national community should be to outsiders and the question about equality more generally among different groups within the community. By furthering the conversation, the general dangers of subordination, undermining of equality and decline of diversity emerge. In other words, by examining how the tension between inclusion and exclusion of migrants is addressed, we can also understand subordination more generally. The chapters in this volume continue this conversation by providing concrete examples of how the restrictions upon migrants' rights have wider repercussions for states' constitutional orders and values.

## On Population Design

### *Using Migration Law to Dismantle Constitutional Democratic Institutions*

PATRICIA MINDUS

Homo vocabulum naturae, persona vocabulum iuris

Giambattista Vico

#### 2.1 INTRODUCTION

This chapter highlights the importance of the distinction between empirical facts versus institutional facts. Physical presence on the territory is an example of the first one, while residence is an example of the second. The chapter advocates for greater awareness of this distinction ([Section 2.1](#)) and argues that, if the distinction is disregarded or blurred, serious consequences follow. Some consequences are spelled out: first, our discourses lack in clarity, which inclines us to make controversial claims. Second, when we disregard the distinction, we might not properly identify our main object of research. For example, our main object of concern may not be individuals moving across borders. It might rather be legal structures that, in fact, immobilise people. The third consequence ([Section 2.5](#)) is that the confusion between empirical and institutional facts affects how we speak about population. We should distinguish the set of living bodies on a given territory (empirical fact) from the institutional fact of population. The chapter demonstrates that, once aware of the distinction, we are better equipped to see how the legal regulations governing the institutional fact of population affects our social and constitutional identity. In this sense, how law frames population has consequences for the empirical dimension of the individuals present on the territory. The

I would like to thank the participants in the conference where this paper was first presented, in Lund in February 2020, and in particular Gregor Noll and Neil Walker for particularly insightful and helpful comments.

reason is that the legal regulations governing who counts as a member of the population determines who we will live with; whether, for example, we might be allowed family unification and the identity of the children that we will give birth to. In light of this, the chapter advances the claim that both whom we admit and whom we do not admit will have an impact on who we will be tomorrow in terms of our social and constitutional identity. Migration policy is, therefore, an important constitutional matter. The fourth consequence (Section 2.6) of the blurring of the distinction between empirical facts and institutional facts is the danger of overlooking the distinction between People-as-a-part (empirical fact) and People-as-a-whole (institutional fact). Populism exploits the blurring of the latter distinction: the populist framing of anti-migration policies pitching ‘them’ versus ‘us’ is a case in point. We ought to beware of the unjustified appropriation of the People-as-a-whole by the People-as-a-part grounded in the disputable assumption that one group enjoys direct epistemic access to the common good. Finally, the chapter ends by pointing out that the appreciation of these five different consequences allows us to understand in a clearer light that migration policy has constitutional impact: it impacts on the composition of the institutional fact of the population, on the empirical fact of who is likely to live within a given territory, but, ultimately, also on the composition of the institutional fact of the People (those who count as citizens) and its role in the constitutional order (what the citizens do, which rights and duties they have) determines the state’s constitutional identity. Therefore, as this chapter argues, migration law can be employed to both strengthen and dismantle constitutional democratic institutions. Migration lawyers thus have much to offer to the constitutional lawyer concerned about the contemporary resilience of the constitutional setting.

More specifically, to this volume’s central question on the relationship between restrictive migration policy, populism and democratic decay, this chapter argues that populism typically employs a debatable view of peoplehood that lays claims on (re)defining the institutional fact of the citizenry in the manner that the group prefers. In the contemporary context, restrictive migration policy emerges as a tool for separating the wheat from the chaff, deepening the divide between the set of individuals living in a given territory and the members of the polity in ways that challenge the mode of self-governance that inspires the democratic form of government. As to this volume’s other key question – what can legal resilience do to avoid the erosion of migrants’ rights? – this chapter advances the seemingly innocuous answer that, if we wish to defend these rights, an important step would be to think (and speak) clearly about certain basic conceptual matters. We need to see how law constitutes the statuses of things that, in ordinary language, are

conceived as natural entities, the evident characteristics of which it would simply be vain to resist. On the contrary, entities such as national belonging, citizenship, residence, habitual dwelling, migration and population, found in the law, do not refer to natural entities or empirical facts. Instead, they constitute, as shown below, institutional facts determined by particular constitutive rules and these rules are set up in the law and could have been different.<sup>1</sup> By ignoring this conceptual point, we obfuscate the crucial fact that we have designed law so that it, say, bans visa-free travel and extraterritorial asylum applications. It is not movement itself, the mere empirical fact of a human body moving in space, that keeps people away from rights. It is the law that does so and law is a question of convention, not of empirical necessity. The motivation to change the law only comes from seeing that it is our creation.

## 2.2 ON INSTITUTIONAL FACTS

Legal thinking concerns what we today usually call institutional facts,<sup>2</sup> where a function is attributed to something that does not have this function in virtue of its empirical properties. Imagine that there is a rule according to which, in certain contexts, something counts as a point in, say, a board game. It is not the nature of the thing itself that makes it a point in this particular board game. Indeed, often there is not even a ‘thing’ to refer to when we employ points in board games. What makes the point such is rather the constitutive rule. This outline of the way a point in a board game works is reminiscent of how many rules work in the law. This insight into the ontology of institutional facts plays a role in our understanding of legal concepts in general and more specifically in our understanding of central concepts in migration law.

Indeed, I understand this edited volume to focus on this internal/external membership dialectics according to which the ‘inside’ and the ‘outside’ dimensions of belonging are ‘intertwined’. Linda Bosniak famously made a point about how border protection runs through the ‘internal’ dimension, away from the territorial confines, to the heart of law and precisely to how members treat physically present non-members.<sup>3</sup> Vladislava Stoyanova

<sup>1</sup> For constitutive rules, see e.g. Frank Hindriks, ‘Constitutive Rules, Language, and Ontology’ (2009) 71 *Erkenntnis* 253.

<sup>2</sup> John Searle, *The Construction of Social Reality* (Free Press 1995); Seumas Miller, ‘Social Institutions’ in *The Stanford Encyclopedia of Philosophy* (2019).

<sup>3</sup> Linda Bosniak, *The Citizens and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008); Linda Bosniak, ‘Territorial Presence As a Ground For Claims: Some Reflections’ (2020) 14 *Nordic Journal of Applied Ethics* 53.



remarks how ‘concerns with protecting the boundaries of membership then can structure and affect the position of everybody’<sup>4</sup> in a call for more of a ‘sustained dialogue between the fields of migration law and constitutional law’<sup>5</sup> – a call that I have joined on many occasions and that recently seems to have gained some traction.<sup>6</sup> Only recently has the constitutional dimension of citizenship begun to be systematically studied.<sup>7</sup> Stoyanova is perfectly right in pointing out, in line with Dora Kostakopoulou’s arguments on political identification, that the ‘internal’ and the ‘external’ have a dialectical relationship: one affects the other, and vice versa.

It is ancient wisdom that how you treat others reflects on who you are, and how you conceive of who you are reflects on how you treat others. Both who you admit and who you do not admit will thus reflect on who you are. We have yet to fully explore the implications of this insight in relation to contemporary democratic decay and twilight constitutionalism. If we are not ready to give in to a lesser kind of rule of law, a lesser kind of democracy, a lesser kind of citizenship, we should look carefully at the lawmaking process when it comes to the design of migration statuses and how these affect other legal positions within the legal order. One reason for this is that one’s migration status is not only about residence rights or the right to enter a country. Rather, it is connected to a whole bundle of legal entitlements and obligations – in the political realm, in family life, in the workplace and economic and social life generally. This is why so much of one’s life is dictated by one’s migration status. This is also why it is such a politically delicate matter. Another reason is that no matter what a state chooses to do in matters of sojourn and naturalisation, the choice will inevitably tell us something about that polity. Elsewhere, I have called this the constitutional-sensitivity thesis.<sup>8</sup>

### 2.3 LIKE A POINT IN A BOARD GAME

The Scandinavian legal realists, the work of whom I have long been interested in, understood early on that legal thinking concerns facts of a different kind

<sup>4</sup> Chapter 1 in this volume.

<sup>5</sup> *Ibid.*, 12.

<sup>6</sup> e.g. Jürgen Blast and Liav Orgav, ‘Constitutional Identity in an Age of Global Migration’ (2017) 19 *German Law Journal* 1587.

<sup>7</sup> Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

<sup>8</sup> Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave 2017) 51.

than ordinary empirical facts. They understood that legal thinking operates with non-empirical facts, facts of another type that can, however, be empirically investigated. Through institutional facts we attribute to something a function that it does not have by virtue of its empirical properties. A common way through which such facts arise is through constitutive rules which are very common in law. From this perspective, the law appears to be essentially status-generative: it creates, or constitutes, different forms of statuses.

Now a status is a bit like a point in a board game: something you can win or lose; something that may be worth having, even though the thing itself (the 'point' or 'points') does not correspond to any empirical object and cannot be exchanged, substituted or replaced by an empirical object. Status is a concept of which we may offer an empirical explanation, even if it is not itself an empirical concept. Philosophers say that we exercise 'our deontic power' by creating different types of statuses.<sup>9</sup>

The law can thus be likened to a technology that we employ to achieve a certain order in the world; for arranging or ordering the world, as opposed to merely describing it. To a certain extent, the law makes the world as it is, one might say, and the main way in which the law orders the world is by constituting and regulating various types of statuses.

Notice that a status is epistemologically speaking a kind of *vox media*. In itself a status is neither true, nor false. As an artefact of the human mind, it is neither good, nor bad. However, it may become good or bad depending on how well (or how poorly) it performs its function within the ecology of other statuses and legal positions it stands in relation to.

If one cannot demonstrate that the *vox media* allows a functional correlation between premise and conclusion in legal reasoning, the legal status may become an arbitrary tool for separating those who fall within its remit from those who fall without.<sup>10</sup> Ill-conceived legal statuses that result in arbitrary line-drawing suffer from lack of justification that undermines their legitimacy. Not having acceptable and satisfactory criteria for distinguishing between, say, citizens and non-citizens, makes it difficult to argue against the proposal of distributing citizenship by, for example, flipping coins or drawing the short straw. Some scholars who have argued that citizenship itself would be

<sup>9</sup> See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1798, JH Burns and HLA Hart eds, Clarendon Press 1970).

<sup>10</sup> Patricia Mindus, 'Towards a Theory of Arbitrary Law-making in Migration Policy' (2020) 14 *Nordic Journal of Applied Ethics* 9.

arbitrary<sup>11</sup> or a tyrannical form of domination<sup>12</sup> have understood this point. Citizenship is not necessarily arbitrary in itself, but necessarily becomes an arbitrary tool of distinguishing insiders from outsiders if we cannot demonstrate that there are good reasons for the selection mechanism to be regulated in a specific way, given the nature of the polity we face. So, as Stoyanova stresses in quoting Ben Habib on the ‘fundamental right to justification’, ‘providing justifications (...) creates a space where different interests can be identified and arguments underpinning possible decisions exchanged. It also implies identification and evaluation of the empirical considerations behind the interests and the possible solutions.’<sup>13</sup> This is true in most contexts where we deliberate on collective action.

The aforementioned insight into the ontological nature of statuses – and what it implies for how statuses can be evaluated normatively – plays a role in our understanding of notions central to our discussion today. Here is how.

Once we realise that statuses are not natural kinds, we are better positioned to appreciate how law constitutes the statuses of things that, in ordinary language, are cast as entities of a natural kind, including notions such as national belonging, citizenship, residence, habitual dwelling, migration and population. It is important for us to distinguish the undeniably empirical dimension of, say, presence on territory (an empirical concept) from its normative cousins ‘entrant’, ‘residence’, ‘stay’, ‘sojourn’, ‘abode’, ‘domicile’, etc. None of the latter, found in the law, refer to empirical facts, but rather all are institutional facts determined by particular constitutive rules that are set up in the law and that could have been different as the very establishment of a constitutive rule is itself a question of convention, rather than of empirical necessity. Not to grasp the difference of the two dimensions would be to confuse fact and norm; to confuse the language of the law with its object of regulation – a mortal sin for a jurist.

If my reading of statuses as institutional facts is correct, it follows that we make certain assumptions about our object of inquiry that may be

<sup>11</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009).

<sup>12</sup> Dimity Kochenov, *Citizenship* (MIT Press 2019).

<sup>13</sup> Chapter 1 in this volume. In previous work I focussed on the lack of justification as a practice of arbitrary lawmaking in relation to non-national disenfranchisement that follows from certain migration policies, cast as an arbitrary form of domination that may undermine political legitimacy. The quaintness of the argumentative strategy employed to sustain non-national disenfranchisement differs from other argumentations in favour of disenfranchisement: it is not framed as a derogation from a rule and it shifts the burden of proof from the state onto the individual. See Patricia Mindus, ‘Citizenship and Arbitrary Law-Making: On the Quaintness of Non-national Disenfranchisement’ (2016) 7 *Società Mutamento Politica* 103.

unwarranted. Contrary to geographers, biologists and doctors, we do not study migration or population as a natural kind – although human fluxes and demographics might be relevant to our understanding of the institutional facts by which law is essentially constituted (and relevant for our understanding of changes to these facts).<sup>14</sup> Perhaps, to start with, migration law might not be about bodies moving in space, but about the design and operations with statuses within the abstract space of legal computation. To see this more clearly, I suggest introducing a distinction between mobility and migration.

#### 2.4 MOBILITY AND MIGRATION

Let us start by distinguishing migration from mobility. The main reason why this distinction should be made is that the law is the technology we use to define who counts as a non-citizen and a citizen respectively; under what conditions this is so, how long this is the case and what it takes for this to change. Nothing of this type can be predicated of mobility in general.

By mobility I mean a movement of a body in space. Such a movement may take place across a border between two states, or across an interstate border. It can also take place where there are no borders or within a borderland. Mobility is an empirical phenomenon that occurs in the world; it is best investigated using empirical methods. Mobility also raises interesting normative issues, but they do not necessarily coincide with the normative issues raised by migration.

By migration I mean a change in a person's legal position vis-à-vis one or more state(s) or supranational organisations. Migration thus concerns the legal positions (rights and obligations) that regulate the individual's right to stay in a country, to be protected from deportation, to be reunited with family members to name only some of the many legal positions that determine a person's migration status. Other such legal positions concern the individual's working life and socio-economic social life in general. According to this definition, *status civitatis* is a 'migration status'. In fact, citizenship is a status that positions a person vis-à-vis one or several political communities and may contain many different rights and obligations. In addition, this

<sup>14</sup> E.g. 'asylum' in the Cold War setting and today may be said to "mean different things"; not merely because of changes to the legal status, to the criteria of acquisition of the status of refugee, but also because the real-world factors surrounding the use of the legal status have changed.

status usually also regulates such things as residence, protection against deportation and the like.<sup>15</sup>

The distinction that I am suggesting is radically different from the way migration studies usually think of migration.<sup>16</sup> I want to take a step away from the common understanding. The reason is due to the ontological tenet that a legal status is not an empirical fact. If this is so and the law constitutes a person's status as an insider or outsider, we should reconsider what we think we know about migration in contemporary social science. We might see things in a new light.

Allow me a metaphor, one that the Scandinavian legal realists sometimes used themselves: the metaphor of money.<sup>17</sup> The relationship between mobility and migration is similar to that between paper and money. There is paper that counts as money, but not all paper is money, and all money certainly is not paper. Similarly, we find mobility that counts as migration, but not all types of mobility count as such. The law perceives a difference between a person stepping out of a house and the same person jumping the fence at the Spanish Melilla enclave. Both are empirically identified as movements of bodies in space. Consider also that migration is not necessarily grounded in mobility. Sometimes, physical movement of people is legally relevant in the sense that it provides reasons for a change in one's migration status, but a migrant is not someone who necessarily moves or crosses a border. One can remain perfectly static and yet become a migrant. It is important to understand that mobility, or the physical movement, may trigger a change in migration status, but mobility is not required for such a change to happen. This means that whatever migration is, it is not grounded in physical movement because physical movement is insufficient to explain migration.

From this viewpoint, migration is not identical to movement across borders. Sometimes a person's physical location is irrelevant for determining his or her migration status. Migration thus does not have to take place in the physical space, but it can occur as a result of a change in personal status (marriage,

<sup>15</sup> For a definition of citizenship in line with this view, see Liav Orgad, 'Review of *At Home in Two Countries: The Past and the Future of Dual Citizenship* by Peter Spiro' (2018) 112 *American Journal of International Law* 789, 792: 'an artifact [sic], a creature of government'.

<sup>16</sup> Think of the canonical definition of international migration as a 'movement of persons across borders', e.g., Vincent Chetail, 'The transnational movement of persons under general international law: Mapping the customary law foundations of international migration law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Elgar 2014) 2: 'international migration law may be broadly defined as the set of international rules and principles governing the movement of persons between States and the legal status of migrants within host States'.

<sup>17</sup> Karl Olivecrona, *The Problem of the Monetary Unit* (Almqvist & Wiksell 1957).

divorce, childbirth, adoption, etc.). Migration status can also change due to changes in the law. Consider the case in which a new ground for loss of a status is introduced. In the case of denaturalisation, for instance, we have seen a number of EU countries that have adopted a new ground for loss of citizenship often for naturalised individuals believed to be involved in terrorism; these individuals may be citizens one day and non-nationals the next, without moving across borders. Status can also change due to changes in the territorial jurisdiction (e.g. Brexit). Status can be modified as a result of the passage of time (e.g. at 18 years, after 5 years, after 24 November 2015) or territorial tampering (e.g. Tampa).

It is also worth mentioning here that the very word migration etymologically does not mean movement in space, but rather changed status. Migration in the sense of travel or moving across borders is not *migrare* in Latin, but *peregrinari*. Now it could be objected that the etymological root which gives the word *migratio* in Latin also gives *ameibein* in Greek which means to change or exchange. But it would be wrong to assume that migration, therefore, refers to mobility or change in general. Instead, it has to do with a change in legal status such as the right of some individuals (*Latini*) to become Roman citizens through the institute of *ius migrandi*. *Ius migrandi* was never a right to free movement, but the right to naturalisation as a Roman citizen.<sup>18</sup> It was not until modern times that the Latin verb *migrare* began to be used to describe a movement in space.

The distinction between migration and mobility has a number of consequences. Let me mention five.

## 2.5 CONSEQUENCES

A first consequence of the distinction made above is that our discourse lacks in clarity. As social scientists we often fall prey to confusing the natural kind with the institutional fact: we speak *as if* residence, sojourn, entrance, family membership and the like would be natural kinds; a confusion that arises because we wrongly assume to have direct epistemic access to the entity at hand. We presume that our prelegal conception of, say, entrance determines our legal uses of the term that only in appearance are the same. We blur the empirical and the institutional features in unfortunate ways. This lack of clarity inclines us to make claims that are questionable. Many have claimed that international law would have failed in governing migration and many

<sup>18</sup> Patricia Mindus, *Cittadini e no: Forme e funzioni dell'inclusione e dell'esclusione* (Firenze University Press 2014) 103.

have pointed to the fact that the state would be incapable in a globalised world to govern migration flows. Regardless of the empirical foothold of such claims, it is rather obvious, that, even in situations where sustained cross-border movement is observed, this says little about any failure in the exercise of the ability to govern migration as here defined. Law might not efficiently shape movements, but it is quite effective in ascribing or denying rights to individuals. The very conception of this volume aspires to show that the law is able to curtail rights (or for that matter, to engender them). Also, when it is affirmed that ‘most asylum seekers are not able to depart and reach European States. The possibilities for movement and flight have been increasingly suppressed’<sup>19</sup> we obfuscate the crucial fact that it is the law – our law – that we have designed in such a way that bans visa-free travel and prohibits asylum applications to be filed with the embassy. By keeping the distinction between movement and migration in mind it becomes evident that it is not the cost of air tickets or the lack of road access to the airport that makes prospective asylum-seekers ‘unable’ to file their claims.

A second consequence of suppressing the distinction between migration and mobility is that we might misconceive the very object of inquiry. Our main object of research may not be individuals moving across borders. Our main object of research perhaps is better understood as the different set of legal positions, attributed to certain groups of individuals – where the physical movement in some cases may trigger a change in status, but this is just one among many triggers – relative to what a state may legitimately do to these individuals. The matters that fall within this realm are not always linked to movement either: it may concern legal positions relative to an individual’s work life, to housing, welfare, education, family life and more. The delimitation of migration law *ratione materiae* seems hard to settle a priori; it is a bit of a moving target. It may even be the case that migration law deals much with institutional legal structures that immobilise people. This point is becoming increasingly clear to those migration scholars who have noticed that contemporary border control policies often aim to immobilise people rather than manage movement. Are we convinced that migration law regulates the position of bodies in space rather than, say, how far in time individuals stand from their inclusion in certain institutional structures? What if it is not movement itself, this mere empirical fact, that keeps people away from institutional structures? What if it is the law that keeps individuals away from accessing rights? A poet like Berthold Brecht saw this point

<sup>19</sup> Chapter 1 in this volume.

clearly: in *Reisen im Exil* he ironically wonders whether the most noble part of Man, after all, is not the passport.

In the contemporary migration debate, we are afflicted by a form of *pensée unique* according to which migration would be a movement across borders. We constantly talk about boundaries, borderlands, liminal spaces, frontiers, frontlines, streams, channels, flows, fluxes, etc. This obsession about space obfuscates a quite evident point for the lawyer: legal orders ultimately determine who is to be considered a migrant, how, when and where this is the case; a legal order is itself a legal construct, not a location in space. If law is an instrument, a technology we employ to determine statuses, state migration agencies identify migrants of a certain kind once they set out to look for them. If a visa is hard to get, entry into a country is more likely to be irregular. So, a country's 'stock' of irregular migrants depends on its visa policy. Make visas harder to get and irregular migration rises; when a state makes legal migration harder, there will be more irregular presence, other things being equal. That is why some think illegal migration is a phantom illness.<sup>20</sup> It is a product of the laws that combat it. Combatting illegality would be somewhat like fighting your own fist basically.

If this is right, migration crisis can be policy-made or fabricated. Mobility does not per se create a 'migration crisis', the law does. This is so for a deeper reason than the reasons usually given when we discuss fabricated emergencies, like those mentioned by Spijkerboer for instance,<sup>21</sup> that is that the 'emergencies' may be caused by suboptimal internal policy choices and not by external forces or events. The deeper reason underpinning a 'migration crisis' is rather the law itself that keeps people away from the reach of institutional structures: states engage in buck-passing so as to avoid responsibility for certain individuals. To see this, we have to understand that mobility is not migration; mobility is an empirical fact; migration is not; migration is an institutional fact construed by the law. In a sense, the Scandinavian realists would have said that it is a little like magic.

## 2.6 ON POPULATION DESIGN AND THE MAGIC WAND OF THE LAW

The design and management of migration statuses play an important part in shaping one of the state's 'constitutive elements', namely its population.<sup>22</sup>

<sup>20</sup> Catherine Dauvergne, *Making People Illegal: What Globalisation Means for Migration and Law* (Cambridge University Press 2012).

<sup>21</sup> Chapter 4 in this volume.

<sup>22</sup> Here population is used in the meaning relevant for legal and constitutional purposes. Population design in this sense also impacts population in its empirical meaning. Yet it is erroneous to treat 'population' as if it were merely a natural kind when it appears in a legal



Thus this section argues that migration and citizenship laws enable population design through the design of institutional facts: by the magic of pen-strokes we modify the number and social characteristics of the individuals we count as migrants or citizens.

The aforementioned infelicitous confusion between empirical and institutional facts affects how we speak about ‘population’. We are often quite unclear, when speaking about population whether we are referring to the population as a natural kind, the mere demographic instance, the set of human living bodies, or to the population as a legal construct, an object of policy design and outcome of census. Notice that population in the first sense (here: population<sup>(1)</sup>) and in the second (here: population<sup>(2)</sup>) may differ significantly. Population<sup>(1)</sup> may both outnumber and, *vice versa*, be less numerous than population<sup>(2)</sup>. The latter may include expats within its scope. At the same time, it may exclude certain individuals on administrative grounds (e.g. unregistered births) by making them invisible in the eyes of the law.<sup>23</sup>

The forms that migration statuses take, the technicalities regulating these, and how they relate to other legal positions (rights and obligations) within the legal order forge the institutional design of the citizenry and hence bear heavily on the question of constitutional identity. Migration and citizenship policy, directly or indirectly, determine the extension and social composition of the population<sup>(2)</sup> in a political community; they attribute to the individual significant bundles of rights and duties that co-determine that individual’s position within society and within the power-setting of the constitutional framework. In this sense, these areas of law contribute to the construction of the position that a given individual occupies vis-à-vis other individuals and their collective endeavours (i.e., the State). Since migration law typically governs access to residence rights and these are prerequisites for naturalisation

setting. ‘Population’ is rather a product of a myriad of legal institutional facts concerning *inter alios* migration and citizenship. That empirical facts concerning the ‘population’ as a natural kind (e.g. population growth, age ratios) may push lawmakers to alter the ecology of the institutional facts in law is well known. We know less about how the design of migration statuses concerning ‘population’ as an institutional fact impact on the legal system over time. Yet we have reason to believe that the design of migration statuses affects peoplehood in a constitutionally sensitive matter. Consider, for instance, that by selecting migrants we also select future voters. This is particularly true where – like in many European countries – naturalizing is often a prerequisite for franchise and residence is key to naturalizing.

<sup>23</sup> Allison Petrozziello, ‘Bringing the Border to the Baby: Birth Registration as Bordering Practice for Migrant Women’s Children’ (2019) 27 *Gender and Development* 31; Cathy Liu, ‘An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the *Matrícula Consular* in Texas’s Birth Certificate Application Policy’ (2017) 50 *Columbia Journal of Law and Social Problems* 620.

in constitutional frameworks – where political rights, in the form of voting rights, are most often reserved for fully capacitated nationals – migration law in combination with citizenship policy, electoral laws and constitutional regulations of the role of the citizenry determine who counts as a member of the People. How we regulate access to, and the content of citizenship determines how the demos, or set of citizens, is composed. In other words, the legal positions reserved exclusively for citizens determine the share of political power that citizens enjoy in the constitutional order: how, when and where they may use political power. The composition of the People (who counts as a citizen) and the citizen's role in the constitutional order (which rights/duties are reserved for citizens) determines the state's constitutional identity.

Crucially, precisely because legal statuses are institutional facts and not natural kinds, we can change our population<sup>(2)</sup> – the number and social identity of the individuals we treat as migrants or citizens, within and beyond our territory by the magic of pen-strokes. For example, EU citizens may become third country nationals by this kind of institutional expedient. In this way, the EU just lost about sixty-six million EU citizens on 'Brexit day' in January 2020. Of course, the magic bullet will not make the actual bodies of people disappear, nor will it, in itself, make individuals appear (population<sup>(1)</sup>). It is not real magic after all. But the legal status can both appear, disappear, and vary at the pace of any given regulatory change. As the legal status is transformed, with each new law, regulation or doctrinal *revirement*, the population<sup>(2)</sup> may change and what we may 'legally' do to certain individuals can thus change significantly. What we may do to individuals also impacts on who they will live with (e.g. family members) and the children they will give birth to. It follows that not only do legal frameworks impact the design of the population<sup>(2)</sup>, they also have important consequences for the volume and the social composition of population<sup>(1)</sup>.

If by population design we mean the design of population<sup>(2)</sup> that impacts on population<sup>(1)</sup>, typical ways of engaging in population design have been used to fabricate citizens or to export the poor or otherwise unwanted. Throughout history, the volume and composition of the population was often thought of as a source of strength (or the lack thereof as a weakness). During the course of history, rules concerning, say, the acquisition of citizenship have been modified to achieve objectives such as drafting men to armies, avoiding responsibility for certain socio-economic groups or getting rid of more or less challenging minorities. Think of it as eugenics by passport distribution. Popular political tricks in population design have included increasing the state's population 'fictively' to gain power, an eternal temptation for electoral district designers, competing in the 'battle for brains' by opening the ranks of the citizenry, cherry-picking a preferred élite by fast-tracking on the migration

route, intervening in other countries through one's diaspora, imposing protection on one's citizens abroad, like Russia did in Georgia for instance, to meddle with foreign policy, incentivising migration to solve unemployment, like Italy or the Philippines have done, or simply exporting poor people, a temptation that Gulf states have been looking into to avoid taking responsibility for guest-workers in the region.

It is important to see that to the extent that the number of individuals influences the distribution of the political power among different social groups, the dimension and composition of the population<sup>(1)</sup> will affect the political distribution of power in a society. Rules concerning citizenship can thus be used for the purpose of shifting power from one group to another. As early as in the fifth century BC, Gorgias from Leontinoi, the famous pre-Socratic sophist, joked about states that bow to the pleasure of fabricating citizens out of thin air. Some 2500 years later we keep on using the same trick. Citizenship policy may thus be seen as an indirect way of gerrymandering and migration law as a tool that allows states to engage in population design, therefore, using population<sup>(2)</sup> to modify population<sup>(1)</sup>, often in view of obtaining political advantages.

A contemporary example of such a shift in power is the persecution of illegal migrants that takes place in India's Assam region.<sup>24</sup> The State claims to suffer a migration crisis due to the uncontrolled entrance and stay of Bangladeshi unauthorised migrants. Instead of, for instance, finding and prosecuting the individuals that the State believes to be 'illegal migrants' that it wants to deport to Bangladesh, Assam has chosen to demand that its residents, many of whom are illiterate, prove that they are indeed citizens. This implies a shift of the burden of proof from the State to the individual. Those who fail to prove their citizenship are placed in custody in view of deportation. Technically, the case of Assam is a case of quasi-loss of citizenship: the validity of the status is declared void *ex tunc*. There is little evidence to suggest that most of those whose citizenship is declared void would be anything else than Indians. But there is quite significant evidence to suggest that those whose citizenship is annulled are overwhelmingly Muslims. This fact alone exacerbates the sectarian tension between Hindus and Muslims in the region. In Assam, the dividing lines of politics largely mimic those between religious identities: the party system

<sup>24</sup> Mihika Poddar, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-based Discrimination and Naturalisation Law' (2018) 2 *Indian Law Review* 108; Regina Paulose, 'A New Dawn? Statelessness and Assam' (2019) 7 *Groningen Journal of International Law* 99; Priya Pillai, 'Of Statelessness, Detention Camps and Deportations: India and the "National Register of Citizens" in Assam' (*Opinio Juris Blog* 12 July 2019).

reflects social identities grounded in religion. So, if many Muslims are denationalised, the electorate's composition changes to the effect that the political party system is impacted. It is like disenfranchising one's political opponent thereby ridiculing the rationale of the democratic form of government. Basically, the effect obtained through a shift in the burden of proof – a technicality in itself – combined with a particularly sensitive legal status (*status civitatis*) is to silence particular political movements. All this is nothing short of manipulation of the constitutional identity.

The Assam case shows very well how a procedural technicality in the area of migration law can impact the political system. The effect of this manipulation distorts the constitutional settlement and by doing so denigrates the value of the citizenship also for the citizens who were not deprived of their citizenship or subjected to deportation. This is possible because citizenship is a status that offers 'bundle-rights',<sup>25</sup> a whole set of rights concerning residence, family life, work life, and, last but not least, political participation.

The Assam case points to the fact that how you design migration statuses reflects who you are. It is important to notice that this is not only true where the policy design choices are of disputable kind. Rather it is true no matter what policy choice is made. To be clear, we should qualify the assertion according to which citizenship policy, in combination with migration policy, 'allow states to choose populations'.<sup>26</sup> At the micro or individual level, it is not so: one could object that citizenship is generally a birth-right and states do not 'choose' their future nationals, at least, in so far as no particular birth-control regimes are practised to this end. If the claim is read in connection with migration law, it looks more convincing: states may cherry-pick certain individuals and design categories to the effect of not allowing others to become part of the legally recognised population. However, what is important to notice is that, although it may be debateable whether states 'choose' their populations in reference to the individual level, this claim holds at the macro-level: states certainly engage in population design and crafting of their citizenry at the macro-level. Many have shown the causal connection between citizenship regimes, allocation of public goods and global inequality.<sup>27</sup>

Also, it is important to see that both whom you admit and whom you do not admit will reflect who you will be tomorrow. The constitutional identity of the

<sup>25</sup> Lars Lindahl, 'Deduction and Justification in the Law. The Role of Legal Terms and Concepts' (2004) 17 *Ratio Juris* 182.

<sup>26</sup> *Ibid.*, 100; Shaw (n 6) 4.

<sup>27</sup> E.g. Lea Ypi, 'Borders of Class: Migration and Citizenship in the Capitalist State' (2018) 32 *Ethics & International Affairs* 144.

State is determined *inter alios* by the choices in these policy fields. This makes migration policy a lofty constitutional matter, albeit sometimes in ways that are not immediately visible. Precisely because migration policy impacts on the constitutional bedrock of the state, there is a particular reason why the populist conception of the People ought to be of interest to both migration and constitutional lawyers. It is important to understand the causal triangulation between democratic decay, authoritarian populism and restriction of rights for migrants. One expression of this triangulation is the resurgence of the synecdoche that characterises populism.

## 2.7 THE SYNECDOCHE OF THE POPULIST PEOPLE

The conception of People in populism is a synecdoche, that is, a particular figure of speech belonging to the category of metonymy in which one refers a part for a whole or vice versa. The particular form of this synecdoche is the microcosm. A microcosm uses a part of something to refer to the entirety.

Neil Walker has rightly pointed out that the political notion of ‘the People’ may always be a synecdoche of sorts. It typically does not refer to all persons; often it does not include reference to disenfranchised categories. All political movements operate with some notion of who are to be sociologically representative of ‘the People’; and ‘the People’ is clearly not synonymous with population<sup>(1)</sup>, a mere empirical concept. However, the way populism employs the synecdoche differs from non-populist uses. One hypothesis is that it does so quantitatively in indicating a stricter use of the figure of speech: fewer members of the microcosm are taken to represent the macrocosm. A more convincing hypothesis is that perhaps the populist use of the synecdoche is characterised by a certain unawareness: the figure of speech would be used without awareness of the fact that it is being used. Consider, *a contrario*, how the synecdoche is employed more ordinarily in constitutional theory: here, the synecdoche lacks the pretence of describing the world, which is evident from the distinction made between *populus* and *multitudo*, to the effect that the theory is self-aware of the employment of the figure of speech to a much higher degree.

To illustrate the point, let us start with the obvious: ‘people’ is an abstract term, with no clear, single referent. It does not refer to a natural kind. The collective subject, that is, the ‘people’, is distinct from the individuals composing it (i.e., population<sup>(1)</sup>) and it exists only in our discourse.<sup>28</sup> As Kelsen famously pointed out, ‘People’ is always a *factio* that obscures the fact that

<sup>28</sup> Norberto Bobbio, *Teoria generale della politica* (Einaudi 1999) 332.

the individuals in a society have multiple and diverging interests and attitudes. The will of the people, as Albert Weale has recently shown, or perhaps reminded us about, is a myth – and a particularly uninformative myth today given the pluralism and complexity of contemporary societies.<sup>29</sup> To make the same point in the words of a scholar who has reflected much on populism, let me quote Ernesto Laclau: ‘People is therefore always ‘a unity – a homogeneity – out of an irreducible heterogeneity.’<sup>30</sup>

What is then the ‘homogeneity’ that populists impute to ‘the people’? If we assume that Jan-Werner Müller has correctly diagnosed contemporary populism as ‘an exclusionary form of identity politics’<sup>31</sup>, we would still need to know what creates this homogeneity besides the ‘national contents’ that will vary from country to country. How can we recognise the construction of homogeneity among the numerous national differences in the construction of collective identities?

Here philosophy can help. As Valentina Pazé has recently pointed out, we know well from the history of political thought what ‘people’ means in populism,<sup>32</sup> that is, what the said homogeneity consists of. It consists of an appropriation of the whole by a part; and not just any part but *a specific part* that needs to be socially recognisable.

Notice that the word *demos*, in the singular, had two meanings that were not clearly distinguishable in Greek.<sup>33</sup> The ‘people’ was a term used to indicate broadly the set of citizens of a *polis* holding political rights (in classical Athens, all free and native-born adult males) but it was also used less broadly, to mean not the (political) citizenry as a whole, but its humbler members: the peasants, the sailors, the manual laborers in general. This explains the fact that Aristotle was able to define democracy not so much as government ‘of the many’, but as government ‘of the poor’.<sup>34</sup> The very term employed – *demos* – obscures the distinction between the ‘People-as-a-whole’ (all members of a political community) and the ‘People-as-a-part’ (members of a class, i.e., the humbler members of society). Yet, it is indisputable that the objects denoted are two (all free and native-born adult males and the humbler members), although the word (*demos*) may be one. Indeed, not even the most

<sup>29</sup> Weale points out that it is difficult to even understand what ‘majority’ means in a pluralist setting. Albert Weale, *The Will of the People: A Modern Myth* (Polity Press 2019).

<sup>30</sup> Ernesto Laclau, *On Populist Reason* (Verso 2005) 182.

<sup>31</sup> Jan-Werner Müller, *What Is Populism?* (Penguin 2017) 3.

<sup>32</sup> Valentina Pazé, ‘The Construction of the People’ in Paul Blokker and Manuel Anselmi (eds) *Multiple Populisms: Italy as Democracy’s Mirror* (Routledge 2019) 17 ff.

<sup>33</sup> Moses Finley, *Democracy Ancient and Modern* (Rutgers University Press 1973).

<sup>34</sup> Aristotle, *Politics*, Book III, section 1279b.

radical anti-élite populist would deny that the élite has political power, rather the opposite. Indeed, in populism, it is the political power of the élite that is decried.

In Book IV of the *Politics* Aristotle identifies different types of democracy. One type is ‘demagogic democracy’ that has many points in common with tyranny. This form of democracy has three main characteristics: (i) supremacy of the demos over the law, (ii) a direct emotional relationship between the leader and the masses, fuelled by a spirit of retaliation against the aristocratic minority, (iii) the use of ‘People’ as synonymous with ‘People-as-a-Part’: *populus* as *plebs*. The synecdoche of populism is that particular figure of speech that takes one for another, that is, that identifies *demos* in the second sense with *demos* in the first sense. This can be also conveyed with the Latin terms (perhaps more common in constitutional and political theory): it is that figure of speech which identifies *populus* (the constitutional notion of peoplehood) with *plebs* (i.e., a section or part, that is socially identifiable, most typically as the humbler members of society). Notice that *demos* in the second sense of *plebs* or People-as-a-part is never identical to *populus* or *demos* in the first sense which is by necessity composed by a larger number of individuals. The synecdoche of populism, therefore, consists in making the uncritical audience believe that the whole People would want what is really only what a section of it wants, namely a part that is both numerically and socially inferior to the whole. In the synecdoche of populism, the People-as-a-part (or *demos* in the second sense or *plebs*) is (i) numerically limited (fewer in number), (ii) bears social marks identifiable as ‘non-élite’ (which may come in a wide variety and is likely to be subject to social change) and (iii) projects itself as a ‘whole’, as a collective actor regardless of whether this is justifiable. Aristotle says that ‘the demos governs as a ‘whole’, ‘the people’ becomes a monarch, and ‘the many’ have power in their hands ‘not as individuals, but collectively’.<sup>35</sup> This is the holistic conception of the people as an undifferentiated whole that recurs in the populist rhetoric.

So, let us recap what we noticed so far. Just like ‘population’ refers to two different things, so ‘People’ does. As clarified in the beginning of the chapter, ‘population’ may indicate all living human individuals within a determined spatio-temporal framework which is an empirical fact (population<sup>(1)</sup>). Population may also indicate all persons recognised as such within a jurisdiction which is an institutional fact (population<sup>(2)</sup>). Also ‘People’ may indicate an empirical fact or an institutional fact. ‘People’, on the one hand, may

<sup>35</sup> Aristotle, *Politics*, Book IV, section 1292a.

indicate all (quasi-) social citizens within a given social setting (People-as-a-part), which is an empirical sociological fact.<sup>36</sup> ‘People’, on the other hand, can also refer to all political citizens or members of the polity within a given constitutional setting (People-as-a-whole) which is an institutional fact.

Now, the populist use of the term ‘People’ is grounded in the view that the People-as-a-Part actually is, or embodies, the People-as-a-whole. When I say ‘embody the sources of all legitimate government’ I refer to a status-generative activity: a group in society (the People-as-a-part) – justifiably or not – claim to (re)define the institutional fact of the citizenry (the People-as-a-whole) in the manner that the group prefers. As such this synecdoche is not very surprising: it is a population design matter, and we have seen that any collective body by necessity engages in such design. What makes this synecdoche ‘populist’, however, is that it is unaware or oblivious of the fact that the People-as-a-part, which is an empirical social fact, and the People-as-a-whole, which is an institutional fact, are of a different nature and, thus, cannot be made to coincide. When the populist speaks in the name of the institutional fact of the People-as-a-whole to make the claim that a determinate interest, or course of action, is what is desired by ‘the People’, it is important to notice that this latter ‘People’ is not the same as the People-as-a-whole. This is why the synecdoche boils down to saying something along the lines of ‘this is what my social peers and I desire’. This may be a perfectly legitimate claim to make, were it not for its unfounded disguise as something that it cannot be: the interest of the ‘People-as-a-whole’ or *bonum commune*. Indeed, it is quite another matter to say that ‘this is what my social peers and I desire’ and to say ‘this is what is best for you all’.

Now, the people invoked as ‘the source of all legitimate government’ – the People that, I would argue, constitutionalists rely on, or intend to rely on – is the People-as-a-whole, not the People-as-a-part. In other words, for the populist and for the constitutionalist ‘the People’ actually means two different things. The semantic uses obey different rules. In the history of political

<sup>36</sup> “Citizen” is used in the sense attributed to the term by T.H. Marshall i.e., social citizen or citizen in the sociological meaning of the term that designates those who enjoy full social integration i.e., the opposite of the emarginated or socially excluded persons, see TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press 1950). This also explains the insertion of the modifier “quasi”. Citizens are, in Marshall’s sense, likened to ‘gentlemen’, i.e., those endowed with a particularly high social status; their opposite are extremely marginalised individuals. Most people are thus to be counted as ‘quasi citizens’ or ‘half-way citizens’ in that they have some ‘belonging to the community’ in Marshallian terms. Indeed, they share social space and live in the same society as the ‘citizens-gentlemen’, or ‘élite’ if you wish, yet, they suffer from social exclusion to varying degrees.



thought, we can clearly see that there are two ideas in play here. First, there is the political-legal notion of the ‘People-as-a-whole’ that we may call ‘the People of constitution’ taken as the basis of legitimate power. Second, there is the sociological notion of ‘People-as-a-part’ usually meaning the ‘common people’,<sup>37</sup> therefore, the same as *plebs* or *demos* in the second sense (namely the humbler members of society).

These two notions coexist and are at times conflated. What relation the ‘People-as-a-part’ should have to the ‘People-as-a-whole’ is a question that triggers political constitutional disagreement. At the risk of oversimplifying, the relationship between these two forms of people can either be one of identity or one of non-identity. If one believes they should be identical, one assumes the populist synecdoche: the People-as-a-part-who-should-actually-be-the-People-as-a-whole. When one assumes this synecdoche, it makes sense to use dichotomous terms to describe the political landscape. Think of the clash between a ‘people’ and a ‘non-people’, the underdogs and the custodians of an order founded on privilege. In political terms, populists will therefore typically think that you are either with or against us – allowing shades of grey is essentially perverse.

If one believes that the relationship between the two aforementioned forms of ‘People’ is one of non-identity, the ‘People-as-a-whole’ and ‘People-as-a-part’ remain separate: this will imply, for example, a distinction between the People of the State, for instance, all those having the nationality of a given country, and the people of the society that may include resident non-nationals. One way to understand this distinction is to say that the society (the People as a sociological, empirical category) is different from, or does not coincide with the People as the aforementioned Kelsenian *factio* which is an institutional fact.

In sum, the populist use of ‘People’ consists in an appropriation of the whole by a part. We stand before a populist rhetoric when we face a synecdoche where the People-as-a-part claims to embody the source of all legitimate government, that is, the People-as-a-whole. The marker of a populist use of the term ‘People’ is the belief in the direct epistemic access of one group to what another group needs, wants, desires, etc. What is populist in the synecdoche is to claim that what the People-as-a-whole needs is known to the People-as-a-part.

Can there be circumstances in which such a claim is warranted? Perhaps. However, this may depend on the context. A caveat is needed here. I am not

<sup>37</sup> Margaret Canovan, *The People* (Polity Press 2005).

saying that there can be a justified identification of the People-as-a-whole by the People-as-a-part: it is always a conceptual error. But there can perhaps be a legitimate identification of the common interests by the People-as-a-part. As has been pointed out by others,<sup>38</sup> the (possibly) legitimate identification of the interests of the whole by a part of the society is typical for the construction of the people as *pouvoir constituant*. Think about the age of revolutions when the idea of the people became a powerful drive for the worst-off in society (so only a part of it) who could use this populist synecdoche to raise issues that may very well have been justified. Think of the Levellers in England, or the more radical wing of the American and French revolutionaries for whom the idea of the 'People-as-a-whole' was understood to coincide with the 'People-as-a-part'. It was not obvious that this appropriation would come across as justified in relation to the *peuple constitué*. While potentially apt to convey the intensity of revolutionary mobilisation, the populist view of the People might be ill-suited to make sense of the ordinary democratic tensions between collective subjects such as parties, unions, interest groups and the like who identify with a set of shared rules.<sup>39</sup> Whether the synecdoche is politically justified or not will hence depend on the context.

This also explains a central point concerning the relationship between the populist appeal to the People and democratic decay. It is generally assumed that once we adopt the twentieth-century representative and constitutional conception of 'party democracy', the synecdoche seems obsolete. Its obsolescence, however, obtains only if we are sure about who is the constituted people/*peuple constitué* and its powers. This is something we are certain of only in the framework of accepted constitutional rules. Where such constitutional rules are the object of deep disagreements, for example, amidst a constitutional crisis, the synecdoche might resurge. This is in line with the observation by Pierre-André Taguieff that conjunctures that favour the rise of populist mobilisation include what we normally call a 'legitimacy crisis' of the political system.<sup>40</sup> A so-called crisis of representation would count as a crisis of legitimacy. From this premise it is not far to conclude, like Mény and Surel, that 'representation' for populists means 'treason'. One may think of crises of parties, of parliamentarism, of trust in institutions and such like as variants of a

<sup>38</sup> Pazé (n 32)17 ff.

<sup>39</sup> Jean-Claude Monod, *Qu'est-ce qu'un chef en démocratie? Politique du charisme* (Seuil 2012) 250–53.

<sup>40</sup> Pierre-André Taguieff, 'Le populisme et la science politique du mirage conceptuel aux vrais problèmes' (1997) 56 *Vingtième Siècle. Revue d'histoire* 43.

crisis of legitimacy. There is thus a connection between the populist synecdoche and democratic decay.

An important expression of democratic decay is lack of respect for pluralism. Democracy conceives politics as expressing a plurality of ‘parts’ which are no longer perceived as ‘factions’ that are destructive for the social body.<sup>41</sup> The populist view of the People relies instead on a reductionist view of politics that considers politics as struggle for power. Such a view rules out that conflict can, and perhaps should, end in a Kelsenian pursuit of compromise between forces that represent ‘partisan’ interests and opinions but do not claim to be the ‘only legitimate totality’.

Notice that this reductionist view of politics as struggle for power – that leaves a Machiavellian and perhaps Schmittian aftertaste – is not a mark of populism since it is also found in the debate over different models of democracy. In particular, the dichotomous manipulation of the political space is a typical characteristic of the ‘majoritarian’<sup>42</sup> or ‘immediate’<sup>43</sup> forms of democracy which are based on the formally, or substantially, direct election of the head of the executive. Think of the presidential and semi-presidential systems, where the political battle culminates in an electoral face-off between two leaders. Valentina Pazé has thus asked ‘Is it a coincidence that America – the continent of populism – is also the home of presidentialism?’<sup>44</sup> At the same time, the populist wave has surged through Europe precisely in a period when many parliamentary systems were ‘presidentialising’<sup>45</sup> Without suggesting a causal implication, the simplistic logic of populism based on drawing a sharp line between ‘us’ and ‘them’ and on the direct relationship between the leader and the masses seems to be particularly suited for presidential systems, and particularly unfit for the institutional complexities of parliamentarism. In systems closer to ‘consensual’ and ‘mediated’ models of democracy<sup>46</sup> the very institutional model translates awareness of the fact that there is a substantial difference between the empirical fact of ‘People-as-a-part’ and the institutional fact of ‘People-as-a-whole’. The constitutional setting of such models is articulated around, on one hand, the artificial character of the constitutional

<sup>41</sup> Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge University Press 1976).

<sup>42</sup> Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999).

<sup>43</sup> Maurice Duverger, *La Vie République et le Régime présidentiel* (Fayard 1961).

<sup>44</sup> Pazé (n 32) 24.

<sup>45</sup> Thomas Poguntke and Paul Webb (eds), *The Presidentialization of Politics: A Comparative Study of Modern Democracies* (Oxford University Press 2005).

<sup>46</sup> Lijphart (n 42), Duverger (n 43).

conception of the People and, on the other, the need to articulate and re-compose the plurality of interests that are voiced by sections of society (People-as-a-Part) through a variety of political forces that organise and articulate different visions of the world. The (sociological) People is dissolved into a multiplicity of people. In such systems, the Aristotelian distinction between People-as-a-whole and People-as-a-part is upheld.

## 2.8 CONCLUSION

Legal thinking concerns institutional facts. This ontological insight grounds the distinction between migration and mobility, only the first being an institutional fact. It is important to understand that migration statuses in the law are not necessarily grounded in mobility. Migrants and citizens may be fabricated by the law and they may disappear by the same magic. This implies that the design and management of migration statuses play an important part in shaping the ‘population’ of a country in ways relevant for legal and constitutional purposes. This substantiates the claim that migration and citizenship law enable population design. The aforementioned ontological insight also allowed me to distinguish two meanings of ‘population’. The first refers to the empirical fact of the sum of human beings within a given space and time, while the second refers to the institutional fact of the sum of persons recognised as such by the legal order. We are often oblivious of this distinction in discussing migration, border control and citizenship matters despite the fact that it so radically shapes our understanding of how these policy-areas impact the democratic constitutional setting. These policy areas directly or indirectly determine the extension and social composition of the population in a political community. They also determine the attribution to the individual of important rights and duties that co-determine that individual’s position within the society and within the power-setting of the constitutional framework. In this sense, these areas of law contribute to constructing the position that a given individual occupies vis-à-vis other individuals and their collective endeavours (state action). Since migration law typically governs access to residence rights and the latter are prerequisites for naturalisation in constitutional frameworks where political rights in the form of voting rights are most often reserved for nationals, migration law, in combination with citizenship policy and electoral laws, determine who counts as the People. The same ontological insight also allowed me to distinguish between two meanings of ‘People’ depending on whether we refer to the empirical fact of a set of members belonging to a society or to the institutional fact of *the* set of members of a polity within a given constitutional framework. This distinction

reflects Aristotle's distinction between the People-as-a-part and the People-as-a-whole. I also showed how populists employ these notions.

The overall picture I was able to paint shows that how we regulate access to and the content of citizenship determines how the *demos*, or set of citizens, is composed since the legal positions that are reserved for citizens determine the share of power that citizens enjoy in the constitutional order (i.e., how, when and where they may use political power). The composition of the institutional fact of the People, or set of citizens, and its role in the constitutional order – what the citizens do, which rights and duties they have – determines the state's constitutional identity. Precisely because migration policy impacts on the constitutional bedrock of the state, there is a salient reason why the populist conception of the People ought to be of interest to both migration and constitutional lawyers. It is important to understand the causal triangulation between democratic decay, authoritarian populism and restriction of rights for migrants. One expression of this triangulation is the resurgence of the synecdoche that characterises populism: People-as-a-part is taken to embody the People-as-a-whole where a section of society thinks that it may speak for the whole to the effect that the irreducible pluralism of individuals composing the collective is muted. This denial is often a key step in the path to othering.

## Viciously Circular

*Will Ageing Lock the European Union into Immigrant Exclusion?*

GREGOR NOLL

### 3.1 INTRODUCTION

The EU is currently experiencing the coincidence of two phenomena: the demise of its decade-old economic model and the looming reduction of growth due to the ageing of European populations. Since the 1950s, the Union has operated a regulatory model on migration, the whole point of which was to promote growth among an incrementally enlarged group of cooperating nation states. It combines the acceptance of the freedom of movement for nationals of cooperating parties with the power to exclude nationals from countries outside the group. To function as an engine of growth, the circle of parties has to be successively widened. With a limited scope for further EU expansion, this model is no longer sustainable according to its own logic. To be sure, I am not engaging with the question of *how* a novel successor model could or should look. Rather, I find reasons to doubt that a new and more viable model will be negotiated at all, unless we reimagine the fundamental assumptions of the European social contract. The ageing of populations will block such a policy process, according to my hypothesis, providing for a vicious circle where two separate factors amplify each other. This interrelation – the demise of a stabilizing regime concurring with an ageing population as a reform-blocking development – merits scholarly attention. My shorthand for it in the following is ‘the *blocage*’, and it will provide the theme for this chapter.

To understand the *blocage*, legal scholarship is necessary, but not sufficient. The power of the EU regulatory model derives from its legal character, and legal scholarship is good at explaining its components. Economic growth and political stability are the *teloi* that this model seeks to ensure. Law has a curious blind spot for its own overarching *teloi*, with disciplines such as political philosophy or economics partly filling that void. The particular crisis that engenders the *blocage* is one of ageing populations – a phenomenon that

demographers would recognize as within their domain. Already now, understanding the *blocage* is a project stretching over four disciplines, and it would not be difficult to add others as political sciences, medicine, sociology or psychology. A multidisciplinary, multiannual research program with a corresponding budget might seem to be a plausible way to research the *blocage*.

At the present juncture, however, a different type of study seems to be called for: exploratory and argumentative in style, and quicker to reach tentative outcomes. The consideration of law's *telo* within law needs to be reinvigorated, I believe, and the findings of other disciplines have to be brought into a conversation with law. This chapter is an attempt at doing that. I shall outline an argument that starts with law and ends with law, and that follows a path of reasoning where relevant findings from other disciplines are integrated. Far from being novel or original, this approach acknowledges that we are all tethered to one or a few disciplines that give a foothold in any exploration of that which is beyond. It reaches for an outcome which helps us decide whether or not we should invest further and more comprehensive efforts into the research of that *blocage*.

Here are the limits of my project. My question is how the ageing of populations in EU Member States will affect their making of migration and asylum law. I shall test the hypothesis that EU asylum and immigration law and policy might develop in a way that is increasingly exclusionary towards large groups of immigrants due to an interlocking of the economic and political consequences of ageing. Here is a simplified version of what might underlie such a development, making up for the *blocage*:

Improved health care makes populations in the West live longer. The resulting 'demographics of ageing' entails slowing growth as every worker needs to support an increasing number of ageing persons. Slowing growth makes redistribution harder and leads to a further increase of domestic income inequality. To the extent increasing domestic inequality can be tied to nation-statist and protectionist policies, we may expect more exclusionary migration laws. This denies states one important remedy for a 'demographics of ageing', namely immigration. As family-friendly politics and stimuli for procreation have had limited or no effects in reality, growth will continue to be sluggish due to unfavourable demographics, freezing or deepening domestic income inequality, and, with it, the move to nationalist and protectionist policies. This vicious circle can be expected to play out if the mutual reinforcement of demography, growth, inequality and immigration policies can be demonstrated.

This paragraph drives my chapter as a hypothesis, and my main interest is to map a number of *pro tanto* arguments speaking to each of the relations that

make up the hypothesis. What intrigues me in this is the interposition of law with democracy, demography and economic growth – factors often compartmentalized into disciplinary silos. In particular, my study shall explore how findings on these linkages are of relevance for the evaluation of existing migration law, and the processes of making future migration law. When uncovering future constraints on law-making, the factor of voter preferences on migration policy under conditions of stalling growth and increasing domestic inequality is of special concern.

In [Section 3.2](#), I shall present the current regulatory model of the EU and give reasons why it has come to its outer limits. [Section 3.3](#) engages with the *blocage* hypothesis, setting out the correlative chain in its entirety before breaking it down into three interlinked correlations. [Section 3.4](#) reflects on how the nexus between ageing, demography, growth and migration law impacts on the themes of democratic decay, populism and migrant rights, and [Section 3.5](#) considers implications of my tentative findings for the law in the short to medium term.

I will argue that the restriction of migrants' rights is but a symptom of a vicious circle of democratic decay, as ageing European societies undermine their own resource base for achieving economically tenable, politically stable and sufficiently egalitarian communities. I shall elaborate on the importance that population ageing will come to play for migration policies. By itself, the law cannot provide for resilience against restrictive migration policies. While the law is a useful tool in single cases and the short term, it emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics. The point is to uncover this shared foundation, and to show that a continuation of politics along its lines amounts to economic and societal self-harm.

### 3.2 THE FOUNDATIONAL NORM ON MIGRATION IN EU LAW

Contemporary migration law emerged within a project of economic and political integration across a group of nation states in the West. Its key driver was a liberal logic of expanding market access and mobility to facilitate commodification and growth. Western integration continues to be a dynamic process that demands a sufficiently clear distinction between in- and outside. I submit that there is a foundational norm on migration reflecting and managing that distinction and rooted in European integration.<sup>1</sup> I describe it

<sup>1</sup> I prefer the adjective 'foundational' over 'fundamental' when labelling this norm to avoid fleeting associations to fundamental rights.



as a staple of EU history from the 1950s until today.<sup>2</sup> It combines a promotional and a repressive aspect in that it packages the acceptance of the freedom of movement for nationals of cooperating parties with the power to exclude nationals from countries outside the group. The foundational norm on migration comprises three dimensions. First, the nationals of a party bound by it are privileged by the freedom to move within the territories of all parties, and, conversely, that party is obliged to accept the entry of nationals of other parties. Second, a party retains the right to exclude colonial subjects and third country nationals from that freedom. Third, a minimum of migration control obligations is imposed on all parties.

Historically, this norm is rooted in the inscription of a freedom of movement for EC workers into the Treaty of Rome. Being one of the four freedoms gives the norm a quasi-constitutional quality, yet its story is usually told without mention of its repressive price. As the negotiating history of the Treaty of Rome indicates, political acceptance for the freedom of movement was conditional on the exclusion of the Member States' colonial subjects. Economic growth of the metropolis was imagined to be contingent on the mobilization of metropolitan European workers, while relegating workers from European colonies and those of third countries to an outside.<sup>3</sup> This dovetails well with the heritage of colonialism in areas such as European human rights law as interpreted by the ECtHR. As Thomas Spijkerboer argues in [Chapter 4](#) in the present volume, current-day migrants, being people from former European colonies, are subjected to a split form of legality that was perfected at the end of the colonial era. That split form of legality also reverberates in today's distinction between intra-EU mobility and immigration from third countries, as its legal techniques originate in the heritage of colonialism.

This foundational structure of mobilization and exclusion would remain even after decolonization. In the following decades, the Commission

<sup>2</sup> The turn to contemporary migration law is perhaps best reflected by the widely quoted US Supreme Court judgment in the 1892 *Nishimura Ekiu* case, confirming the right to exclude aliens. This judgment, and the protectionist policies of the 1920s in many immigration countries, are of a different quality than the exclusionist laws emerging from European integration. While the former grew out of the context of single nation states, the latter are characterized by a collective action element bringing together a group of nation states.

<sup>3</sup> By the mid-1950s, France made clear that it wished to join a Common Market only in conjunction with its overseas countries and territories. As it saw population movements between those and European countries as problematic, these were to be excluded from any freedom of movement. Other negotiating parties followed suit. Peo Hansen and Stefan Jonsson, *Eurafrica. The Untold History of European Integration and Colonialism*, (Bloomsbury 2014) 150–1.

repeatedly made clear that the Member States retain their full freedom to exclude third country nationals, if only they accept the obligation to include workers from other Member States. Generally, ‘freedom of movement’ means the freedom of privileged nationalities to move across borders of the cooperating parties with a minimum of bureaucratic friction, while friction would be maximized for undesired populations from third countries. Until the 1970s, it was workers who were central to freedom of movement, but with the case law of the European Court of Justice, this freedom gradually became a privilege of all citizens of Member States.

As serious work began to promote freedom of movement with the Single European Act in 1986, it became clear that the *privilege* to exclude third country nationals successively morphed into an *obligation*. The realization of freedom of movement presupposed obligatory “flanking measures” as the precursors to today’s main legal instruments as the Dublin Regulation, the Schengen Border Code and the Visa Regulation.

With successive phases of enlargement, the foundational norm on migration expressed itself in novel ways. The question of how the citizens of acceding states would use their novel freedom of movement was central in political debates. Already before formal membership, candidate countries were offered the privilege of accelerated circulation in the form of visa-free travel for their nationals while assuming obligations on border control and refugee protection in exchange. This led to readmission agreements under international law, concluded in conjunction with visa liberalization agreements, all of which became moot once the candidate was admitted to the EU. It follows the pattern established by the liberalization of trade since the 1930s, which first manifested itself in bilateral agreements, and later served as a model for the multilateral GATT.<sup>4</sup> After enlargement, the foundational norm manifested itself in the privileged position of EU citizenship bartered against a full set of *acquis* norms on border control and refugee protection.

Today, after the 2004 and 2007 EU enlargement rounds, few states are left to permanently integrate into the project of Westernization (negotiations are ongoing with Montenegro, Serbia and Turkey; Albania and Macedonia being official candidates). This takes the foundational norm to its limits. The 2016 EU–Turkey agreement contained a barter element on visa-free travel, which is of great significance to the Turkish side. Its implementation appears to be forever postponed, as the EU Commission believes that its agreed preconditions remain unfulfilled. Ongoing negotiations with Tunisia and Egypt barter

<sup>4</sup> Anne Orford, ‘Theorizing Free Trade’, in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016) 701, 729–30.

readmission of migrants against simplified visa procedures, illustrating very clearly that citizens of these countries are at most given a privileged position amongst the excluded.<sup>5</sup> The February 2017 France–Germany note was an illustrative intermediary step: it demanded a mechanism for the ad hoc designation of safe third countries in crisis; it was tailor-made for the Libyan situation, and, realistically, it does not even mention possible bartering with visa-free travel.

How is the foundational norm part of a liberal accumulation logic? When Westernization adds new states to the Western group, these are given privileged access to the overall resources for the purposes of accumulation. The mobilization of Westernizing nationals is an important aspect of this logic, as is the immobilization of third country nationals. Since the 1950s, the assumption prevails that both projects promote growth while enjoying the acceptance of electorates in the Member States. In recent years, central parts of this assumption have been drawn into doubt.

Let us start with the power to exclude third country nationals, which is one of three elements of the foundational norm of migration, as I stated at the beginning of this section. What do I mean by the ‘power to exclude’? In what sense is that a power? In the 1950s context, it was a power to uphold colonial exclusion within a continued domestic competence, untainted by the Rome Treaty. In the phases preceding the two enlargements of 2004 and 2007, it was a power in the sense that Western partners equipped candidate states with the capabilities to control borders, which included the processing of asylum seekers.

In the relationship between the EU and Turkey, it means that Turkey is empowered to process asylum seekers returned from Greece or blocked from onward travel with EU funding. But the promise of visa-free travel to EU countries for Turkish citizens has not materialized yet. So, Turkey offers critical assistance to render the exclusion of third country nationals from the EU effective, but it has not – yet – been given the benefit of facilitated mobility by visa exemption. It is comparable to a person paying the full membership fee for a club whose advantages that person can only use in part. This explains why the conflict between the EU and Turkey is so deep and protracted – the withholding of visa-free travel is really a core element of the

<sup>5</sup> ‘The European Union is offering simplified visa procedures and increased economic aid to Tunisia and Egypt in exchange for smoother deportations of unwanted African migrants, two senior officials in Brussels said.’ ‘EU pushes Migration Talks with Tunisia, Egypt’ (*Reuters*, 20 February 2017).

‘non-agreement’<sup>6</sup> between Turkey and the EU. Considering the potential of visa-free travel, which facilitates business and promotes the integration of economies waiving visa requirements for each other’s citizens, the Turkish frustration at EU recalcitrance in this regard is based on a rational and long-term economic interest.

In the Libyan context, the power to exclude manifests itself only rudimentarily. Already under Gaddhafi’s reign, Italy provided speedboats permitting Libyan authorities to pursue human smugglers. It is hardly conceivable that single Member State or the EU would offer Libyan nationals visa-free travel under current conditions and without a functioning central government upholding control over the territory. Without a functioning central government, the EU lacks a counterpart for activities as cooperating with, funding or training Libyan coast guards or border guards.<sup>7</sup> This deprives the EU and its Member States of the carrot needed for the stick on border protection to be acceptable in the long term. The much larger question of how the EU might stabilize a fledgling Libyan government<sup>8</sup> that would cooperate on the point of migration control is currently impossible to answer, given the disagreement between EU governments and the recent attempts by Russia and by Turkey to side with competing powerholders in Libya.

Looking back, we realize that the foundational norm on migration has moved from a static logic of ensuring the needs of the labour market to an ever-larger societal project of mobility for wider groups of EU citizens and their families. Third country nationals’ access to the Union has been regulated with a growing number of norms since the 1990s, moving from a few intergovernmental agreements to a dense texture of supranational instruments, of which a core is couched in the form of regulations. Enlargement brought a new dynamic to labour market supply, as a number of new Member States brought with them mobile labourers willing to work under competitive conditions. In these developments, we have two expansions: one moving from a narrowly defined group of labourers to a wider group of persons tout court, and another moving from a relatively static membership to the integration of

<sup>6</sup> EU–Turkey Deal Not Binding, says EP Legal Chief, *EUObserver*, 10 May 2016) <<https://euobserver.com/justice/133385>> accessed 23 December 2020.

<sup>7</sup> For an exploration of how the absence of a Libyan government affected Operation Sophia by the EU, see Renske Vos, *Europe and the Sea of Stories. Operation Sophia in Four Absences* (VU Amsterdam, 2020) 115–38.

<sup>8</sup> Internal EU Report Exposes Libya Turmoil, (*EUObserver*, 10 February 2016) <<https://euobserver.com/migration/136973>>; EU External Action Service, ‘EUBAM Libya Initial Mapping Report Executive Summary’ 25 January 2017, available at <<http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>> accessed 23 December 2020.

new members and new partner countries into the system of mobility and border control. The end of both moves is in sight, which calls into question how growth can be produced by better labour supply and better controlled borders in the future.

### 3.3 ADAPTING MIGRATION LAW TO AGEING?

The foundational norm on migration might be based on wrong assumptions on the drivers of growth. Since its inception, it assumes that labour mobility within the EU promotes overall growth in the long term. EU expansion would then provide for a sufficient expansion of the necessary resource base of internally mobile labour. With expansion, the EU would not outgrow itself. This assumption now meets the reality of demographic change – a reality whose long-term effects on the economy have been underestimated up until quite recently. Demographics are probably related in a much stronger way to growth than economic policy. This is a relatively novel insight with profound implications for policy as much as for research. A 2016 paper by the US Federal Reserve research division suggests that demographics are responsible for virtually all of the decline in economic growth of the past thirty-five years.<sup>9</sup>

In a 2016 RAND paper, Maestas, Mullen and Powell report the following findings for the US economy:

Our estimates imply that 10% growth in the fraction of the population aged 60 and older decreases growth in GDP per capita by 5.5%. Decomposing GDP per capita into its constituent parts – GDP per worker and the employment-to-population ratio – we find that two-thirds of the reduction in GDP growth is driven by a reduction in the rate of growth of GDP per worker, or labour productivity, while only one-third is due to slowing labour force growth. This finding runs counter to predictions that population aging will affect economic growth primarily through its impact on labour force participation, with little effect on average productivity . . . In addition, we find that the decline in productivity growth does not only reflect changes in the age composition of the pool of workers (who are on average older in states that age faster). Instead, evidence that population aging slows earnings growth

<sup>9</sup> E Gagnon, B K Johannsen and D Lopez Salido, 'Understanding the New Normal: The Role of Demographics', (Board of Governors of the Federal Reserve System, 2016), available at <[www.federalreserve.gov/econresdata/feds/2016/files/2016080pap.pdf](http://www.federalreserve.gov/econresdata/feds/2016/files/2016080pap.pdf)> accessed on 23 December 2020.

across the age distribution suggests that it leads to declines in the average productivity of workers in all age groups, including younger workers.<sup>10</sup>

Against this backdrop, the question of how the demographics of ageing relate to the restrictiveness of immigration and asylum law and policy attains greater urgency. It is clear that the foundational norm on migration did not take the full complexity of how migration relates to growth into account. As any regulatory regime, its core ideas become costlier to revise over time. Seen like this, it might be a good thing that it has come to the end of its lifecycle for non-demographic reasons, stated in the preceding section.

However, we should envisage the possibility that EU asylum and immigration law and policy will grow more exclusionary towards large groups of immigrants, in and beyond the final stages of the model based on the foundational norm on migration. This would be due to an interlocking of democratic and economic factors associated to population ageing. In economic terms, population ageing results in too small a workforce to provide for growth sufficiently large to address domestic inequality. In addition, democracy needs to be factored in: as domestic inequality continues to be pegged at a sufficiently high level, a sufficiently large number of voters supports anti-immigrant policies to express their continuing preference for economic equality.<sup>11</sup> Also, ageing electorates are more risk-averse in their voting behaviour, suggesting there is limited appetite for a systemic shift, the field of immigration being a pertinent example. This represents a considerable opportunity for populist parties, and it will impact on the formulation of migration law even by mainstream parties seeking to compete with populists on this point. This opens a vicious circle where political remedies for the economic and social drawbacks of population ageing become unavailable.

What could these remedies be? Stimulation of fertility, immigration and raising participation in the labour force, for example, by delayed retirement or the activation of those without employment, are standard methods for keeping up growth in an ageing society. Lately, automation has been added to the list.

<sup>10</sup> N Maestas, K Mullen and D Powell, 'The Effect of Population Aging on Economic Growth, the Labor Force and Productivity' (RAND Corporation, 2016) 3–4, (references omitted) <[www.rand.org/pubs/working\\_papers/WR1063-1.html](http://www.rand.org/pubs/working_papers/WR1063-1.html)> accessed on 23 December 2020.

<sup>11</sup> According to a 2016 study, UK regions whose industry was affected negatively by cheap imports from China tended to vote for Brexit. Regions affected by immigration, however, did not stand out in their support for Brexit. I Colantone, P Starig, 'Globalisation and Brexit' (VOX CEPR Policy Portal, 23 November 2016) <<http://voxeu.org/article/globalisation-and-brexit>> accessed on 23 December 2020.

Pronatalist politics have proven to be ineffective over the long term.<sup>12</sup> Their impact on the number of births is modest, as a 2018 study by Clements and others suggested with further references, although they might affect the timing of births, and to have a positive impact on the labour supply decisions of mothers.<sup>13</sup> Expanded immigration and delayed retirement are both unpopular at the ballot box. Also, as migrants age and the productivity of all older workers is impacted by decreased health, neither of them is a straightforward remedy. While acknowledging the importance of delayed retirement as an issue, the question of whom to admit is at the heart of how democracy organizes itself and also how nation states reinvent themselves. On automation, it is probably too early to pass a predictive verdict.

Moving from economic to democratic considerations, the following subsections break down my hypothesis into manageable correlations and discuss research outcomes under each. The question is whether these outcomes, once integrated into the argumentative sequence of my hypothesis, would provide *prima facie* support of my hypothesis.

### 3.3.1 *Does the Demography of Ageing Decrease Growth?*

Is the population of EU Member States ageing? If so, does it influence growth? Since more than a decade, population ageing has established itself as an academic discipline<sup>14</sup> and has become a topic for think tank strategizing<sup>15</sup> and popular writing.<sup>16</sup> It is by now uncontroversial that populations indeed are ageing,<sup>17</sup> with advances in medical sciences and care as well as reduced fertility being main factors. Two of the ten key findings of the *UN World Population Prospects 2019* state that the world's population is growing older, with persons over sixty-five being the fastest growing group, and that

<sup>12</sup> Connelly compares countries having pursued active population politics with countries not having done so and finds that outcomes are the same in both categories over time. M Connelly, *Fatal Misconceptions* (Harvard University Press 2010).

<sup>13</sup> B Clements, K Dybczak, V Gaspar et al, 'The Fiscal Consequences of Shrinking and Ageing Populations' (2018) 43 *Ageing International* 391.

<sup>14</sup> An academic journal dedicated to *Population Ageing* has been published since 2008.

<sup>15</sup> R Jackson and N Howe, 'The Graying of the Great Powers', (Center for Strategic & International Studies, 2008) available at <[www.csis.org/component/option,com\\_csis\\_pubs/task,view/id,4453/](http://www.csis.org/component/option,com_csis_pubs/task,view/id,4453/)> accessed on 23 December 2020.

<sup>16</sup> A recent example is D Bricker and J Ibbotson, *Empty Planet. The Shock of Global Population Decline* (PenguinRandomHouse 2019).

<sup>17</sup> D E Bloom, S Chatterji, P Kowal, P Lloyd-Sherlock, M McKee, B Rechel, L Rosenberg, J P Smith, 'Macroeconomic Implications of Population Ageing and Selected Policy Responses' (2015) 385 *The Lancet* 649, 649.

falling proportions of working-age people are putting pressure on social protection systems.<sup>18</sup>

I already referred to the two 2016 studies which both argued that there was a stronger linkage between demographics and growth than earlier assumed.<sup>19</sup> The existence of the linkage is corroborated in other research as well. By way of example, Aksoy and others suggest that the current trend of population ageing ‘may contribute to reduced output growth and real interest rates across OECD economies’ after tracking age profile changes in a macroeconomic analysis.<sup>20</sup> This leads to the question why output growth is reduced by population ageing. In their 2014 article, Goodhart and Erfurth point out two factors: first, the support ratio, defined as the ratio of producers to effective consumers shifts sharply from being beneficial to being adverse, and, second, the rate of growth in the number of workers globally slows down.<sup>21</sup> The negative effects of ageing population on growth can be observed in countries such as Japan already. A 2018 article by Cooley and Henriksen based on growth accounting across the G7 argues that countries that aged fastest – such as Japan – tend to have been growing at a slower pace, to have a positive growth contribution from higher capital accumulation, and to have negative growth contributions from total factor productivity and from labour supply on the intensive and extensive margins.<sup>22</sup> ‘Total factor productivity’ is the ratio of aggregate output to aggregate input, while labour supply on the intensive margin reflects how many hours those in the labour force work on average. Labour supply on the extensive margin denotes participation in the labour force. Less workers, and workers working less by and large confirms the second factor of Goodhart and Erfurth. At this point, it is sufficiently clear that European populations are ageing, and that this impacts negatively on growth.

<sup>18</sup> United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019: Ten Key Findings* (2019), key findings 7 and 8, available at <[https://population.un.org/wpp/Publications/Files/WPP2019\\_10KeyFindings.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_10KeyFindings.pdf)> accessed on 25 November 2020.

<sup>19</sup> See E Gagnon, B K Johannsen and D Lopez Salido (n 9); N Maestas, K Mullen and D Powell (n 10).

<sup>20</sup> Y Aksoy, H Basso, T Grasl and R Smith, ‘Demographic structure and the Macroeconomy’ (*VoxEU*, 8 April 2015) available at <<https://voxeu.org/article/demographic-structure-and-macroeconomy>> accessed on 27 November 2020.

<sup>21</sup> C Goodhart and P Erfurth, ‘Demography and Economics: Look Past the Past’ (*VoxEU*, 4 November 2014) available at <<https://voxeu.org/article/demography-and-economics-look-past-past>> accessed on 29 November 2020.

<sup>22</sup> T Cooley and E Henriksen, ‘Demographics and Long-Run Growth’ (*VoxEU*, 11 June 2018) available at <<https://voxeu.org/article/demographics-and-long-run-growth>> accessed on 23 December 2020.



### 3.3.2 *Could Immigration Increase Growth?*

Might immigration remedy the loss of growth due to population ageing? This question brings economists to examine the past as well as to speculate on the future. Obviously, the variation in their responses is a product of the methodological choices they make. It depends if the perspective of an inquiry is limited to individual taxpaying and social service benefits, or widened to look at the collective impact of immigration on growth at large. If the latter is chosen, gains set off by societal diversity and played out in the number of patents or other innovations are included, potentially leading to different conclusions compared to the former. It is relatively easy to support an ideological argument in this field by moving the frame in an adequate way. These differences notwithstanding, it is possible to identify a field of convergence where many writers meet.

Examining twenty-two OECD countries, Boubtane et al (2016) found that migrants' human capital has a positive impact on GDP per capita, and that a permanent increase in migration leads to a positive impact on GDP per worker. A fifty per cent increase in net migration of the foreign-born generates, on average, an increase of three-tenths of a percentage-point in per worker GDP per year in OECD countries. The long-run effect is, on average, about two per cent. Increasing the selectivity of migration policies does not appear to have a more marked effect on GDP per worker, except perhaps in countries where recent immigrants are somewhat less educated than the resident population.<sup>23</sup> Two lessons can be derived from this. First, immigration adds growth by adding to the GDP per worker. This growth can be achieved by non-selective immigration policies as well, suggesting that incoming refugees and other persons in need of protection contribute to growth on a collective level. This goes to show that immigration would in itself be a suitable means to offset the negative growth brought about by population ageing.

Drawing on a 2014 study by Lisenkova et al, we could ask what reduced migration does to the economy, as a kind of projective counter experiment to the work by Boubtane et al.

The authors of the 2014 study took its cue from the UK Conservative Party migration target valid at the time, purporting to reduce net migration to the UK 'from hundreds of thousands to tens of thousands'. Comparing a baseline scenario with a scenario where net migration is reduced by around fifty per cent, Lisenkova et al find strong negative effects on the UK economy. By

<sup>23</sup> E Boubtane, J-Ch Dumont, C Rault, 'Immigration and Economic Growth in the OECD Countries 1986–2006' (HAL, 2016), 354–5.

2060 the levels of both GDP and GDP per person would fall by 11.0 per cent and 2.7 per cent respectively.<sup>24</sup>

As the EU has embarked on a course of labour mobility early on, research establishing the positive effects of migrant workers on the economy would seem to vindicate its approach. With its foundational norm on migration, the European Union embarked on a long-term experiment with worker mobility at its core. However, while economic analysis found that it promoted growth, it did not promote economic convergence, because the gains of one region were the losses of others. This much is stated by Huber and Tondl (2012) who examined the effects of immigration on unemployment and GDP in EU27 NUTS2 regions<sup>25</sup> between 2000 and 2007. The timespan of their study covers the 2004 enlargement, bringing early effects of East-West labour migration into view. An increase in immigration by 1 per cent is associated with 0.02 per cent higher GDP per capita and 0.03 per cent higher productivity, although the long-run effects are higher and estimated at about 0.44 per cent for GDP per capita and 0.20 per cent for productivity.<sup>26</sup> We may conclude that the intra-EU labour mobility has a limited potential to offset the negative effects of population ageing on growth. So, if we would assume that all remaining candidate countries became Member States in the near future, the effects would be insufficient. Greater volumes of migration would be required to counteract the negative effects of ageing in a more tangible way, further confirming that the foundational norm on migration is insufficient in this regard.

How could this translate into numbers? Recall the assertion by Maestas and others, quoted in the preceding section, suggesting that 10 per cent growth in the fraction of the population aged sixty and older in the USA decreased growth in GDP per capita by 5.5 per cent. Let us apply this as a first, rough indicator, accepting the differences between the USA between 1980 and 2010 and the EU after 2020, and noting that UN statistics only offer percentages of population aged sixty-five years and older (instead of sixty years and older, as in US statistics used by Maestas and others). Between 2020 and 2030, the fraction of Europe's population aged sixty-five years and older will grow by 3.9 per cent

<sup>24</sup> K Lisenkova, M Mérette, M Sánchez-Martínez, 'The Long-Term Economic Impact of Reducing Migration in the UK' (2014) 229 *National Institute Economic Review* R22

<sup>25</sup> NUTS stands for *Nomenclature des unités territoriales statistiques*, a geocode standard used to classify regions within the EU.

<sup>26</sup> P Huber and G Tondl, 'Migration and Regional Convergence in the European Union' (2012) 39 *Empirica* 439

from 19.1 per cent to 23 per cent.<sup>27</sup> This increase of the older parts of the European populations would translate into a 2,145 per cent decrease of European growth in GDP per capita. If European policymakers intended to offset that decrease in growth by a migration increase alone, that increase in migration would amount to 4,875 per cent.

It is not enough, though, to ponder percentages of additional migrants needed to compensate for the detrimental effects of population ageing. Obstacles to migrants' labour market participation are a very important factor. Bélanger and others brought out the difference this makes in a 2020 study for the European Commission that mapped how natives, intra-EU migrants and extra-EU migrants contributed to and benefited from social services. Their report submits that natives currently show a higher net fiscal contribution than extra-EU migrants and a similar contribution to intra-EU migrants. Once the ageing of the native population is taken into account, however, this will change. By 2035 an average extra-EU migrant would be a net beneficiary of public transfers, yet to a lesser extent than the average native, while intra-EU mobile citizens would continue to be net contributors. Most importantly, Bélanger and others underscore that an increase of the flows of new migrants without removing obstacles to their full labour market integration would yield only small fiscal benefits for the host country. By contrast, labour market policies targeted at increasing labour participation of migrants could generate large fiscal gains.<sup>28</sup>

The reported correlations should be applied to migrants' economic contributions in their totality, and not be limited to the aspect of fiscal contributions. It is not enough, I conclude, that governments muster political support for a liberalization of immigration law in general. To trigger benign economic effects, a liberalization of labour market legislation as well as a more stringent enforcement of anti-discrimination legislation could be needed. This puts new demands on law-making and enforcement in contexts where nation-state borders are perceived as natural barriers to immigrants, as is foreignness to full societal participation on equal conditions. Any push for full labour market participation of migrants will likely be framed as undue ethnic preference by populist parties.

What happens once states start opening up towards immigration to stimulate lagging growth? Clements argued in 2018 that keeping the old-age

<sup>27</sup> United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019, Volume II: Demographic Profiles* (2019) 69.

<sup>28</sup> A Bélanger, M Christl, A Conte, J Mazza, E Narazani, *Projecting the Net Fiscal Impact of Immigration in the EU*, EUR 30407 EN (Publications Office of the European Union, 2020) 7.

dependency ratio constant over the next eighty-five years in more developed economies would require an immediate eightfold increase in net migration (from 2.5 million to eventually over 21 million per year net migrants from the less developed to the more developed countries). He points out that such levels of migration would eventually deplete the working-age population in less developed economies.<sup>29</sup> Bruni argues in a 2013 article that the decline in Chinese fertility, and the end of the one child policy that has been partially responsible for it, will provoke immigration flows above replacement level.<sup>30</sup> Considering the size of the Chinese labour market, this would have a tangible impact on other states' access to skill. If we accept Bruni's conclusions, many ageing nation states have reasons to compete for immigrants on a global market in the future. Any 'migrant shopping' by EU member states might meet stiff competition by non-EU economies. This would be another factor calling into question the sustainability of the EU foundational norm on migration.

So far, there is agreement that immigration affects growth positively. However, compensating the negative growth effects of ageing populations with immigration alone would be a very complex undertaking, as a comparatively large volume of additional migrants would be needed. The political challenge is enormous indeed.

### 3.3.3 *Does Ageing and Growing Inequality Increase Political Support for Anti-Immigration Parties?*

But is it at all likely that a policy turn towards a greater intake of migrants could take place in the EU? We could explore this question either in today's political situation, or in a future shaped by the ageing of populations and its consequences. I limit myself to point out two factors that make a turn towards additional immigration to the EU less likely: one is the effect of biological age on voting, the other is the effect of comparable inequality across EU regions on voting.

'The rational policy response to ageing,' Juhana Vartiainen writes, 'is to increase the labour supply by trimming unemployment benefits, increasing retirement ages and encouraging employment-based immigration'. She goes

<sup>29</sup> B Clements, K Dybczak, V Gaspar, S Gupta, and M Soto. 'The Fiscal Consequences of Shrinking and Ageing Populations' (2018) 43 *Ageing International* 391.

<sup>30</sup> M Bruni, 'China between Economic Growth and Mass Immigration', (2013) 21 *China and World Economy* 56, 56–7.

on to state that '[i]t is precisely such policies, however, that have eroded the support for traditional political parties and created a fertile ground for nativist populism'.<sup>31</sup> The relation between nativist populism and ageing turns out to be more complex upon a closer look, though. Ageing can play out as ageing of the electorate on municipal, regional, national or European level, leading to the question of how an increasing share of older voters perceive immigration. Or it can play out in the lived experience of society, where feelings of relative advantage or disadvantage might affect voting behaviour of young as well as old.

Schotte and Winkler asked in a 2018 paper why the elderly are more averse to open immigration policies than their younger peers.<sup>32</sup> In earlier studies, individuals tended to display high levels of opposition against increased immigration, even though the potential welfare gains were considerable. The elderly in particular indicated the highest levels of opposition to liberal immigration regimes in most countries, these studies showed.<sup>33</sup> Using household surveys for twenty-five countries over a twelve-year period, Schotte and Winkler added nuance to this picture when they found generational change to be an important factor, suggesting that an ageing electorate might turn less averse to more liberal immigration over time. Applied to our context, this would suggest that any present attempts at reforming the EU foundational norm on migration will be dominated by a growing number of a migration-averse cohort of older voters, but that future reform attempts in a liberalizing direction might meet less resistance by a generation that has grown up and aged with immigration as a normal element of life. That would imply that we would have to live with the reform *blocage* for a limited time, but that it would dissolve once more immigration-friendly generations would start to age.

However, age affects the willingness to take risks irrespective of the historical experiences of particular generations, a 2018 article by Dohmen et al suggests. While history does play a role in shaping the readiness to assume risks, the authors were able to show that our willingness to accept risks declines with biological age, a result that remained robust even if

<sup>31</sup> J Vartiainen, 'The Future of the European Welfare States: The Intriguing Role of Demography?' (2017) 16 *European View* 131, 131.

<sup>32</sup> S Schotte and H Winkler, 'Why Are the Elderly More Averse to Immigration When They Are More Likely to Benefit? Evidence across Countries' (2018) 52 *International Migration Review* 1250.

<sup>33</sup> Schotte and Winkler referred to Facchini and Mayda 2008; O'Rourke and Sinnott 2006, Card, Dustmann, and Preston 2012.

controlled against economic indicators.<sup>34</sup> This study appears to dampen any cautious optimism on the reform of EU migration law arising due to Schotte and Winkler's study.

But it might be too crude to model the future of EU migration law on liberalizing attitudes or the effects of biological age alone. Inequality is a relative phenomenon, dividing parts of a population that are better off from other parts worse off. The experience of relative disadvantage might very well influence voting behaviour in its own right, irrespective of age-contingent risk aversion.<sup>35</sup> For the purposes of this chapter, however, research bringing together the factor of relative disadvantage with the factor of population ageing would be most helpful. A 2020 MIDEM study turns out to be the right resource in that respect.<sup>36</sup> The MIDEM team researched the consequences of emigration for the support of populism, concluding that populist parties advance in economically weak regions with considerable outward migration. This is a factor that may explain the success of populist parties. For Germany, the report finds a nexus between emigration and support for the *Alternative für Deutschland*, a nationalist-populist party on the right. The more a region has been affected by outward migration in the past three decades, the higher election percentages the *Alternative für Deutschland* was able to muster. On the European level, these relations are more subtle. Emigration does not generally translate into support for parties of the populist right. In economically weak regions, however, high emigration rates do translate into additional votes for such parties.<sup>37</sup>

This dovetails with the tendency of the elderly to oppose immigration, as acknowledged by referenced research. In economically weak regions of net emigration, the share of the elderly can be expected to be more significant. To what extent this alone can account for a strengthening of support for the populist right, or what degree of relative deprivation would be needed to bring that effect about would require further research. An ageing and economically stagnating EU is more likely to produce emigration. In that, it would be similar

<sup>34</sup> T Dohmen, A Falk, B Golsteyn, D Huffman, U Sunde, 'Identifying the effect of age on willingness to take risks', (*VoxEU/CEPR*, 21 January 2018) available at <<https://voxeu.org/article/effect-age-willingness-take-risks>> accessed on 20 December 2020.

<sup>35</sup> For an argument that group relative deprivation, the feeling that one's group is unfairly deprived of desirable goods compared to other out-groups, is a major explanation for the ethnic threat of immigration, see B Meuleman, K Abts, P Schmidt, T F Pettigrew and E Davidov 'Economic Conditions, Group Relative Deprivation and Ethnic Threat Perceptions: A Cross-National Perspective' (2020) 46 *Journal of Ethnic and Migration Studies* 593.

<sup>36</sup> MIDEM 2020: *Emigration in Europa* (Dresden 2020).

<sup>37</sup> *Ibid.*, at 9 and 37.

to the disadvantaged EU municipalities affected by emigration today, whose ageing population moves towards the populist right in its voting behaviour.

### 3.4 UNDERSTANDING AGEING AND MIGRATION LAW-MAKING

Taken in conjunction, the literature I reviewed supports my hypothesis that a vicious circle of population ageing threatens migration law-making in Europe. How will the ageing of populations in EU Member States affect their making of migration and asylum law? With the research reported above in mind, it is reasonable to expect the perseverance of existing restrictions and the introduction of further restrictions of migration and asylum law. The threat of the vicious circle is not confined to migration law-making, though. It extends to the economic model on which European nation states rely, and, in the long run, it strikes at societal cohesion at large. How does this relate to a broader question pursued in this book, namely to what extent restrictions of migrant rights represent a form of democratic decay in populist times? I shall now consider the themes of democratic decay, populism, and the rights of migrants in that order.

First, add population ageing to the consideration of migrant rights, and see how the diagnosis of *democratic decay* is pushed far beyond the rule of law alone. Democracy is decaying not only as a particular way of organizing politics (with a loosening of the self-restraint built into it), but also as a depletion of the demographic and economic resources on which any such politics rests. Seen as such, restrictions on migrant rights reach their apex at a moment when the resource base on which democracy rests in ageing societies is giving way. The vicious circle demonstrates the importance of methodological framing for the analysis of migration law and migrant rights to legal analysis. Once we base our work on a wider societal context, including the economy, demography, politics and history of Europe, restrictions to migrant rights no longer appear as a momentary implementation problem. Once we narrow it down and put migration and constitutional stability into separate silos, we are blinding ourselves to the real threats ahead: economic crisis, growing political division and its exploitation by populist actors.

Second, adding demographic change makes contemporary European *populism* appear as a decline indicator, gaining in strength as the foundational norm on migration is about to reach the end of its geopolitical resources. In its polemics against migrants and their rights, populism exploits the historical dependence of European states – and the EU – on the nativist core that provides the foundational norm on migration with discursive power. This nativist core sees the state, including its supranational extensions in EU law,

as ultimately being in service to the nation.<sup>38</sup> Resistant to any definition, the nation remains an amalgamation of ethnicity, history and demography whose continuity hinges on a permanent distinction between the native and the non-native.<sup>39</sup> Once it is widely realized that a politics that lives out this idea of the nation is leading ageing societies into stagnation, the nativist case of populists could be expected to unravel. But one characteristic trait of populism is that it shirks political responsibility for how its own assumptions play out in reality. Populists not in power tend to affect and infect the political agendas of mainstream parties, without having to take responsibility for emergent policies. Populists in power work with scapegoat enemies (as the image of stealthy powerholders pursuing population exchange) to whom ultimate responsibility for policy failures is passed on. While European nation states also build on the distinction between the native and the non-native, as populists do, the option of shirking political responsibility for the failure of the foundational norm on migration is not open to them. Populism therefore turns into a strong and dangerous catalyst for the systemic failure in the making. Indicting it as the primary culprit of this failure would be to make too much of it. The European Community invested into nativism in 1958 at the level of its primary law, and if we are hunting for causation, here is a candidate.

Third, the demographic challenge to ageing European societies brings us to consider how contingent *rights* are on conditions prevailing during finite historical periods. Enshrining rights in binding law and adding institutional guardians for its implementation provides a certain stability, but one which does not withstand major political shocks. For the formulation of migrant rights as we know them today, the demographical, political and economic conditions prevailing between 1958 to 2008 were essential. The wave of restrictive law and practice after 2015 should illustrate as much. As these conditions are slowly giving way, so do the rights of migrants. To state this is not to naturalize the decline of migrant rights, and neither to vindicate those who are actively pursuing this decline. Rather, it suggests how pressing the task of reimagining the very foundation of European societies is.

<sup>38</sup> In a 2020 interview with the German weekly *Die Zeit*, Viktor Orbán suggested that the 'basic unity' of the EU is the Member State: 'But Europe needs to grow from below, and be built by its peoples with its gloriously different cultural and historical traditions'. *Die Zeit* (Hamburg 26 November 2020) 7 (translation by this author).

<sup>39</sup> This becomes very visible when immigration policies of EU members governed by populist parties are analyzed. In [Chapter 8](#) on Hungary in this volume, Nagy and Kovacs demonstrate that Hungarian immigration policy is ethnicist and economically utilitarian. While the Hungarian government appears to condemn migration in all its forms, Hungary actively seeks certain migrants from third countries based on ethnonationalist criteria.



Taken together, these considerations suggest that it would be wrong to focus on a better implementation of migrant rights alone, as much as it would be wrong to frame populism as a root cause of democratic decay and the decline of rights. Populism is an indicator of a deeper crisis, and not its cause. As we tackle this crisis, we are concomitantly addressing populism, democratic decay and the decline of migrant rights along with it. While the law is a useful tool to remedy single cases of rights violations in the short term, it emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics. The point is to uncover this shared foundation, and to show that a continuation of politics along its lines amounts to economic and societal self-harm. Teachers and practitioners of law must not get embroiled in a false dichotomy, however. A provisional agenda pushing for the implementation of migrant rights by legal avenues does not contradict the overarching agenda of reforming the very fundament of the European social contract.

### 3.5 CONCLUSION

Is a reform *blocage* of EU migration law likely enough to motivate more comprehensive efforts into researching the *blocage* and possible ways of overcoming it? Within this chapter, I have provided a first overview of research, mostly stemming from the field of economics. Once we integrate these findings into an argumentative sequence, a continued and more thorough reflection on the vicious circle facing the EU seems definitively motivated. But the hypothesis of the vicious circle starts with the law – a law whose *telos* of reconciling nativism with limited labour mobility has turned out to be inadequate in the present, and counterproductive for the future of European societies. While I have reflected on the negative consequences of the *blocage* for migrant rights in the preceding section, the question remains what a new *telos* for European law might look like. While an answer is beyond this chapter, a number of reflections guiding it might be in order.

First, if capitalism is a driver of politics in the West, how could an anti-growth norm as the foundational norm on migration persist in it over such a long time, and get a new lease of life under populist influence? Is this an indication that the Westernization project of the EU featured ordoliberal tenets, with ordoliberals suggesting that state institutions are needed to bring the market to optimal performance? If that is so, are we wrong to give capitalism too large a role by placing it at the beginning of the argumentative chain in the form of Westernization and the imperative to ensure growth? Once we consider how an ideology of growth contributed to the depletion of

natural resources, a response to population ageing cannot be to treat surplus populations and their livelihoods as expendable when seeking to resurrect European growth. That would be to follow the script of colonialism.

Second, longer life in Europe possesses an aura of naturalness, whose normative implications should be challenged. After all, it pushes for a further dismantling of social divisions, and perhaps it will do so on a scale comparable to industrialization. This reminds of Marx' dictum 'Alles Ständische . . . verdampft', translated as 'everything solid melts into air', but actually suggesting that social strata evaporate by virtue of advances in (steam) technology.<sup>40</sup> Today, population ageing flows from an advance in medical technology which possesses the potential to grind down social stratification, including those built on nativist assumptions. At its extreme, the narrative of ageing and diminishing growth translates into an anti-nation-statist and pro-growth argument that is libertarian rather than ordoliberal. The state with its insistence on borders and divisions between nationals and non-nationals appears to be a mere obstacle to growth, an element that is to be grinded down if it behoves accumulation. This threat comes with its reactionary mirror image. It rests on a direct interplay between domestic nativism and an imagined European autochthonous culture, with the state being subordinated to their dialectics. Therewith, the challenge to those of us looking for a new telos that could, one day, become that of the law is to imagine an economic sociability that states of the future should sustain.

<sup>40</sup> See Jem Thomas' helpful clarification in his letter to the editors of the *London Review of Books* of 16 June 2013 <[www.lrb.co.uk/the-paper/v35/j11/letters](http://www.lrb.co.uk/the-paper/v35/j11/letters)> accessed on 23 December 2020.

PART II

Resilience at the European Level



## Coloniality and Recent European Migration Case Law

THOMAS SPIJKERBOER

### 4.1 INTRODUCTION

Beginning with the 2014 *Khlaifia* judgement (infra), the European Court of Human Rights and the Court of Justice of the European Union have given a series of judgments that have been widely perceived as constituting a state-friendly rupture with its earlier case law promoting the human rights of migrants. Practitioners and academics consider this new turn in the case law as a response to the 2011 and 2015 migration crises in Europe.<sup>1</sup> However, it has been argued that these crises were not the unforeseeable consequence of external events impacting on European migration and asylum law and policy, but followed from structural shortcomings of European law and policy itself.<sup>2</sup> Also, the idea that the earlier case law of the two European courts constituted a robust protection of the human rights of migrants has been subjected to fundamental critiques.<sup>3</sup> Taking these two analyses together, this chapter will

<sup>1</sup> See Louis Imbert, “Du palais des droits de l’homme au Palais Royal: Chronique d’un renoncement jurisprudentiel face à l’argument de la crise migratoire” (2019) 38 *Revue des droits et libertés fondamentaux*; Anita Sinha, “Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants” (2019) 50 *Columbia Human Rights Law Review* 176; Iris Goldner-Lang, “Towards ‘Judicial Passivism’ in EU Migration and Asylum Law?” in T Čapeta, I Goldner Lang & T Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart 2020).

<sup>2</sup> Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, “Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System” (2016) 53 *Common Market Law Review* 607; Daniel Thym, “The ‘Refugee Crisis’ as a Challenge of Legal Design and Institutional Legitimacy” (2016) 53 *Common Market Law Review* 1545. More broadly see Jaya Ramji-Nogales, “Migration Emergencies” (2017) 68 *Hastings Law Journal* 609; Katie Oliveiro, “The Immigration State of Emergency” (2013) 25 *Feminist Formations* 1.

<sup>3</sup> Bas Schotel, *On the Right of Exclusion. Law, Ethics and Immigration Policy* (Routledge 2012); Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counter-Point* (Oxford University Press 2015); Sandra Mantu, “Alternative views on EU citizenship” in C.A. Grütters, S. Manda and P. Minderhoud

not approach European law as failing to counter the undermining of migrants' rights, but will interrogate European law as actively contributing to such undermining since its inception. This does not necessarily mean that European law *only* undermines the rights of migrants. At times social movements have successes within the overall "sedentarist"<sup>4</sup> framework of European migration law, and it is conceivable that a number of such successes in the future might fundamentally transform the framework itself. From this critical perspective, the current developments in European case law may be seen not as a rupture, but as a continuation of a pre-existing characteristic – as new inflections of a more long-term tendency to privilege the interests of European states over those of migrants and of Europeans with transnational ties.

The notions of crisis and emergency are reflected in law. John Reynolds has shown that the legal notion of emergency is an elastic concept that may take on various forms. It is not an exceptional legal instrument placing a situation outside of law, but a permanent legal governance technique that was developed in the European colonies and subsequently has been absorbed into international law. The notion of emergency normalised special state powers over colonial subjects, especially when used for an extended period. Legal techniques making this possible maintain the legitimacy and legality of state action, in particular of intensified state violence against populations who are ruled through force, not consent. Emergency regimes are an element of legal techniques of subjugation of racialised and lower-class groups.<sup>5</sup> The migrants whose rights are being undermined by the case law of the European courts originate from former colonised regions; they do not have a say in the policies that are enforced against them; and they have been subject to intensified forms of state violence in the form of deprivation of liberty, expulsion, and exposure to extreme living conditions.

The European Convention on Human Rights contains three options to limit rights. In addition to the limitation clauses concerning specific rights, there is the general derogation clause for public emergencies (Article 15 ECHR) as well as colonial clause (Article 56 ECHR) allowing states not to extend the Convention to their colonies or, if they choose to do so, to apply it

(eds), *Migration on the Move. Essays on the Dynamics of Migration* (Brill/Nijhoff 2017) 225. More broadly see Tendayi Achiume, "Migration as Decolonization" (2019) 71 *Stanford Law Review* 1509–1574.

<sup>4</sup> Daniel Thym, "Migrationsfolgenrecht" 2017 (76) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 169.

<sup>5</sup> John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press 2017); Nasser Hussain, *The Jurisprudence of Emergency. Colonialism and the Rule of Law* (University of Michigan Press 2003).

there “with due regard to local requirements”.<sup>6</sup> Fawcett specified in 1969 that the concept of “local requirements refers primarily to permanent or organic characteristics of a territory and would not extend to temporary features”.<sup>7</sup> A current textbook admits that the local requirements standard “may permit a lower standard of compliance with the Conventions’ requirements in dependent territories”.<sup>8</sup>

EU law does not have a colonial clause, but it does regulate its territorial scope of application. The 1957 EEC Treaty contained a provision stipulating that the treaty would apply to Algeria and French overseas departments for a number of issues (one of the applicable notions is that of public emergency, Article 227(2) EEC Treaty). It requires intimacy with the text of the treaty to see that free movement of persons is missing and hence does not apply to Algeria. Furthermore, it provides that for the overseas territories of the member states a special association regime applied, laid down in Article 131–136 EEC Treaty. A series of protocols detailed the status of the overseas territories upon entry into force of the Treaty. The current application of EU law to overseas territories is regulated via Article 355 TFEU. In addition, in the field of asylum Article 78(3) TFEU allows the Union to adopt provisional measures for the benefit of states that are confronted by an emergency situation characterised by a sudden influx of third country nationals

Clearly, the recent case law of the European courts does not apply Article 15 or 56 ECHR, or Article 355 TFEU. However, in this chapter this case law will be analysed as an application of the idea on which these provisions are based, namely that the physical proximity of (in this case: former) colonial subjects constitutes an emergency which requires excluding colonial subjects from the full application of the law. The hypothesis which will be examined here is that current-day migrants, being people from former European colonies, are subjected to a split form of legality that was perfected at the end of the colonial era. Article 56 ECHR and 227 EEC Treaty (currently 355 TFEU) are emblematic of this split legality. They both allow for a legal system that maintains the pretence of equality before the law while at the same time

<sup>6</sup> On the relation between these three alternatives, see Reynolds, 117–137. Compare with Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017) 197–205; A.W. Brian Simpson, *Human Rights at the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 276–322.

<sup>7</sup> J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford University Press 1969) 342.

<sup>8</sup> D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press 2014) 101.

relegating colonial subjects to sub-standard legal protection by either excluding them from the application of these treaties altogether (infra, Section 4.2) or by lowering the standards (infra, Section 4.3). In addition to these two elements, a third legal governance technique with its origins in colonialism is the use of emergency powers themselves (infra, Section 4.4). Authorities have special powers at their disposal for use in case of emergency, and have considerable leeway in deciding whether there is an emergency and, if so, what it requires.

## 4.2 THE LAW DOES NOT APPLY

The most radical version of coloniality foreseen in European treaty law consists of not applying European legality at all. This can be seen in the EU Court of Justice's judgments about the EU-Turkey statement. A second example of non-application of European legality is the case law of both European courts in cases of Syrians applying for humanitarian visas so as to claim asylum in Europe without having to risk their lives on smuggling boats. In a third context, that of migrant detention at European external land borders, the Strasbourg court adapted its case law so as to make the ECHR inapplicable (by precisely denying that the people concerned were being detained), while the Court of Justice did not adopt that innovation and continued to apply European law to such detention.

### 4.2.1 *The EU-Turkey Statement*

The Court of Justice was asked to annul the 2016 EU-Turkey statement.<sup>9</sup> The court developed a complicated argumentation in order to reach the conclusion that the European Union is not one of the parties to the agreement, but that it was concluded between the 28 member states of the EU and Turkey.<sup>10</sup> The Court based this on the wording of the EU-Turkey statement. The judgment is at odds with the so-called ERTA doctrine in a quite evident

<sup>9</sup> See Sergio Carrera, Leonhard den Hertog and Marco Stefan, "The EU-Turkey Deal: Reversing 'Lisbonisation' in EU Migration and Asylum Policies" Sergio Carrera et al (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 155; Mauro Gatti and Andrea Ott, "The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law".

<sup>10</sup> *N.F., N.G. and N.M. v. European Council*, Cases T-192/16, T-193/16, T-257/16, General Court 28 February 2017.



manner.<sup>11</sup> This doctrine, codified in Article 3(2) TFEU, holds that whether a decision is a decision of the EU or of the Member States is governed by European law. Contrary to what the Court argues in this case, the label that the decision itself provides is not decisive. The ERTA doctrine concerns exactly the situation at hand – ministers of all EU Member States meet – but do they meet as the council (thus representing the European Union) or as representatives of the Member States? Decisive is not the label, but whether the decision implements a common policy; whether it deals with a matter falling within EU competence; whether it has definite legal effects on a common policy. The EU-Turkey Statement has legal effects (if only because it creates considerable tension with European and international asylum law) concerning a common policy (rules on asylum and migration policy, visa policy) and therefore (in the terms of the ERTA judgment) “the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.<sup>12</sup>

Because the Court ruled that the EU was not a party to the EU-Turkey statement, it also excluded the possibility of prejudicial questions by domestic courts about the statement. An internal appeal against the judgment in the EU-Turkey statement case was lodged, but this was dismissed as being inadmissible because the Court found the appeal grounds incomprehensible.<sup>13</sup> Be that as it may, it allowed the Court to leave intact an evidently problematic judgment and allowed itself not to have to pass judgment on the compatibility of the EU-Turkey statement with EU constitutional law, including the Charter on Fundamental Rights.

#### 4.2.2 Humanitarian Visa

In October 2016, a Christian family from Aleppo (then a war zone) applied for a short-stay visa with limited territorial validity at the Belgian Embassy in Beirut, and returned to Syria the day after. They had indicated that they intended to apply for asylum in Belgium, and explained that they were forced

<sup>11</sup> Nariz Idrin, “The EU-Turkey Statement or the ‘Refugee Deal’: The Extra-Legal Deal of Extraordinary Times?” in Dina Siegel and Veronika Nagy (eds.), *The Migration Crisis?: Criminalization, Security and Survival* (Eleven Publishing 2018), 61; Antoine Guérin, “Déclaration UE-Turquie du 18 mars 2016: la CJUE ou les singes de sagesse” (2019) 16 *Revue des droits de l’homme*.

<sup>12</sup> *Parliament v. Council and Commission*, Joined Cases C-181/91 and C-248/91, para 17, 30 June 1993.

<sup>13</sup> *N.F. and Others v. European Council*, Joined Cases C-208/17 P to C-210/17 P, 12 September 2018.

to return to Syria by the fact that they were not allowed to register as refugees in Lebanon, and were not sufficiently prosperous to be able to maintain themselves in Lebanon without such registration. The EU Court of Justice ruled that an application for a visa with the aim of applying for asylum is not an application for a visa for a stay of no longer than three months (*X & X v Belgium*, case C-638/16). Therefore, the issue was not covered by the Visa Code, which only governs short-stay visas. As the issue of visas for a stay longer than three months has not been harmonised, it was not governed by European law, but only by national (in this case Belgian) law. As a consequence, the EU Charter of Fundamental Rights does not apply. Therefore, the court did not have competence to rule on the substantive issue of whether European states may be under an obligation to issue a visa in a situation such as that of the Syrian family. The reasoning of the court is formal, but compelling. Remarkably, the Advocate General in this case had an equally compelling formal reasoning with the opposite outcome. He argued that the applicants had applied for a short-stay visa. One of the grounds for denying such a visa was the fact that there were doubts as to whether the applicant would leave after the period for which the visa had been granted. However, it was possible to grant a visa despite such doubts in humanitarian cases by making an exception to this ground for refusal. In addition, the Advocate General argued that the applicants intended to stay for no longer than three months in Belgium on the basis of their visa; after that, their stay would have been based on their status as asylum seekers. Therefore, the procedure really and actually concerned a short-stay visa. In this way, the Advocate General found the EU Visa Code and consequently the Charter of Fundamental Rights to be applicable. The Advocate General then argued that EU Member States were under an obligation to issue a visa if there are substantial grounds to believe that the refusal thereof would have as a direct consequence that the applicant would be exposed to inhuman or degrading treatment, by depriving that national of a legal route to exercise his right to seek international protection in that Member State. The relevant impending inhuman or degrading treatment consists, in the analysis of the Advocate General, both of the treatment the applicant may be exposed to in the country of origin and in the risks inherent in an irregular trip to a country of asylum to which a refusal of a visa would expose the applicants. As Rijpma has observed, the Court's decision not to adopt the position favoured by the Advocate General was motivated by its wish not to intervene in a highly sensitive area, and it was allowed to make this choice by the ambiguity of the notion of the scope of EU law.<sup>14</sup>

<sup>14</sup> Jorrit Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory" (2017) 2 *European Papers* 571, 579. I have analysed this

A similar case was brought before the European Court of Human Rights.<sup>15</sup> Again during the siege of Aleppo, a Syrian family from that city applied for a visa at the Belgian embassy in Beirut, with a view to applying for asylum in Belgium. They argued that the refusal to issue that visa exposed them to inhuman treatment in the sense of Article 3 ECHR. The crux of the case was whether Belgium had exercised jurisdiction in the sense of Article 1 ECHR over the Syrian family. The Court has ruled that jurisdiction is primarily a territorial concept. Exceptionally, states can exercise extraterritorial jurisdiction through acts performed or producing effects outside its territory. One example of this is exercising effective control over territory or persons. Another, and one that is highly relevant for this case, is actions or omissions of its diplomatic or consular officials. Until the decision of May 2020, the Court had held that such acts constituted the exercise of jurisdiction if they were committed in an official capacity. In its new decision, the Court added to its summary of case law that acts or omissions of diplomatic or consular officials were an exercise of jurisdiction if they concern “that State’s nationals or their property”.<sup>16</sup> In one case, jurisdiction had been exercised over non-nationals (in the Danish embassy in east Berlin), but in that case the non-nationals were physically removed from the embassy’s premises.<sup>17</sup> Whereas previous restatements of the Court’s case law on diplomatic or consular officials had covered nationals and non-nationals of the State in question, the Court in *M.N. and Others v. Belgium* restated its case law as being about diplomatic and consular acts vis-à-vis own nationals, and physical acts vis-à-vis non-nationals. This allows the Court to assert that the case law about consular acts towards nationals and physical acts towards non-nationals is not applicable to the given case, as it is about consular acts towards non-nationals.<sup>18</sup> Hence, the Court is not bound by precedent holding that consular acts constitute an exercise of jurisdiction. The Court ruled that it was not possible to trigger, unilaterally, jurisdiction by addressing a request to a state with whom the applicants had no prior connection, and without that state having chosen to be imposed a treaty obligation.<sup>19</sup> The alternative, the Court adds, would amount to a near-universal application of the Convention on the basis of the unilateral choices

judgment, as well as the EU-Turkey judgment addressed above, more extensively in Thomas Spijkerboer, “Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice” (2018) 31 *Journal of Refugee Studies* 216.

<sup>15</sup> *M.N. and Others v. Belgium* App no 3599/18 (ECHR GC, 5 May 2020).

<sup>16</sup> *Ibid.*, para 106.

<sup>17</sup> *Ibid.*, para 106.

<sup>18</sup> *Ibid.*, para 118.

<sup>19</sup> *Ibid.*, para 121, 122 and 123.

of any individual, irrespective of where in the world they find themselves, and therefore create an unlimited obligation on states to allow entry to individuals who might be at risk of inhuman treatment.<sup>20</sup> This would “have the effect of negating the well-established principle of public international law (...) according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens”<sup>21</sup> – an ironic statement because the Court is in the process of concluding that the entry of these aliens is precisely not subject to *any* treaty obligations.

### 4.2.3 Border Detention

Another legal issue connected to the 2015 “crisis” was also decided by both courts. It concerned the Röske “transit zone” at the Hungarian–Serbian border. Asylum seekers who wanted to enter Hungary from Serbia were stopped at the Hungarian border, which is an EU external border. They applied for asylum, which had to be done from within the Röske “transit zone”, – a closed and guarded area that people could only enter or leave with permission and cooperation by the Hungarian authorities. In *Ilias and Ahmed v. Hungary* the Hungarian authorities removed the asylum seekers to Serbia without substantive examination of their asylum claims on the ground that Serbia was a safe third country. The European Court of Human Rights found the removal of two Bangladeshi asylum seekers to Serbia to be a violation of Article 3 ECHR,<sup>22</sup> because there was consistent general information that Serbia would send them onward to Macedonia, which would move them onward to Greece. Because return to Greece would constitute a violation of Article 3 ECHR,<sup>23</sup> exposing asylum seekers to such return without substantive assessment of their asylum applications constituted a violation of the procedural aspect of Article 3.<sup>24</sup> In this respect the Court followed its earlier case law,<sup>25</sup> despite invoking the right of states “to control the entry, residence and expulsion of aliens” as well as “the challenge faced by the Hungarian authorities during the relevant period in 2015, when a very large number of foreigners

<sup>20</sup> *Ibid.*, para 123.

<sup>21</sup> *Ibid.*, para 124.

<sup>22</sup> *Ilias and Ahmed v. Hungary* App no 47287/15 (ECHR GC 21 November 2019).

<sup>23</sup> *M.S.S v. Belgium and Greece* App no 30696/09 (ECHR GC 21 January 2011).

<sup>24</sup> *Ilias and Ahmed*, supra note 22, para 158–163.

<sup>25</sup> *M.S.S. v. Belgium and Greece*, supra note 23.

were seeking international protection or passage to western Europe at Hungary's borders".<sup>26</sup>

However, it ruled that their factual situation did not amount to detention. This constituted a new turn in the Court's case law. The Court had previously held that people who were held in an airport transit zone or in a reception centre on a Mediterranean island were being held in detention.<sup>27</sup> In *Ilias and Ahmed*, however, in contrast to the Chamber judgment in the same case,<sup>28</sup> the Grand Chamber held that holding people in a "transit zone" at a land border in this case did not constitute detention, despite the fact that the people held there were under the control of the Hungarian authorities,<sup>29</sup> and despite the fact that "the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities".<sup>30</sup> It did so by distinguishing this situation from the cases it had ruled on previously.<sup>31</sup> It furthermore considered:

that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges. It is important in particular to recognise the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration.<sup>32</sup>

The reference to the right of Hungary to control its borders was repeated,<sup>33</sup> as was the reference to "conditions of a mass influx" and the "ensuing very significant difficulties".<sup>34</sup> The main aspect that the Court referred to so as to find that the situation was not one of detention was that the two applicants entered Hungary at their own initiative,<sup>35</sup> without being at a direct risk to life

<sup>26</sup> *Ilias and Ahmed*, supra note 22, para 125 and 155 respectively.

<sup>27</sup> *Amuur v. France* App no 19776/92 (ECHR 25 June 1996); *Khlaifia and others v. Italy* App no 16483/12 (ECHR GC 15 December 2016); *J.R. et autres c Grèce* App no 22696/16 (ECHR 25 January 2018); *Kaak et autres c Grèce*, App no 34215/16 (ECHR 3 October 2019).

<sup>28</sup> *Ilias and Ahmed v. Hungary* App no 47287/15 (ECHR 14 March 2017).

<sup>29</sup> *Ilias and Ahmed* Grand Chamber, supra note 22, para 186.

<sup>30</sup> *Ibid.*, para 232.

<sup>31</sup> *Ibid.*, para 215–219.

<sup>32</sup> *Ibid.*, para 213.

<sup>33</sup> *Ibid.*, para 222 and 225.

<sup>34</sup> *Ibid.*, para 228.

<sup>35</sup> *Ibid.*, para 220 and 221.

or health,<sup>36</sup> and could return to Serbia voluntarily<sup>37</sup> without a direct threat to life or health.<sup>38</sup> The Court did not find it decisive that they had no legal right to enter Serbia (and actually were returned to Serbia in circumvention of border control).<sup>39</sup> Nor did it find the length of their confinement (twenty-three days) decisive because this length was not longer than necessary for examining their asylum claim.<sup>40</sup> The Court consistently minimises these twenty-three days, by referring to “only”<sup>41</sup> twenty-three days or by calling the confinement “short”.<sup>42</sup> The decisive argument seems to be the voluntary nature of the applicants’ decision to enter Hungary from Serbia and their decision not to return to Serbia until they were eventually forced to do so by the Hungarian authorities.<sup>43</sup> The main problem with this is that the Court itself has held that the asylum procedure in Serbia had such deficiencies that exposing people to it amounts to a violation of Article 3 ECHR. The idea that to prefer confinement over being exposed to a real risk of inhuman treatment is a matter of free choice, is Orwellian in the sense of being evidently cynical.

In a judgment given six months after the Grand Chamber’s *Ilias and Ahmed* judgment, the EU Court of Justice clearly distanced itself from the interpretation of the term detention of the Strasbourg Court.<sup>44</sup> In a case concerning asylum seekers who were held in the same transit centre at Rösztke it gave a complex definition to state the obvious: detention is “a coercive measure that deprives (a person, TS) of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter”.<sup>45</sup> It added that the fact that people “are free to leave the Rösztke transit zone to travel to Serbia cannot call into question the assessment that the placing of those applicants in that transit zone cannot be distinguished from a regime of detention”.<sup>46</sup> The EU Court of Justice’s refusal to go along with Strasbourg’s new exception signals that, when European case law is analysed through the lens of coloniality, one

<sup>36</sup> *Ibid.*, para 223.

<sup>37</sup> *Ibid.*, para 235 and 236.

<sup>38</sup> *Ibid.*, para 242–243.

<sup>39</sup> *Ibid.*, para 237. This creates a tension with *Salah Sheekh v. Netherlands* App no 1948/04 (ECHR11 January 2007) para 141.

<sup>40</sup> *Ilias and Ahmed* Grand Chamber, *supra* note 22, para 227, 228 and 233.

<sup>41</sup> *Ibid.*, para 233.

<sup>42</sup> *Ibid.*, para 192 and 225.

<sup>43</sup> *Ibid.*, para 123; the Court rejects the respondent government’s argument that their return to Hungary was not a removal but voluntary act of the applicants.

<sup>44</sup> Case C-924/19 PPU and C-925/19 PPU *F.M.S. and Others* [2020].

<sup>45</sup> *Ibid.*, para 223.

<sup>46</sup> *Ibid.*, para 228.

cannot assume that coloniality necessarily leads to a particular outcome. Like the Strasbourg Court, the Court of Justice was impressed by the “large numbers” arriving in Europe at the relevant time,<sup>47</sup> but it found it possible to apply the normal concept of detention in that situation.

#### 4.3 DUE REGARD TO LOCAL REQUIREMENTS

The previous section provided a number of examples where, through the application of European treaty law, former colonial subjects were excluded from European legality. We will now turn to a second category of examples, where European legality is deemed applicable but where it is applied with, in the words of Article 56(3) ECHR, “due regard to local requirements” – in this case, with due regard to the fact that the people it is being applied to are former colonial subjects.

##### 4.3.1 *Island Detention Conditions*

During the Arab Spring in 2011, nationals of North African states tried to reach Europe using smuggler boats. On 17 and 18 September 2011, three Tunisians in their twenties were intercepted by the Italian Coast Guard and detained on Lampedusa, a 20 km<sup>2</sup> island with some 5,000 inhabitants 200 kilometre south of Sicily and 110 kilometre east of Tunisia. On 20 September, a revolt broke out, the centre burnt down and the men were transferred to a sports complex. The next day, with some 1,800 others they escaped and demonstrated in the streets of Lampedusa. They were arrested, flown to Palermo, and detained on two ships. They were flown to Tunisia on 27 and 29 September 2011 on the basis of an agreement between Italy and Tunisia of 5 April 2011, the text of which remains secret.<sup>48</sup> In accordance with its standard case law, the European Court of Human Rights in *Khlaifia and others v. Italy* held unanimously that the right to liberty had been violated because there had been no legal basis for the detention, the detainees had not been informed of the grounds for their detention and they had no access to court (Article 5 ECHR).<sup>49</sup> It also held unanimously that they had not had access to an effective legal remedy (Article 13 ECHR).<sup>50</sup> However, in contrast to the

<sup>47</sup> *Ibid.*, para 242–243.

<sup>48</sup> *Khlaifia and others v. Italy*, App no 16483/12 (ECHR GC 15 December 2016), para 11–21 and 36–18.

<sup>49</sup> *Ibid.*, para 55–135.

<sup>50</sup> *Ibid.*, para 256–281.

Chamber judgment<sup>51</sup> the Grand Chamber held by a majority of sixteen to one that the applicants had not been subjected to collective expulsion (Article 4 Protocol 4 ECHR),<sup>52</sup> and that they had not been subjected to inhuman or degrading treatment (Article 3 ECHR) during their detention on Lampedusa and on the ships.<sup>53</sup>

The difference between the Chamber and Grand Chamber judgments on the point of collective expulsion is of a rather factual nature. It turns around the issue of whether the decision-making process leading to the expulsion had or had not been sufficiently individualised. However, on the question whether the detention conditions on Lampedusa constituted inhuman or degrading treatment (hereafter for stylistic reasons: inhuman treatment), the Grand Chamber takes a new turn. According to long-standing case law, the Court uses two principles in assessing whether a treatment is to be considered as inhuman. On the one hand, the prohibition of inhuman treatment is absolute and does not allow for derogation under any circumstances. On the other hand, however, treatment must reach a minimum level of severity if it is to be characterised as inhuman treatment, and the assessment of that level “is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”. The Court also takes other factors into consideration, in particular the purpose and context of the treatment, as well as whether the individual is in a vulnerable situation.<sup>54</sup> The Court has developed detailed case law on the question when detention conditions amount to inhuman treatment. It uses a weighty but rebuttable presumption that a violation of Article 3 has occurred when a detainee has a personal space of less than three square metre, which is below the four square metre norm of the Committee for the Prevention of Torture. Other relevant elements are the availability of toilets and the hygienic situation.<sup>55</sup>

The Chamber judgment cites a report of a Special Commission of the Italian Senate, which points out that a thirty square metre room in the Lampedusa detention centre was supposed to accommodate twelve persons (2.5 square metre per person) but in fact accommodated up to twenty-five people (1.2 square metre per person). Toilets and showers had no privacy, there were no taps, and the smell from the toilets was pervasive.<sup>56</sup> The Grand

<sup>51</sup> *Khlaifia and others v. Italy*, App no 16483/12 (ECHR 1 September 2015).

<sup>52</sup> *Khlaifia* Grand Chamber supra note 48, para 212–255.

<sup>53</sup> *Ibid.*, para 136–211.

<sup>54</sup> *Ibid.*, para 158–160.

<sup>55</sup> *Ibid.*, para 165–167.

<sup>56</sup> *Khlaifia* Chamber, para 131.



Chamber, however, begins by taking into account the context in which the events had taken place (one of the factors to be taken into consideration to assess whether the situation reaches the minimum level of severity, see above), and in passing accepts the qualification of this as a context of humanitarian emergency.<sup>57</sup> More specifically, it held that “(t)he arrival *en masse* of North Africa migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities”.<sup>58</sup> On the actual conditions, the Court stated: “Admittedly, as noted by the Chamber, the accommodation capacity available in Lampedusa was both insufficient to receive such a large number of new arrivals and ill-suited to stays of several days.” But it then goes on to note that the revolt (which in the Court’s words included protest marches, clashes with the local community, and acts of self-harm and vandalism) “contributed to exacerbating the existing difficulties and creating a climate of heightened tension”. This culminates in the following paragraph:<sup>59</sup>

While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.

The Court then turned to the situation in the Lampedusa detention centre. It found the report of the Special Commission of the Italian Senate irrelevant because it dates from 2009, refers to a report dating from four months before Khlaifia was detained<sup>60</sup> and ignores a report of Amnesty International from the same period that gives similar facts as the Italian Senate Committee two years earlier.<sup>61</sup> After this, the Court did not mention the hygienic situation anymore. On the “alleged overcrowding” it pointed out that the government had given conflicting statements about the capacity of the detention centre as well as about the number of inmates present at the relevant moment. The Court concluded from this that the capacity of the detention facility must have been exceeded by fifteen per cent to seventy-five per cent. It did not mention that the 2.5 sq metre per person which inmates would have had if there had been

<sup>57</sup> *Khlaifia* Grand Chamber, para 178.

<sup>58</sup> *Ibid.*, para 179.

<sup>59</sup> *Ibid.*, para 185.

<sup>60</sup> *Ibid.*, para 190–191.

<sup>61</sup> *Ibid.*, para 50 where the Amnesty International report is quoted.

no overcrowding (above) was already below the minimum established in the Court's case law. Instead, it pointed out that inmates could move around within the detention centre, make phone calls, make purchases, and could contact humanitarian organizations and lawyers. Furthermore, it pointed out that although Khlaifia and his fellow applicants had been rescued at sea, they were not asylum seekers and were not elderly nor minors, and therefore they were not vulnerable persons. Their detention lasted merely three or four days.<sup>62</sup> The Court pointed to other case law where short term detention had not been held to be a violation of Article 3 despite problematic conditions, and found that the minimum level of severity had not been reached.<sup>63</sup>

The Court has held in previous cases that serious socio-economic problems cannot justify detention conditions that fall below the threshold of Article 3 ECHR.<sup>64</sup> Nonetheless, the new logic of the *Khlaifia* judgment has been applied to the appalling detention conditions on the Greek Islands since then.<sup>65</sup> It has, however, not been applied in a case on migrant detention conditions in a Greek police cell in February 2016 a violation of Article 3 ECHR, where the Court did not refer to the challenges the Greek authorities were facing.<sup>66</sup> Like the Court of Justice judgment on the Röske detention centre, this is another indication that, even if the case law of the European courts has a colonial structure, this does not determine the outcomes. I will return to this in the concluding paragraph of this chapter.

#### 4.3.2 *The Spanish Exclaves*

Another example of application of the Convention “with due regard to local circumstances” is the case about the Spanish exclaves. A Grand Chamber judgment of the European Court of Human Rights addressed the immediate return of two Malian and Ivoirian nationals by Spain after they had climbed the fence between Morocco and Spain in Melilla.<sup>67</sup> The Chamber in *N.D.*

<sup>62</sup> *Ibid.*, para 192–195

<sup>63</sup> *Ibid.*, para 196–199.

<sup>64</sup> *Poltoratskiy v. Ukraine* [2003] V ECHR 92, No. 38812/97. On balancing as part of Article 3 ECHR, see Hemme Battjes, “In Search for a Fair Balance. The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR” (2009) 22 *Leiden Journal of International Law* 583.

<sup>65</sup> *J.R. et autres c Grèce* App no 22696/16 (ECHR 25 January 2018); *Kaak et autres c Grèce* App no 34215/16 (ECHR, 3 October 2019).

<sup>66</sup> *SH. D. et autres c. Grèce, Autriche, Croatie, Hongrie, Macédoine du nord, Serbie et Slovénie*, App no 14165/16 (ECHR, 13 June 2019).

<sup>67</sup> *N.D. and N.T. v. Spain* App no 8675/15 and 8697/15 (ECHR Grand Chamber, 13 February 2020).

and *N.T. v. Spain* ruled that their return was not in violation of Article 3 ECHR, an issue not under review by the Grand Chamber. The Chamber did, however, conclude that their return as part of a group without individual decision or examination had been a violation of the prohibition of collective expulsion in the sense of Article 4 Protocol 4 ECHR. In agreement with the Chamber, the Grand Chamber found that the case fell within Spain's jurisdiction because Spanish state agents had forced the men to leave Spanish territory,<sup>68</sup> and it also accepted that their removal constituted an expulsion.<sup>69</sup> Contrary to the findings by the Chamber, however, the Grand Chamber did not consider that the expulsion had been a collective one, despite the absence of individual examination and decision making.<sup>70</sup> The Grand Chamber stated, in conformity with consistent case law, that

(i)t should be stressed at the outset that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens.<sup>71</sup>

By way of innovation, it then stated that states “may in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements”,<sup>72</sup> and thus assimilated the right to control borders in the manner states prefer to the right of states to control migration. Subsequently, it emphasised “the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East”.<sup>73</sup> In a remarkable next move, the Grand Chamber then interpreted Article 4 Protocol 4 as having as its aim to maintain the possibility to make the claim that the return would violate the Convention<sup>74</sup> – which must mean: *another* Convention provision. This means that the prohibition of collective expulsion has little, and potentially no added value compared to the other provisions of the Convention. But is expulsion only a prohibited collective expulsion if, through the collective character of the expulsion, other Convention rights are

<sup>68</sup> *Ibid.*, para 109–111.

<sup>69</sup> *Ibid.*, para 173–192.

<sup>70</sup> Until now, the Court had labelled such expulsions as collective, see in particular *Hirsi Jamaa and others v. Italy* App no 27765/09 (ECHR GC, 23 February 2012).

<sup>71</sup> *N.D. and N.T.*, supra note 67, para 167.

<sup>72</sup> *Ibid.*, para 168.

<sup>73</sup> *Ibid.*, para 169.

<sup>74</sup> *Ibid.*, para 198.

violated too? If so, what is then the independent meaning of Article 4 Protocol 4 and its added value? The Court then stated that the applicants' own conduct "is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol 4".<sup>75</sup> In an earlier judgment, the Court held that the state was not responsible for the fact that there had been no individual examination in a situation where that had been made impossible by the lack of cooperation of a person with the procedure for conducting an individual examination.<sup>76</sup> In the case of the Malian and Ivoirian men, however, the Court formulated the following exception: the prohibition of collective expulsion does not apply if people have genuine and effective access to a means of legal entry but do not make use of it, and instead cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and the use of force, and thereby create a clearly disruptive situation which is difficult to control and endangers public safety. This non-applicability of the prohibition of collective expulsion can – the Grand Chamber continued – be different if there were cogent reasons not to use this means of legal entry which are based on objective facts for which, in this case, Spain is responsible.<sup>77</sup>

In effect, the Court holds that the expulsion of a group of people without individual examination does not constitute a collective expulsion (despite standing case law finding precisely this covered by that notion) because, as a starting point, states have the right to control migration, and can guard their borders in the manner they prefer. As long as there is a possibility for people to access the territory of a state in a legal manner for the purpose of invoking the protection of the Convention, the expulsion of a group without individual examination is not collective because the members of that group have an alternative which does allow for individual assessment. This interpretation is given in light of "the challenges facing European States in terms of immigration control", and it entails that at European land borders the notion of collective expulsion no longer has independent significance in comparison to the other provisions of the Convention.

In its reasoning in *N.D. and N.T.*, the Grand Chamber mentioned two possibilities which the men had to access Spain legally. The first was to go to a border crossing point at the Spanish–Moroccan land border. The applicants,

<sup>75</sup> *Ibid.*, para 200.

<sup>76</sup> The Court refers to *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.) App no 18670/03, ECHR 2005-VIII and *Dritsas and Others v. Italy* (dec.) App no 2344/02, 1 February 2011.

<sup>77</sup> *Ibid.*, para 201.

however, argued that due to brutalities from the side of Moroccan police forces it was very difficult or even impossible to approach the border crossing point. As a response, the Grand Chamber observed that there is no evidence that suggested that Spain was responsible for this, and hence dismissed the applicants' argument as irrelevant.<sup>78</sup> This ultimately means that since the responsibility of Spain for the actions of Moroccan police forces is hard to establish, the Court accepts the ineffectivity of Article 4 Protocol 4 not in theory (the Court does mention the possibility of Spanish responsibility) but in practice as a consequence of evidentiary requirements. There is considerable evidence of the major impact of Spanish policies on Moroccan migration policy and practice, and requiring evidence of Spanish government involvement in the Moroccan practice of preventing particular people from approaching a particular border crossing point at a particular moment makes the theoretical norm the Court formulates ineffective in practice.

The second possibility that the Court held against the two men was the possibility to invoke the protection of the Convention at a Spanish embassy or consulate, for example, by applying for a visa.<sup>79</sup> This reasoning is, however, incompatible with the Grand Chamber decision in *M.N. and Others v. Belgium* delivered three months after *N.D. and N.T. v. Spain*. It became clear from *M.N. and Others v. Belgium* that the refusal of a visa by an embassy or consulate abroad does not constitute an exercise of jurisdiction in the sense of Article 1 ECHR (supra). Therefore, in contrast to what the Court suggested in *N.D. and N.T. v. Spain*, approaching embassies or consulates is not a manner in which non-nationals can invoke the protection of the Convention.

Two months after *N.D. and N.T. v. Spain*, a Chamber judgment ruled that three Chechnyans rejected at the Polish-Byelorussian border were within the jurisdiction of Poland,<sup>80</sup> and that a refusal to examine their asylum application constituted a violation of Article 3 ECHR<sup>81</sup> as well as a violation of the prohibition of collective expulsion.<sup>82</sup> Once again, this signals that, even if one accepts the colonial structure of the Court's case law, this does not imply that the Court necessarily rules against migrants – to which we will return in the conclusion of this chapter.

<sup>78</sup> *Ibid.*, para 218–221.

<sup>79</sup> *Ibid.*, para 222–228.

<sup>80</sup> *M.K. and Others v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020) para 130–131.

<sup>81</sup> *Ibid.*, para 174–186.

<sup>82</sup> *Ibid.*, para 204–211.

#### 4.4 EMERGENCY POWERS

So far, we have seen that an emergency may lead to non-application of the law and to sub-standard application of the law. Yet another option is that an emergency may enable the state to use special powers which it cannot normally use.

##### 4.4.1 *The EU Relocation Decision*

The use of emergency powers was at stake in the Court of Justice's judgment in *Slovak Republic and Hungary v. Council of the European Union*. On 22 September 2015, the Council adopted a decision which obliged EU member states to cooperate in relocating asylum seekers from states like Italy, Greece and Hungary (which as a consequence of the Dublin Regulation are responsible for the examination of the large majority of asylum applications in Europe) to states with less asylum seekers. This Council Decision was based on Article 78(3) TFEU, which allows for provisional measures for the benefit of states that are confronted by an emergency situation characterised by a sudden influx of third country nationals. Slovakia and Hungary asked the Court of Justice of the EU to annul the Council Decision. In its judgment, the Court dismissed their actions.<sup>83</sup> One of the issues the Court dealt with was whether the Council could use emergency competence under Article 78(3) TFEU. The Court rejected the argument that the influx was not sudden (Slovakia and Hungary argued the increase had been gradual). The Court pointed out that the Council had identified a sharp increase in a short period of time, in particular in July and August 2015, and concluded that, without making a manifest error of judgment, the Council could classify such an increase as "sudden" in the sense of Article 78(3) TFEU even though the increase was a continuation of a pre-existing pattern. In its reasoning, the Court of Justice also added that EU institutions such as the Council have broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, and complex assessments.<sup>84</sup>

Besides that gradual increase, a second argument for annulment raised by Slovakia and Hungary was that the emergency in Greece was not caused by

<sup>83</sup> *Slovak Republic and Hungary v. Council of the European Union* CoJ EU (GC) 6 September 2017, Cases C-643/2015 and C-647/2015.

<sup>84</sup> *Slovak Republic and Hungary v. Council of the European Union*, para 122–124.

the influx, but by the serious shortcomings of the Greek asylum system.<sup>85</sup> The Court admitted that there were structural shortcomings in Greece in terms of lack of reception capacity and of capacity to process asylum applications, all of which also contributed to the emergency situation. However, it held that the 2015 inflow of asylum seekers was on such a scale that it would have disrupted any asylum system, even one without structural weaknesses. Therefore, there was a sufficiently close link between the inflow and the emergency.<sup>86</sup> The Court therefore accepted that the Council could use the competence under Article 78(3) TFEU to take provisional measures in an emergency situation.

To sum up, the Court held that the Council could use its emergency competence in a situation where policymakers saw the presence of a number of asylum seekers as an emergency, and refused to substantively address arguments holding that the situation did not (as Article 78(3) TFEU requires) arise suddenly, or that the emergency did not arise as a result of the sudden influx but because of pre-existing shortcomings in asylum policy.

#### 4.4.2 “Waving Through” and Dublin

Two other Grand Chamber judgments address the basic rule of the Dublin Regulation that asylum applications have to be examined by the EU member state where the applicant has entered the territory of the EU.<sup>87</sup> The cases concerned Afghan and Syrian asylum seekers who had entered the European Union via Turkey and Greece. They had then travelled onwards, and were transported by the Macedonian, Serbian, Croatian and Slovenian authorities northward, and subsequently applied for asylum in Austria. Under normal circumstances, Greece would have been the responsible member state because that was where they irregularly entered the EU (Article 13(1) Regulation 604/2013 (Dublin III)). However, the sub-standard nature of the Greek asylum system has made return of asylum seekers to Greece impossible since 2011.<sup>88</sup> Therefore, it could be argued that Croatia was responsible on the basis of Article 13(1) Dublin III. At the core of these cases was the question whether the asylum applicants had entered Croatia irregularly.<sup>89</sup> When they

<sup>85</sup> See on these shortcomings *M.S.S v. Belgium and Greece*, supra note 23; and *N.S and M.E.* C-411/10 and C-493/10 [2011].

<sup>86</sup> *Slovak Republic and Hungary v. Council of the European Union*, para 126–128.

<sup>87</sup> Case C-646/16 *Jafari* [2017] and Case C-490/16 *A.S. v. Slovenia* [2017].

<sup>88</sup> See *M.S.S. v. Belgium and Greece*, supra note 23, and Cases C-411/10 and C-493/10 *N.S. and M.E* [2011].

<sup>89</sup> I leave aside the issues of whether the Croatian wave through could be qualified as the issuance of a visa in the sense of Article 12 Dublin III, as well as whether the wave through could be

reached the Croatian border in November 2015 and February 2016 respectively, the Croatian authorities did not initiate an expulsion procedure, did not check whether they qualified for lawful entry into Croatia, but organised onward transport to Slovenia.<sup>90</sup> Thus, they entered Croatia with *de facto* authorisation of the Croatian authorities, while this authorisation could not be labelled either as the issuance of a visa or as visa waived entry in the sense of Article 14 Dublin III. If their entry could be labelled as based on either a visa or a visa waived entry, this would lead to Croatian responsibility on the basis of Article 12 Dublin III. If, to the contrary, this was not considered as irregular entry in the sense of Article 13 Dublin III, then Dublin's default rule (responsibility of the member state where the asylum application is lodged) was applicable (Article 3(2) *juncto.* 15 Dublin III). Underlying this very formal issue (can *de facto* authorised entry be considered as irregular entry?) was the question whether Dublin III had to be applied so as to concentrate the overwhelming majority of asylum seekers in peripheral member states, or whether the circumstances in 2015/2016 justified spreading the burden. In other words: would asylum seekers be allowed to set in motion a spontaneous intra-European solidarity mechanism, or were they to be referred back to the peripheral member states?

Advocate General Sharpston interpreted Article 13 Dublin III in such a manner that *de facto* authorised entry could not be labelled as unauthorised entry in the sense of Article 13 Dublin III. As a result, in her opinion the member state where an application had been lodged was responsible for the examination of asylum applications. While this is a strictly formal interpretation, throughout her opinion Sharpston emphasised that the situation at the time was “wholly exceptional”<sup>91</sup> and “unprecedented”.<sup>92</sup> The Court of Justice opted, however, for the opposite approach, which Sharpston labels as “the

considered as visa waived entry in the sense of Article 14 Dublin III. Including these issues into the analysis would add complications without contributing to the overall analysis.

<sup>90</sup> Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 9, 71, and 86. *Jafari*, *supra* note 87, para 29; A.S. *supra* note 87, para 14.

<sup>91</sup> Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 18 and 242.

<sup>92</sup> Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 109 and 237. Throughout her opinion she uses such terms: “the times were anything but normal” (para 5); “extraordinarily large number of people” (para 104); “exceptional situation” (para 155); Dublin II was not conceived to deal with “a massive inflow of people” (para 171 and 238); “humanitarian crisis” (para 181–182); “the front line” (para 183); “a sudden massive inflow of third-country nationals” (para 221); border states “would have been overwhelmed” (para 231); “overburdened” (para 232); “disproportionate burden” (para 234); “one of the biggest humanitarian challenges that (Slovenia) has faced since the Second World War” (para 235); “mass inflow of people” (para 236).



strict interpretation”.<sup>93</sup> The Court used an *a contrario* construction of the term irregular crossing: any border crossing without fulfilling the conditions imposed by domestic legislation in the member states concerned must necessarily be considered irregular in the sense of Article 13 Dublin III.<sup>94</sup> After having reached this conclusion it continued to refer to “the arrival of an unusually large number of third country nationals”,<sup>95</sup> but merely to state that this “cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation”.<sup>96</sup>

Both the Advocate General and the Court use a formal approach to interpret the meaning of “irregular crossing” in Article 13 Dublin III. Undeniably, the bigger issue (should asylum seekers be contained in peripheral states, or should they be allowed to spread out over all member states if there are many of them?) plays a role, be it not in the formal reasoning. Sharpston uses the notion of exception and crisis liberally throughout her opinion, with the effect of naturalising the outcome she proposes: making an exception to the usual Dublin system of placing the responsibility for asylum seekers with peripheral states. The Court is quite prim in its language, and even when it refers to “unusual” or “exceptional” numbers it does so without finding this to be a good reason to deviate from the conclusion it has reached through its formal approach. This underlines how formal interpretation methods do not guarantee that there is only one possible outcome, and it underlines the importance of rhetorical tools to help make the outcome of a formal interpretation plausible.

#### 4.5 CONCLUSION

Many consider the case law of the European courts since *Khlaifia* to constitute a rupture. However, both courts themselves have not indicated that they want to break with previous case law and have emphasised the continuity with previous precedents. One may dismiss this as bad faith, or as a result of damage control efforts of liberal judges. While these hypotheses have not been

<sup>93</sup> Opinion Advocate General Sharpston, Case C-490/16 and C-646/16, para 231.

<sup>94</sup> CoJ 26 July 2017, Case 646/16, para 74; Case C-490/16 para 39.

<sup>95</sup> It sticks to this phrase, CoJ 26 July 2017, Case 646/16, para 40, 54, 58 and 59. These words are taken from the preliminary questions, para 36, question 2(a). The Court only uses other terms if they are taken from legal instruments: “mass influx”, para 97, from Article 18 Directive 2011/55, and “sudden inflow” from Article 78(3) TFEU. For unclear reasons, in Case C-490/16, the Court sticks to “an exceptionally large number of third-country nationals”, para 36, 40, 41 and 42.

<sup>96</sup> CoJ 26 July 2017, Case 646/16, para 93.

explored here and hence remain possible, this chapter has explored the idea that, indeed, the recent migration case law does not constitute a rupture but a new inflection of a colonial ground pattern that has been part of European migration law for a long time.<sup>97</sup> Indeed, three techniques of legal governance that have their origin in colonialism (not applying European treaty law; application of European treaty law with lowered standards; and the use of emergency powers) can be identified in recent migration case law of the European courts. They can also be seen at work more broadly, as in the emergency character of the EU Trust Fund for Africa (which side-lines constitutional guarantees as well as public procurement)<sup>98</sup> or in the widespread reintroduction of internal border controls since 2015.<sup>99</sup> In this understanding, the European courts always had the option of relying on these techniques, but in previous cases (on border detention<sup>100</sup> or hot returns<sup>101</sup>) did not use them in the way they have done since *Khlaifia*. And we have seen that since *Khlaifia* too, the Courts have not always relied on these techniques in the same way. This, as well as the differences between Chamber and Grand Chamber judgments in Strasbourg and between Advocate General opinions and judgments in Luxembourg, shows that the colonial deep structure of the Courts' migration case law does not necessarily result in outcomes that are as excluding as they have been in recent years, even when coloniality remains a structuring element. Naming and exposing this colonial deep structure may be helpful to the extent that it makes a legal and political critique possible, in addition to helping actors to navigate the field.

<sup>97</sup> E.g. Dembour *supra* note 3; Nadine El-Enany, *(B)ordering Britain. Law, Race and Empire* (Manchester University Press 2020).

<sup>98</sup> Thomas Spijkerboer and Elies Steyger, "European External Migration Funds and Public Procurement Law", (2019) 4 *European Papers* 493.

<sup>99</sup> European Commission, *Notifications of the Temporary Reintroduction of Border Controls*, [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en), accessed 4 February 2021.

<sup>100</sup> *Amuur*, *supra* note 27.

<sup>101</sup> *Hirsi Jamaa*, *supra* note 70.

# 5

## Migration as a Constitutional Crisis for the European Union

ALEZINI LOXA AND VLADISLAVA STOYANOVA

### 5.1 INTRODUCTION

This chapter aims to offer insights into the wider implications for the rule of law, including for the EU constitutional order, of the restrictions of migrants' and asylum-seekers' rights that follow from systematic non-compliance with the Common European Asylum System (CEAS) by certain Member States.<sup>1</sup> In other words, has the migration and asylum crisis developed into an EU constitutional crisis? There is a growing body of literature about the constitutional crisis of the EU.<sup>2</sup> A rich debate also exists as to the failures of the CEAS.<sup>3</sup> Our aim is to bring these two into conversation to demonstrate that migration governance has a constitutive role for the EU. If the EU fails to treat the migration crisis as an EU constitutional crisis, the EU might risk disintegration and return to the national. This would take the evolution of the European project further away from its telos.

The framing of our research question and our arguments requires at least three initial clarifications that are offered in [Section 5.2](#). The first refers to our

<sup>1</sup> Restrictive practices regarding migrants' rights might be in accordance with the CEAS, but still in violation of other standards (such as those enshrined in the ECHR). Such restrictive practices might be also in compliance with both the CEAS and ECHR, but still objectionable in light of, for example, the wider principles of solidarity or the rule of law that are constitutionally enshrined.

<sup>2</sup> See K L Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) *Yearbook of European Law* 1, for further references.

<sup>3</sup> M den Heijer, J Rijpma and T Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System' (2016) 53 *Common Market Law Review* 607.

understanding of the EU constitutional order and when this order can be perceived as being in crisis. The second refers to our understanding of a migration and asylum crisis. The third refers to the specificities of the EU as a supranational legal order in relation to the migration crisis as an EU constitutional crisis. Section 5.3 presents how the EU constitutional order has been challenged by the migration crisis. Specifically, it presents how non-compliance, non-enforcement and informalization have become characteristics of the EU migration and asylum governance especially post 2015 and have prompted a constitutional crisis where both EU institutions and Member States furnish disintegration. Given the current vision of the EU on the development of its asylum and migration governance, as expressed in the New Asylum and Migration Pact, Section 5.4 shows that these characteristics are likely to persist and will continue to have constitutional implications. Finally, Section 5.5 examines what the future holds for EU migration and asylum governance in view of the rise of populism in EU Member States, to conclude that all the alternative scenarios indicate that it might be wiser for the EU to *not* come forward with new proposals (such as the New Pact) in ‘politically and symbolically charged areas’ (such as migration and asylum) during populist times.<sup>4</sup>

## 5.2 A UNION OF CRISES

To address the question whether the migration and asylum crisis has developed into an EU constitutional crisis, it is necessary to explain our understanding of constitutional crisis. For this purpose, it is useful to refer to Hailbronner who defines the crisis of EU constitutional democracy as ‘weakening of European democracy and of the normative force of important European constitutional principles’.<sup>5</sup> These key constitutional principles of the EU are the rule of law, mutual trust, sincere cooperation, solidarity, and commitment to human rights and democracy.<sup>6</sup> Hailbronner explains that crisis of constitutional democracy entails ‘a systemic weakening of the power of constitutional norms to provide direction for and constraints on the exercise

<sup>4</sup> An expression taken from R McCrea ‘Forward or Back: The Future of European Integration and the Impossibility of the Status Quo’ (2017) 23 *European Law Journal* 66, 72 where he explains that a reason for the success of the European integration is the choice to integrate ‘less controversial “functional areas” and to avoid ‘politically and symbolically charged areas’.

<sup>5</sup> M Hailbronner, ‘Beyond Legitimacy. Europe’s Crisis of Constitutional Democracy’ in M Graver, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 277, 278.

<sup>6</sup> Article 2 TEU.

of political power and/or a considerable decrease in the quality of democracy.<sup>7</sup> The weakening of EU constitutional norms has important implications for how the EU engages with Member States. In this sense then, our understanding of an EU constitutional crisis also includes the inability of the EU, due to the absence of tools or the non-utilization of existing tools, to effectively provide a political and legal response to the shared challenges faced by Member States from within its constitutional framework and in respect of its normative foundations.<sup>8</sup>

As to the migration and asylum crisis, we understand this as a twofold crisis. First, a crisis caused by the collapse of the Common European Asylum System, manifested through its systemic non-application and the inherent and well-known deficiencies as to its design. Second, a crisis resulting from the prevalent and protracted situation experienced post 2015 where the EU constitutional principles of human rights, solidarity and rule of law are not upheld in EU legislative or judicial practice (as shown in detail in [Section 5.3](#)). All of this suggests a failure of the European Union to lead a response to address the common challenge experienced at Member States level.

Certainly, individual Member States, as demonstrated in [Part III](#) of this volume, face constitutional challenges of weakened democracies and have systematically engaged in restrictions of migrants' rights. It can thus be argued that appeals for anti-immigration policies in constitutional democracies should 'not be mistaken for evidence of a "constitutional crisis"'; rather such appeals are 'compatible with existing constitutional understandings and arrangements'.<sup>9</sup> Restrictions upon migrants' rights 'can take place within normal politics' since commitments to human rights can be reinterpreted in a way that is less favourable to migrants.<sup>10</sup> The position of the EU is, however, specific in comparison with the Member States. Accordingly, while restrictions of migrants' rights might not necessarily lead to a constitutional crisis at the level of Member States,<sup>11</sup> the situation is different from the perspective of the EU. This is because the EU is an example of governance beyond the

<sup>7</sup> Hailbronner (n 5) 277, 280.

<sup>8</sup> 'One of the weakest elements in the legal-political edifice of today's European Union (EU) is [...] ensuring that the national governments are faithful to the basic principles of democracy, protection of fundamental rights, and the Rule of Law.' Scheppele, Kochenov and Grabowska-Moroz (n 2) 2.

<sup>9</sup> A Aleinkoff, 'Inherent Instability. Immigration and Constitutional Democracies' in M Graver, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 477, 485.

<sup>10</sup> *Ibid.*, 491.

<sup>11</sup> See [Chapter 1](#) in this volume.

state.<sup>12</sup> If the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States must be assumed, Member States will resort to self-help, that is, each Member State will try to individually solve the issues in accordance with its own interests as perceived at the particular point in time.<sup>13</sup> Self-help ultimately defeats the purpose of having a Union, or at least having an EU with competence in the area of migration and asylum.

### 5.3 THE CHALLENGES TO EU MIGRATION AND ASYLUM GOVERNANCE

EU integration in the area of migration and asylum has been characterized by a ‘continued tension between nationalism and Europeanization’.<sup>14</sup> The constant bargain between Member States and the EU, with respect to transfer of sovereign powers has shaped this legal area that has not evolved in light of the *telos* of an ever closer Union. Instead, as Walker notes, ‘the resilience of the tension between competing visions of the role of the states and the European centre in the development of FSJ [the area of Freedom, Security and Justice]’ can be seen ‘as a factor conditioning its constitutionalization’.<sup>15</sup> This is persistent in the history of EU integration in asylum and migration throughout the treaties where the ‘sovereigntist legacy in immigration translates itself into a policy-making environment in which national jealousies and priorities are never far from the surface’.<sup>16</sup> Overall, it was not until the Lisbon Treaty when certain constitutional guarantees first made their appearance in EU migration and asylum law.<sup>17</sup>

<sup>12</sup> For the EU’s mission of taming the nation-state, J H H Weiler, ‘To Be a European Citizen. Eros and Civilization’ in J H H Weiler (ed), *The Constitution of Europe* (Cambridge University Press 1999) 324.

<sup>13</sup> As it actually happened during the 2015–2016 crisis.

<sup>14</sup> H Toner, ‘The Lisbon Treaty and the Future of European Immigration and Asylum Law’ in L Azoulay and K de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 28.

<sup>15</sup> N Walker, ‘In search of the Area of Freedom, Security and Justice: A constitutional Odyssey’ in N Walker (ed), *Europe’s Area of Freedom, Security, and Justice* (Oxford University Press 2004) 20.

<sup>16</sup> *Ibid.*

<sup>17</sup> By this we mean full judicial review by the Court of Justice of the EU. Under Amsterdam Treaty the jurisdiction of the CJEU was limited substantively and procedurally pursuant to Articles 62(1) 68(3) TEC for the transitional period prescribed in Article 67 TEC. Contrary to the other transitional arrangements of Amsterdam, the limitation to the Court’s jurisdiction was only abolished with the Treaty of Lisbon.

Against this background, it can be expected that a migration crisis would push the EU framework of cooperation to its limits. Still, with the legal mechanisms in place after Lisbon it was not certain to what extent such a crisis could affect the EU as a constitutional order. This uncertainty has been resolved given that, as this section will show, post 2015 the governance of migration and asylum has been pushed outside the EU constitutional frame with serious implications for the EU legal order. This section thus demonstrates how non-compliance, non-enforcement and informalization have become the prevalent characteristics of EU migration and asylum governance post 2015. All of this has led to a constitutional crisis where both the EU institutions and the Member States create ‘disintegration by evading existing law’.<sup>18</sup>

### 5.3.1 Non-compliance

To begin with, Member States’ compliance has been an issue characterizing asylum and migration law harmonization for many years. Even prior to the migration crisis, Member States in the south were turning a blind eye towards secondary movement by asylum seekers.<sup>19</sup> Italy, Bulgaria, Hungary and Malta feature among the Member States with a history of non-compliance with the CEAS requirements.<sup>20</sup> Greece has, however, been the primary culprit for defying the rules. The structural deficiencies of the Greek asylum system resulted in the cases of *MSS v. Belgium and Greece* and *N. S. and others* that recognized that Member States should not always carry returns under Dublin if this could expose asylum seekers to treatment contrary to their human rights.<sup>21</sup> At that point, the foundational principle of mutual trust as the basis of the European project and, relatedly, the CEAS, was undermined by the systemic flaws existing in one EU Member State. It is important to note, however, that the non-application of the Dublin mechanism took place from within the EU legal framework. Specifically, the non-application of the

<sup>18</sup> R Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2021) 44 *West European Politics* 72, 86.

<sup>19</sup> D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53 *Common Market Law Review* 1545, 1548.

<sup>20</sup> See *Tarakhel v. Switzerland* App no 29217/12 (ECHR 2014); V Stoyanova, ‘“Recasting” Detention of Asylum Seekers: Human Rights Law, EU Law and Its Application in Bulgaria’ in V Mitsilegas, V Moreno-Lax and N Vavoula (eds), *Securitising Asylum Flows* (Brill 2020) 319; European Council on Refugees and Exiles, ‘Dublin II Regulation: Lives on hold – European Comparative Report’, February 2013, 113–114.

<sup>21</sup> *M.S.S. v. Belgium and Greece* [GC] App no 30696/09, ECHR 2011; Judgment of 21 December 2011, *N. S. and others*, C-411/10 and C-493/10, EU:C:2011:865.

ordinary Dublin rules on responsibility was based on Article 3(2) of Dublin II, according to which Member States have a discretion to examine asylum claims even in cases where they were not responsible according to the Dublin rules.<sup>22</sup> Despite the non-compliance with the rules, no hard enforcement measures were adopted by the European Commission. Instead, the measures actually taken at the EU level focused on providing financial and administrative support.<sup>23</sup>

The financial and administrative support proved insufficient in the face of the 2015 arrivals. This is because the architecture of the EU legal order relies on the importance of patrolling the common external borders while allowing an internal area of free movement. The story as to how the rights of non-EU citizens have been sacrificed, so that the EU citizens benefit from free movement within the Union, is well known.<sup>24</sup> In relation to the interplay between border control and the rights of asylum-seekers, the message transmitted by the EU to the Member States of South and Central Europe has prioritized the control of the external borders, often at the expense of asylum-seekers.<sup>25</sup> This message has been part of the constitutional foundation of the EU, which has implied ‘collectivization of the protectionist side of the nation state’.<sup>26</sup>

During the 2015/2016 crisis the ‘collectivization of the protectionist side of the nation state’ created particular problems for the EU that protectionism would not normally create for the nation state. Faced with increased arrivals of migrants and refugees, the periphery EU Member States had two choices – (i) preventing entry at all costs or (ii) subverting the EU asylum system by not registering arrivals but rather letting people make their way to the North and the West. As to the first option, it implied a humanitarian crisis at the EU doorstep.<sup>27</sup> It turned out to also be practically impossible to achieve.<sup>28</sup> So, the

<sup>22</sup> Dublin III then came with an amended Article 3(2) in order to reflect the specific circumstance of non-return due to systemic flaws in the Member State responsible which could lead to treatment contrary to Article 4 of the Charter.

<sup>23</sup> For an overview see European Commission, Recommendation of 8.12.2016 Addressed to the Member States on the Resumption of Transfers to Greece Under Regulation (EU) No. 604/2013, 8 December 2016, COM(2016) 8525 final, paras 4–8

<sup>24</sup> R Byrne, G Noll and J Vedsted-Hansen, ‘Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System’ (2020) 33 *Leiden Journal of International Law* 871.

<sup>25</sup> *Ibid.*

<sup>26</sup> G Noll, ‘Why the EU Gets in the Way of Refugee Solidarity?’ *Open Democracy* 22 September 2015.

<sup>27</sup> This almost became a reality in February 2020 when the Turkish president deliberately ignored the EU-Turkey statement and let migrants and refugees reach the Greek border.

<sup>28</sup> People find ways to circumvent border controls.



second option prevailed; the periphery EU Member States bypassed their obligations and became corridors *en route* to the North and West. Subsequently, the failure of the Member States located at the external borders to offer substantive protection to asylum seekers and to guard the borders created a domino effect of non-compliance. Germany publicly declared that it would disregard Dublin and would accept all refugees that managed to enter its territory.<sup>29</sup> As a consequence, ‘the “Western Balkans route” became an epitome for the partial collapse of the Dublin system and the EU’s border control policies’.<sup>30</sup> The practical collapse of Schengen followed – in the autumn of 2015 border controls were reinstated far beyond the permissible time limits set by the Schengen Border Code.<sup>31</sup> Austria, Germany, Denmark, Sweden, Norway and France in practice nullified the Schengen acquis. These countries have exhausted all procedures and continued to impose border controls until May 2020 under the justification of public policy or public security threats due to migratory movements.

### 5.3.2 Enforcement Deficit

EU asylum and migration law is not only disregarded, it is also not enforced. The problem is not that there are no enforcement mechanisms. Rather there is often ‘no interest in activating them’.<sup>32</sup> Specifically, it does not seem like the Commission ever understood non-compliance as an issue capable of threatening the constitutional structure of EU Law. This cannot but have negative repercussions for the constitutional structure of EU Law.

In this context, it was not until 2015 that proceedings were first initiated against Member States located at the external EU borders (Greece, Croatia, Italy, Malta and Hungary) to ensure ‘full compliance’ with EU asylum law.<sup>33</sup> This late reaction is hard to understand given that most of these countries defied EU law in a systemic manner. The procedures initiated by the Commission, which primarily concerned reception and registration upon

<sup>29</sup> A Dernbach, ‘Germany Suspends Dublin Agreement for Syrian Refugees’, 26 August 2015, Euractiv (translated by Sam Morgan, Der Tagesspiegel); D Thym, ‘Beyond Dublin-Merkel’s Vision of EU Asylum Policy’, 26 October 2015, EU Migration Law Blog.

<sup>30</sup> D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (n 19) 1549.

<sup>31</sup> P Thallmann, ‘Schengen, Migration – and the Resurrection of the Westphalian Nation-State?’ in C Rauegger and A Wallerman (eds), *The Eurosceptic Challenge, National Implementation and Interpretation of EU Law* (Hart 2019) 110–134.

<sup>32</sup> Den Heijer, Rijpma, and Spijkerboer (n 3) 614.

<sup>33</sup> EU Commission Press Release, ‘Implementing the Common European Asylum System: Commission Escalates 8 Infringement Proceedings’, 10 December 2015.

entry, were closed with regard to nearly all the Member States as the Commission found improvements.<sup>34</sup> The protracted situation of vulnerability experienced by asylum seekers on the ground testifies the opposite. At the same time, the Commission has not opened any infringement action in relation to the failures of Austria, Denmark, Sweden, Norway, Germany and France to comply with the Schengen Border Code. On the contrary, the Commission legitimizes these countries' actions of non-compliance by proposing amendments to the Border Code that would render the period of exceptional reinstatement of border controls close to indefinite.<sup>35</sup>

The failure of the periphery Member States to effectively protect EU borders and deter secondary movements prompted a reaction by the Member States of the North to protect their national borders. In essence, Member States with no experience in asylum, having troubled administration and unable to provide for the material needs of asylum seekers, failed to comply with the CEAS. This failure by the Member States at the external border, to keep migrants far from the Member States of Central and Northern Europe legitimized the violation of the Schengen *acquis* and the reestablishment of border controls. The EU institutions were simply bystanders for some time. Then, they proceeded with half-hearted attempts to ensure that the first deviants (the Member States at the external borders) comply with EU law and with endorsement of the second deviants (the Member States in the West and North) by recognizing the legitimacy of their defiance and proposing amendments to fit their behaviour.

The only cases related to infringements of the CEAS that have reached the CJEU concern Poland, Hungary and the Czech Republic.<sup>36</sup> These Member

<sup>34</sup> On the implementation of EURODAC Regulation (EU) 603/2013: Case INFR(2015)2197 against Croatia, Case INFR(2015)2202 against Greece and Case INFR(2015)2203 against Italy (closed 8/12/2016). On the Asylum Procedures Directive 2013/32/EU: Case INFR(2015)0402 against Greece (closed in 25/07/2019), Case INFR(2015)0459 against Italy (closed 25/07/2018). On Reception Conditions Directive 2013/33/EU: Case INFR(2015)0403 against Greece (closed 25/07/2019), Case INFR(2015)0460 against Italy (closed 10/10/2019). See, however, Cases INFR(2015)0432 and INFR(2015)0433 against Hungary on non-communication of transposition measures for the Asylum Procedures Directive 2013/32 and the Reception Conditions Directive, which are still open and Case INFR(2015)2201 against Hungary on the incorrect implementation of EU asylum and migration *acquis* which was referred to the CJEU and addressed in the Judgment of 17 December 2020, *Commission v. Hungary*, C-808/18, EU: C:2020:1029.

<sup>35</sup> EU Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders COM (2017) 0571 final.

<sup>36</sup> See European Commission Fact sheet, 'December infringements package: key decisions', 7 December 2017.

States were referred to the CJEU for non-compliance with the relocation decisions.<sup>37</sup> Hungary was also referred to the CJEU for non-compliance with the Asylum Procedures Directive, the Return Directive and the Reception Conditions Directive, read in conjunction with the Charter of Fundamental Rights of the EU.<sup>38</sup> These initiatives can be assessed as part of measures intended to address the broader rule of law problems in Hungary and Poland (such as independence of the judiciary, freedom of speech, etc.). This linkage of migration and asylum law with broader problems, has its positive sides – it might be an indication that the Commission perceives non-compliance with the CEAS as a problem that triggers more general concerns about the rule of law. At the same time, however, it might also indicate that the Commission is not that troubled by violations of EU migration and asylum law *per se*. If the latter is correct, the Commission does not seem to understand that such an approach threatens the EU internal rule of law. The EU is, after all, founded upon the centrality of law whose application and implementation guarantee not only rights for individuals (even if these happen to be migrants), but also the very viability of the integration project. When migration and asylum law function as legal areas characterized by compliance and enforcement deficit (by themselves even if not linked to broader rule of law problems), it can be doubted to what extent the EU can be considered as a constitutional order. Such doubts also arise since EU migration and asylum governance has been dominated by informalization, a feature that has become very prominent post 2015.

### 5.3.3 Informalization

By way of emergency framing, the EU response to the migration and asylum crisis was only in a very limited way characterized by measures adopted from within the Treaty framework. Instead, informal cooperation and the adoption of soft law was promoted for having the necessary expediency and flexibility to address the situation on the ground.<sup>39</sup> As a result, informal cooperation has

<sup>37</sup> Judgment of 2 April 2020, *Commission v. Poland, Commission v. Hungary and Commission v. Czech Republic* (Temporary mechanism for the relocation of applicants for international protection), C-715/17, C-718/17 and C-719/17, EU:C:2020:257.

<sup>38</sup> Judgment of 17 December 2020, *Commission v. Hungary*, C-808/18, EU:C:2020:1029. See also Judgment of 18 June 2020, *Commission v. Hungary* (Transparency of associations), C-78/18, EU:C:2020:476.

<sup>39</sup> J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in S Carrera, J Santos Vara and T Strik (eds), *The External Dimensions of EU Migration and Asylum Policies in Times of Crisis* (Edward Elgar Publishing 2019) 21.

become the governance paradigm.<sup>40</sup> The EU-Turkey agreement has been the prime example of this paradigm leading the way for a series of other informal instruments and creating spaces of liminal legality.<sup>41</sup> This agreement appeared in the form of a press release on the EU Council website and, according to the CJEU, it lies outside the scope of EU law.<sup>42</sup> Regardless of its legal nature which has been explored in detail,<sup>43</sup> the agreement managed to contain new arrivals and it has been seen as a blueprint for the external dimension of EU asylum and migration law ever since.<sup>44</sup> The move towards more informal cooperation in asylum and migration governance is also evident from the Migration Partnership Framework and the Joint Way Forward on Migration Issues between Afghanistan and the EU.<sup>45</sup> In this context, Wessel has noted that '[t]he political reasons for expediency and pragmatism are understandable, but [...], they do come at a price'.<sup>46</sup> The price to pay, in this case, is the push of migration and asylum law out of the EU constitutional framework to a space of liminal legality with severe costs for the affected individuals and serious repercussions for the EU constitutional order as a whole.<sup>47</sup>

These repercussions manifest themselves in the following. First, informal agreements bypass the European Parliament and cannot be an object of *ante* judicial control as they are not adopted following the procedure of Article 218 TFEU.<sup>48</sup> As a result, they lead to diminished protection for the affected

<sup>40</sup> T Strik, 'Migration Deals and Responsibility Sharing: Can the Two Go Together?' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 56–74.

<sup>41</sup> EU-Turkey statement, 18 March 2016 <[www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/)>.

<sup>42</sup> Exemplified in the Order of 12 September 2018, *NF v. European Council*, C-208/17 P to C-210/17 P, EU:C:2018:705, Order of 11 December 2018, *QC v. European Council*, T-834/16, EU:T:2018:984.

<sup>43</sup> M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 175–200.

<sup>44</sup> EU Commission, On establishing a New Partnership Framework with third countries under the European Agenda On Migration, COM (2016) 0385 final.

<sup>45</sup> EU Commission, On establishing a New Partnership Framework with third countries under the European Agenda On Migration, COM (2016) 0385 final; Joint Way Forward on Migration Issues between Afghanistan and the EU, WK 6248/20 INIT.

<sup>46</sup> Wessel (n 18) 72.

<sup>47</sup> Cf C Kilpatrick, 'The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality' (2017) 70 (1) *Current Legal Problems* 337, 341–345 on the term 'liminal legality' and the constitutional challenges raised for the EU in the context of the economic crisis.

<sup>48</sup> The control of an informal agreement after its adoption also does not seem very likely as was seen in the case of the EU-Turkey statement. Vara (n 39) 29–36.

individuals.<sup>49</sup> As Vara has noted, '[t]he lack of jurisdiction of the Court of Justice might also mean that it is not allowed to protect the general principles of EU law and, in particular, institutional balance and sincere and loyal cooperation.'<sup>50</sup>

Another repercussion from the informalization has been identified by Vitiello: 'by transposing EU principles, such as solidarity and shared responsibility, into international relations while de-contextualising them, the Union may trigger their transformation into "empty boxes" to be filled – on a case-by-case basis – with national voluntarism.'<sup>51</sup> Principles that are central to the EU architecture like solidarity, sincere cooperation and mutual trust are no longer seen as tied solely with intra-EU cooperation. Instead, they are transplanted to external action as a means of legitimizing informal cooperation with third countries as a central element of EU asylum and migration governance. This transplantation runs the real risk of diluting the legal significance of these principles in the EU legal order.<sup>52</sup> This has been the case with the binding principle of solidarity. Despite attempts to operationalize solidarity through the Relocation Decisions and the ensuing litigation,<sup>53</sup> the binding nature of this principle seems to have been indeed diluted – in light of the narratives of the Commission and the proposals in the New Pact – to something that 'must be given voluntarily' and that 'cannot be forced'.<sup>54</sup> (see Section 5.4.2) .

#### 5.4 THE NEW ASYLUM AND MIGRATION PACT

The presentation of the New EU Pact on Migration and Asylum in September 2020 expresses a continuous effort to find a solution within the EU by more harmonization through law and the introduction of a common framework for responsibility sharing.<sup>55</sup> Acknowledging the shortcomings exposed by the 2015/

<sup>49</sup> Vara (n 39) 33.

<sup>50</sup> *Ibid.*

<sup>51</sup> Michael W Doyle, 'Responsibility Sharing: From Principle to Policy' (2018) 30(4) *International Journal of Refugee Law* 618.

<sup>52</sup> D Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in V Mitsilegas, V Moreno-Lax and N Vavoula (eds), *Securitisating Asylum Flows* (Brill 2020) 158.

<sup>53</sup> Judgment of 6 September 2017 in *Slovakia v. Council* and *Hungary v. Council*, C-643/15 and C-647/15, EU:C:2017:631.

<sup>54</sup> See 'State of the Union Address 2016: Towards a Better Europe, a Europe that Protects, Empowers and Defends' (Press Release IP/16/3042). See A Michailidou and HJ Trenz, 'European Solidarity in Times of Crisis: Towards Differentiated Integration' (Arena Working Paper 5/2018) 7.

<sup>55</sup> New Pact on Migration and Asylum COM(2020) 609 final.

2016 migration crisis, the New Pact tries to offer a ‘fresh start’ to EU migration and asylum governance under the presumption that the problems experienced by Member States can be overcome by changes in the legal landscape. The proposed changes strengthen the synergies between migration control and asylum under the assumption that protection needs can be easily and swiftly identified at the EU external borders. In addition to these synergies, a second prominent characteristic of the New Pact is the introduction of the idea of flexible solidarity. Finally, the New Pact reiterates the need to cooperate with third countries so that the pressure on the EU is relieved. A closer look will show that there are historical and constitutional origins behind these three solutions. The Pact can thus be viewed as a continuation of the persistent EU deficiencies in migration and asylum governance rather than the ‘fresh start’ that it claims to be.

#### 5.4.1 *Solidification of the Nexus between Protection and Migration Control*

A noticeable aspect of the Pact is the solidification of the links between asylum, external border controls and return procedures. This will be chiefly achieved in the following ways. First, a ‘pre-entry screening’ is introduced,<sup>56</sup> which builds on the idea of transit zones, such as the ones used by Hungary,<sup>57</sup> and which aims at swift removals of the persons. Second, a ‘seamless link’ between asylum and return is forged by the extended use of border procedures.<sup>58</sup> Third, the position of asylum seekers in the context of Dublin transfers, is weakened.<sup>59</sup> We would like to focus on the latter since, as we will show, it has serious repercussions of a constitutional nature for the EU.

The New Pact retains the link between the responsibility for examining asylum needs and the protection of the external borders since the responsibility criteria based on first entry are preserved.<sup>60</sup> This link is actually further strengthened by ‘reinforcing the responsibility of a given Member State for

<sup>56</sup> Proposal for a regulation introducing a screening of third-country nationals at the external borders COM(2020) 612 final, 1.

<sup>57</sup> See [Chapter 8](#) on Hungary in this volume.

<sup>58</sup> Amended proposal for a regulation establishing a common procedure for international protection in the Union, COM(2020) 611 final, 9.

<sup>59</sup> Although the Dublin regulation has been repealed, the New EU Pact does not substantially change the Dublin system for determining the responsible Member State. For this reason, we will continue to refer to Dublin.

<sup>60</sup> Articles 9(1) and 21, Proposal for regulation on asylum and migration management. Some new criteria are introduced: extending the definition of family member, clarifying a Member State’s responsibility following search and rescue operations, and introducing a new criteria relating to the possession of educational diplomas.

examining an application for international protection' and by deleting some rules on cessation or shift of responsibility between Member States.<sup>61</sup> The objective is to 'further incentivize persons to comply with the rules and apply in the first Member State of entry and hence limit unauthorized movements and increase the overall efficiency of the CEAS'.<sup>62</sup>

The Dublin mechanism has been based on coercion of asylum-seekers. The element is further strengthened since the 'incentives' to comply with the rules include punishing asylum seekers by limiting their right to material reception conditions to the Member State where the applicant is required to be present.<sup>63</sup> Therefore, instead of creating incentives for better convergence and improvements regarding the Member States' reception conditions, the burden is transferred in the form of an obligation upon the asylum seekers to prevent their unauthorized movements. Such an effect is also expected by the deletion of the rules allowing for cessation or shift of responsibility of the Member State based on the behaviour of the applicant – absconding or leaving the territory of the Member States.<sup>64</sup> In addition, by introducing a system of take back notifications instead of the existing take back request system for cases where responsibility has already been established, the proposed Regulation on Asylum and Migration Management aims to simplify the take back procedure and to achieve more procedural efficiency.<sup>65</sup> Such efficiency is also intended to be achieved by shortening the deadlines for making and replying to requests to take charge, for making take back notifications, as well for making and deciding on appeals.<sup>66</sup>

The limitations of procedural rights of asylum seekers subject to transfer decisions, also aim at increased system efficiency. The scope of the right to challenge transfer decisions is limited to an assessment as to whether the transfer would result in a real risk of inhuman or degrading treatment and whether the family related criteria have been correctly applied.<sup>67</sup> A challenge to a transfer decision has to be submitted within two weeks and does not have an automatic suspensive effect. The individual can, however, request a court to suspend the transfer.

<sup>61</sup> Proposal for a regulation on asylum and migration management COM(2020) 610 final, 17.

<sup>62</sup> Recital 54, Proposal for regulation on asylum and migration management.

<sup>63</sup> Article 10 Proposal for a regulation on asylum and migration management.

<sup>64</sup> Recital 54, Proposal for regulation on asylum and migration management.

<sup>65</sup> Asylum and Migration Management Regulation SWD (2020) 207 final, 12. Article 31 of the Proposal.

<sup>66</sup> Recital 58, Proposal for regulation on asylum and migration management.

<sup>67</sup> Article 33, Asylum and Migration Management Regulation.

Member States have been pushing for limitations on judicial review in line with the floodgates argument, in order to limit the procedural safeguards for asylum seekers that have been established by the CJEU.<sup>68</sup> However, access to court as the central tenet of the EU rule of law does not only presuppose the existence of remedies, but it is also related to the intensity of judicial review. It is precisely this kind of judicial scrutiny that guarantees not only the rights of asylum seekers, but also respect for the rule of law within the EU, as former AG Sharpston has argued.<sup>69</sup> The proposed limitations as to the possibility of challenging Dublin transfers, reverse the case law of the CJEU regarding the right to an effective remedy,<sup>70</sup> and represent a return to the status quo at the time of Dublin II.<sup>71</sup> As the Court has observed in *Ghezlbach*, Article 27(1) of Regulation No 604/2013, that which enshrines the right to an effective remedy, makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself/herself of that remedy.<sup>72</sup> The CJEU justified this procedural protection by noting that the Dublin Regulation governs not only relations between Member States, but also the relation between a Member State and an individual. The Court has also suggested that these two levels of relations are actually linked and inform each other. In *Ghezlbach*, the Court thus explained that:

the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the

<sup>68</sup> Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 *H.A.* – on appeal rights of asylum seekers in the Dublin system, 12 February 2021, EU Law Analysis Blog, point 16 and 161.

<sup>69</sup> Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 *H.A.* – on appeal rights of asylum seekers in the Dublin system, 12 February 2021, EU Law Analysis Blog, point 128.

<sup>70</sup> Judgment of 7 June 2016, *Ghezlbash*, C-63/15, EU:C:2016:409; Judgment of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410; Judgment of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805; Judgment of 26 July 2017, *Mengesteab*, C-670/16, EU:C:2017:587; Judgment of 16 February 2017, *C. K. and others*, C-578/16 PPU, EU:C:2017:127; Judgment of 25 January 2018, *Hasan*, C-360/16, EU:C:2018:35; Judgment of 23 January 2019, *M.A. and others*, C-661/17, EU:C:2019:53; Judgment of 2 April 2019, *H. and R.*, C-582/17 and C-583/17, ECLI:EU:C:2019:280; Judgment of 15 April 2021, *H.A.*, C-194/19, EU:C:2021:270.

<sup>71</sup> In its judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, the Court held that Article 19(2) of Regulation No 343/2003 meant that the only way an asylum seeker could challenge the responsibility of a Member State, as the Member State where the asylum seeker first entered the EU, was by pleading systemic flaws in the asylum procedure and in the reception conditions, which provided substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.

<sup>72</sup> *Ghezlbash* C-63/15.



regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria – failing, for example, to take account of the information provided by the asylum seeker – to be subject to judicial scrutiny.<sup>73</sup>

Therefore, as noted in *Ghezelbash*, the idea behind the individual procedural guarantees in the Dublin system that lead to judicial scrutiny, is to ‘verify whether the criteria for determining responsibility laid down by the EU legislature have been applied correctly’. The correct application of these criteria is arguably also intended to serve the relation of mutual trust between the Member States. After all, since Member States purport to mutually trust each other, they have adopted these criteria and the assumption seems to be that Member States are interested in their correct application. If not, the whole Dublin system seems to be a farce: if the genuine objective of correct application of the rules is under question, then the objective appears to be evading responsibility at all costs and under any circumstances in disregard of the rules themselves. But then why have these rules and why keep on amending the rules that are not or are reluctantly complied with anyway? Are these rules simply for the sake of sustaining the perception that there is a common EU asylum system, when ultimately national interests govern and the system is only relevant when it selectively operates in harmony with the national interests? If this is the case, this situation does raise serious concerns as to the constitutional structures of the EU that are based on the rule of law.<sup>74</sup> The reason is that law is adopted when it is questionable whether the relevant actors, the Member States and the affected individuals (i.e. the asylum seekers) genuinely intend to comply with the law that in any case might not be in their interests. The anomaly seems to be suggestive of the situation during the 2015/2016 crisis when the Dublin mechanism collapsed since both the Member States and the affected individuals had a joint interest not to

<sup>73</sup> *Ghezelbash* C-63/15, para 53.

<sup>74</sup> Serious concerns as to the protection of fundamental rights also arise. However, arguments on how rules from the CEAS might be in violation of these rights, have been widely explored. See for example, V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017). See also H Hofmannova and K Řepa, “Othering” in *Unconcerned Democracies and the Rise of Anti-liberal Political Divisions* in M Jesse (ed), *European Societies, Migration and the Law* (Cambridge University Press 2020) 43, 44, for arguments on how since restrictions of migrants’ rights might be contrary to human rights law, such restrictions endanger ‘the core normative structures of modern post-war constitutionalism’.

apply the rules. If this anomaly is about to be normalized to some extent and in some form, there cannot be rule of law.

Procedural guarantees contribute to the objective of correct application of the Dublin criteria. If the latter is assumed to be the actual objective pursued by the Member State, then procedural guarantees actually strengthen mutual trust between them.<sup>75</sup> It then logically follows that if *in practice* there is no mutual trust (rather mistrust and making sure that responsibility is avoided as much as possible by quick and efficient transfers), conferral of individual procedural rights to asylum seekers should be indeed avoided. The limitation of these procedural rights then appears understandable. It follows that the objective of efficiency, heavily relied upon in the proposed Regulation on Asylum and Migration Management, not only undermines the rule of law, as already mentioned above; it is also suggestive of the instability and vulnerability of mutual trust among Member States in practice.

#### 5.4.2 *Flexible Solidarity*

Similarly, the proposed system of ‘flexible’ solidarity in the Regulation on Asylum and Migration Management reveals the absence of trust. The proposed Regulation on Asylum and Migration Management intends to regulate solidarity in two situations: disembarkations following search and rescue operations and migratory pressures. In the first situation, the Member States are offered the possibility to *choose* between the following solidarity measures: relocation, or relocation of only vulnerable persons, or ‘capacity-building measures in the field of asylum, reception and return, operational support and measures aimed at responding to migratory trends affecting the benefiting Member State through cooperation with third countries’.<sup>76</sup> In a situation when a Member State is assessed to be under migratory pressure (i.e. the second situation), the assisting Member States have the option to help *only* through the above mentioned capacity-building measures. They also have the option to contribute only through return sponsorship.<sup>77</sup> The latter means

<sup>75</sup> The CJEU in *Ghezelbash C-63/15*, para 55, did not directly say this. It did add, however, that ‘if it were established in the course of such an examination that an error had been made, that could have no bearing on the principle of mutual trust between Member States on which the Common European Asylum System is based, as such a finding would simply mean that the Member State to which the applicant was to be transferred was not the Member State responsible within the meaning of the criteria laid down in Chapter III of Regulation No 604/2013 [references omitted].’

<sup>76</sup> Article 47(4) Proposal for a regulation on asylum and migration management.

<sup>77</sup> Article 52 Proposal for a regulation on asylum and migration management.

supporting the benefitting Member State to carry out the return of third-country nationals. Support in the form of return sponsorship is defined and regulated in the proposed regulation.<sup>78</sup> In contrast, support in the form of capacity building is not concretized; it is therefore difficult to understand the concrete measures that it demands.

Overall, ‘flexible’ solidarity means that Member States might be relieved from the responsibility of relocating asylum seekers. The available options between relocation, return sponsorship and the vaguely defined ‘capacity building measures’, imply that Member States can trade their responsibilities in the area of asylum by helping with returns. The relief offered to Member States that do not want to relocate asylum seekers, is not necessarily offset by requiring them to contribute to the *asylum policy* (by, for example, funding reception capacities in other Member States). It can be rather offset by helping with returns or cooperating with third countries for preventing arrivals. This not only further strengthens the abovementioned synergies between asylum and return, but it also reflects the absence of an asylum policy that can be characterized as *common* to the Member States.

In sum, instead of attempting to achieve implementation of law and harmonization of protection offered on the ground, the new Pact and the paradigm of ‘flexible solidarity’ embodies conflicting elements and objectives and reflects the absence of a commonality and common policy. It seems to be intended to serve the interest of the Visegrad countries. This paradigm seems like a further turn towards common goals, as a method of international governance, rather than common rules that have been central to the development of the EU project. The scheme is not meant to apply equally to all the Member States, but it allows each to pick and choose what they want to do, with the Commission determining both what each Member State needs and how sufficient each Member State’s action is. This poses the risk of creating another area of differentiation in EU migration and asylum law, while at the same time negating predictability and legal certainty.<sup>79</sup>

#### 5.4.3 Cooperation with Third States

As already noted in [Section 5.3.3](#), legal certainty cannot exist when informalization is a governing paradigm. The continued domination of this paradigm clearly emerges from the New Pact, where migration policy is placed ‘at the

<sup>78</sup> Article 55 Proposal for a regulation on asylum and migration management.

<sup>79</sup> E. Karageorgiou, ‘Guest Note on the New Pact on Migration and Asylum’ (2020) 2(3) *Nordic Journal of European Law* III.

heart of relations with third-country partners'.<sup>80</sup> The component of 'mutually-beneficial partnership and close cooperation with relevant third countries' is set as a priority in the EU's approach for addressing 'the entirety of the migratory routes'.<sup>81</sup> In light of this priority, the proposal for a Regulation on Asylum and Migration Management envisions that the Commission and the Council shall take 'appropriate actions' with regard to third countries that do not cooperate sufficiently in the readmission of illegally staying third-country nationals.<sup>82</sup> In its communication on the New Pact on Migration and Asylum, the Commission identifies not only readmission, but also supporting developing countries that host refugees, helping third countries to manage irregular migration and human smuggling, and the development of legal pathways to Europe (e.g. resettlement),<sup>83</sup> as key points in the EU relationship with third countries. The Commission's document also indicates that this relationship is 'first and foremost based on bilateral engagement'.<sup>84</sup>

Overall, the Pact maintains the historical link of migration and asylum policies with both the Area of Freedom, Security and Justice and the EU Common Foreign and Security Policy and Development Cooperation.<sup>85</sup> This link between the constitutional Area of Freedom, Security and Justice and the intergovernmental area of Common Foreign and Security Policy, bears important ramifications. The adoption of measures related to the Area of Freedom, Security and Justice under the Common Foreign and Security Policy legal basis raises concerns in relation to the horizontal division of competences that is inherent in the constitutional structure of the Union and the division of powers between the EU and the Member States.<sup>86</sup> The most pressing concern is the significant limitation of judicial guarantees.

<sup>80</sup> Proposal for a regulation on asylum and migration management COM(2020) 610 final 6; New Pact on Migration and Asylum COM(2020) 609 final 17.

<sup>81</sup> Article 3(a), Proposal for a regulation on asylum and migration management.

<sup>82</sup> Article 7, Proposal for a regulation on asylum and migration management.

<sup>83</sup> See Commission Recommendation 2020/1364 on legal pathways to protection in the EU, [2020] OJ L 317/13.

<sup>84</sup> New Pact on Migration and Asylum COM(2020) 609 final 17.

<sup>85</sup> G Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' 2013 15(3) *European Journal of Migration and Law* 283; S Lavenex and R Kunz, 'The Migration-Development Nexus in the EU External Relations' (2008) 30 *European Integration* 439, 449; C Matera, 'An External Dimension of the AFSJ? Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2019) 362, 376–380.

<sup>86</sup> P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *Common Market Law Review* 157–200; Matera (n 85) 370–372.

Measures adopted under a Common Foreign and Security Policy legal basis are not subject to full judicial review by the CJEU.<sup>87</sup> In such a context, any procedural guarantee of individual protection is taken away. Individuals, whose rights might be violated in the context of Common Foreign Policy and Security Missions, may have recourse to other adjudicatory bodies, but they are not entitled to protection by the CJEU.<sup>88</sup> This is important since it frames a setting where the EU legal order – founded as a *sui generis*, yet complete order of law – functions, in certain instances, as a loosely integrated intergovernmental setting with no accountability for the actions it undertakes.

What is more, the Pact maintains and strengthens the emphasis on use of soft-law measures that escape the rule of law and promote bilateralism. In this way, the concerns about judicial review and accountability, mentioned in Section 5.3.3, persist. They are even intensified by the normalization of informal cooperation with third countries as the core of EU external migration governance. In light of the assumptions underpinning the EU asylum and migration governance, as solidified in the New Pact, namely that asylum is abused by migrants coming from third countries, cooperation with these countries appears crucial for convincing them to fight the irregular migration of their own nationals (i.e. the migrants or the prospective migrants). It is thus necessary for the EU to present this fight as a shared concern and thus make third countries willing to cooperate. This is not an easy task. An additional complexity arises from the cooperation with third countries (such as Turkey and Libya), where, according to the current EU policy, migrants are to be contained.<sup>89</sup> To sustain this cooperation, the EU needs to continue to project to third countries the normative value of the asylum-seekers' right to protection, given that these countries host a substantial number of migrants and with its policy the EU is keen to ensure that these migrants do not leave their

<sup>87</sup> Article 49 TEU and 275 TFEU. See also E De Capitani, 'Progress and Failure in the Area of Freedom, Security and Justice' in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 404–405.

<sup>88</sup> An example to this effect is the ECtHR. See V Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 23(3) *International Journal of Refugee Law* 40. See also V Mitsilegas, 'Extraterritorial immigration control, preventive justice and the rule of law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 305–307; M Giuffrè and V Moreno-Lax 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82–108.

<sup>89</sup> V Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) *German Law Journal* 436.

current hosts. If the projection by the EU of the normative value of asylum fails, the current EU strategy of engaging with third countries would collapse: the latter will have weak incentives to be hosts.

Finally, the emphasis on use of soft law as the primary method for outsourcing migration control to third countries, creates issues in relation to enforcement. The events that occurred at the Greece-Turkey border in March 2020 were revealing.<sup>90</sup> They showed that governance through partnerships of contested legal nature, is always dependent on the will of both parties. Hence, when such third countries find themselves in destabilized national and international settings and, consequently their will to serve the EU subsides, the respective EU migration policy is trapped in the informality it pursued.

## 5.5 CONCLUSION: EU MIGRATION AND ASYLUM LAW IN POPULIST TIMES AND THE PROSPECTS FOR THE FUTURE

It has always been a challenge for the EU to fully integrate the governance of migration and asylum within its constitutional structures. Even if common rules in the area of asylum and migration exist, there is a tendency not to comply with them, not to enforce them and to evade them. Even worse, in practice Member States are rewarded for not complying with the rules. Those Member States that deviate from the rules of the CEAS are rewarded since they could shift responsibility to other Member States. The shift, however, is prompted by the relevant law that unfairly places the burden on the deviant Member States. Instead of working towards reinstating legality, the EU institutions praise state practices which go against EU and international human rights obligations in so long as they manage to function as a European 'shield' and keep migrant populations outside EU borders.<sup>91</sup>

In this context, we can speak of migration as posing a constitutional crisis for the EU, in the sense that migration and asylum as EU legal areas have developed by threatening the core foundations of the EU as a project. The

<sup>90</sup> AD Ergin, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis', 30 September 2020, *Verfassungsblog*.

<sup>91</sup> Cf the events taking place in Greek-Turkey land borders in March 2020 when attempts for mass entry were met with push backs, detention and suspension of the right to submit asylum applications. This approach was endorsed by the EU institutions and Greece was thanked for being the European 'aspida'[shield] in EU Commission Press Release, in remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel, 3 March 2020.

project's core tenets such as rule of law, respect for human rights, freedom of movement and mutual trust have been challenged.

In this chapter we brought forward the policy incoherence that characterizes the unsustainability of the current EU migration and asylum law, which has repercussions of a constitutional nature for the EU project and its progress. Ronan McCrea defines 'policy incoherence' as 'a situation where different EU rules or a combination of EU and national rules, operate at cross purposes, undermining the ability of each to achieve the goals intended or where the rules and structures brought about by the degree of integration achieved to date produce otherwise avoidable negative outcomes for the Union and its Member States'.<sup>92</sup> McCrea explains that situations of policy incoherence are not sustainable for the EU.<sup>93</sup> He argues that the only solution for the EU is further integration and if this is blocked by some Member States, the EU constitutional project will struggle.

The policy incoherence that pervades the EU asylum and migration law can be summarized as follows. First, EU migration and asylum governance is characterized by rules that operate at cross purposes: protecting internal security, protecting asylum seekers, ensuring strict border controls, assisting in the development of third countries and so on. The security considerations behind the creation of an EU cosmopolitan migration regime undermine the creation of a full area of freedom security and justice, respect for the fundamental rights of migrants as full human beings and not as just objects of EU policies, and the division of competences at a procedural level.<sup>94</sup> At the same time, the current structures of EU migration and asylum law produce negative outcomes both for the EU and for the Member States, as is shown by the broader tendency of non-compliance and implementation deficit.

Overall, EU asylum and migration law is characterized by intense political tension and partial compliance, partial implementation and partial integration. Much like McCrea, we believe that standing still is not an option. At the same time, however, it seems that the EU does not have the necessary means and political support to push forward integrational processes through the classic community method. In this context, it seems like the New Pact functions as a simple adjustment of EU law which involves no additional integration. The future then is likely to be characterized by erosion of law's place 'as integration's dominant medium' and by turn towards closer

<sup>92</sup> McCrea (n 4).

<sup>93</sup> *Ibid.*

<sup>94</sup> See 'The Insecure Security Constitution' in K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 269–318.

administrative cooperation and co-evolution through the establishment of common approaches and goals.<sup>95</sup> The latter, however, would come with its distinct risks of bypassing the normative and conceptual foundations of the EU project and in terms of results, it does not look like it would be located far from disintegration.

In light of the tensions, we will now proceed to examine what seem like the different possible future developments of the EU migration and asylum law.

### 5.5.1 *Adoption of New Instruments and Repoliticization*

The attempts for more harmonization through the adoption of new instruments are not sufficient to re-introduce migration and asylum in the EU constitutional framework. As Section 5.4 shows, the most recent efforts to revamp the CEAS brought nothing revolutionary or novel; rather, the new additions in many ways express the interests of countries like Hungary and Poland. Even more disturbingly, the New Asylum and Migration Pact in some way normalizes or even endorses non-compliance by proposing rules which take the CEAS a step back in terms of human rights guarantees and hence in terms of European constitutional principles. In this regard, the New Pact may be considered as a technical fix attempting to cover rather than correct the inherent problems of EU migration and asylum law.

It has been proposed that instead of technical fixes, political debates are necessary to discuss the meaning of constitutional values, such as asylum. Thym has, for example, observed that ‘basic consensus on the normative foundations is what the EU’s asylum policy lacks at this juncture’.<sup>96</sup> Thym has thus proposed politicization that implies overcoming the cleavages among the Member States and introduction of a functioning system of cooperation among them of a lasting nature.<sup>97</sup> We are, however, skeptical about this proposal since the value of asylum does not seem to have much resonance given the populist political climate, as described in the country chapters included in this volume. Politicization of the matter is not likely to lead to solutions that might be empirically grounded and morally just. Rather, as Noll suggests in [Chapter 3](#) in this volume, the current political and democratic structures lock us into policies that do not respond to the actual problems of

<sup>95</sup> M Dawson, ‘Integration Through Soft Law? New Governance and the Meaning of Legality in the European Union’ in D Augenstein (ed), *Integration through Law’ Revisited, The Making of the European Polity* (Ashgate 2012) 139.

<sup>96</sup> D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (n 19) 1568.

<sup>97</sup> *Ibid.*, 1569 and 1572.



the empirical reality.<sup>98</sup> Unless European societies emerge with different kinds of political and representative structures of governance, the current ones might not lead us to different solutions. Even the courts, both national and international, that are meant to be non-majoritarian and are viewed as sites where populist policies can be contested,<sup>99</sup> are susceptible to statist policies that have serious negative effects on migrants.<sup>100</sup> In short, democracy as a form of governance leads to moral and social injustice.

### 5.5.2 *The Unlikely Potential of Convergence*

Any solution to the challenges that the EU faces in the area of migration and asylum would have to address the socio-economic differences between the Member States and the different standards of protection offered in each one of them. Solidarity is about sharing norms, which implies better harmonization of standards so that asylum seekers are offered similar reception conditions in say Sweden and Bulgaria and the recognition rates are comparable for the different nationalities. However, this implies not simply adoption of norms, but also guaranteeing these norms in reality.

The idea of harmonization of asylum procedures and reception conditions is a myth, given the persisting socio-economic differences between the Member States. Asylum and migration laws cannot bridge these differences. The gaps between countries like, for example, Sweden and Bulgaria, will persist. This reality cannot be simply ignored anymore. Admittedly, since the 2004 enlargement – if not before – this reality has been existing also with respect to other areas of EU action, for example, social security or monetary union. The specificities of asylum and migration lies, however, in the lack of enforcement through infringement proceedings against the deviants (from the side of the EU) and the powerful political tensions characterizing these policy areas (from the side of the Member States) especially post 2015.<sup>101</sup>

<sup>98</sup> Noll's analysis focuses on the ageing population in Europe. However, his idea and arguments can be extrapolated and have more general relevance.

<sup>99</sup> See [Chapters 10–12](#) in this volume that argue that courts are the site where populist policies can be contested (Italy, Austria and Belgium).

<sup>100</sup> See [Chapter 4](#) in this volume.

<sup>101</sup> In less politically salient areas, the Commission has been a lot more proactive. The data published by the Commission in the Annual reports on monitoring the application of EU law show that since 2015 the vast majority of infringement cases opened by the Commission are in the fields of Environment; Internal Market Industry, Entrepreneurship and SMEs; Mobility and Transport; and Financial Stability, Financial Services and Capital Markets Union, at [https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law\\_en](https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en).

This data could also mean that there are more violations in these areas. However, if we think

The essential question that arises then is whether this reality can allow more central actions (at the level of the Union) to tame nationalistic tendencies. This looks unlikely. The Union is precluded from solving these fundamental disparities between Member States, unless we assume that integration in one area (i.e. migration and asylum) produces the need for integration in other areas (i.e. social policies, salaries, welfare rights). However, migration and asylum interact with social and economic realities that lie beyond the reach of the Union due to the absence of competence and with policy areas on which consensus is a lot harder to achieve in an enlarged Union with varied national interests.<sup>102</sup> As a result, there is little prospect that Member States will agree upon common rules that can actually make a practical difference. The reason behind this seems to be the broader lack of political consensus in connection with the rise of populist parties.<sup>103</sup> Without Member States' agreement in this 'politically and symbolically charged area',<sup>104</sup> ultimately the EU might be without the means for change. Not having such means is more than indicative of a constitutional crisis.

### 5.5.3 *The Prospect of Europeanization Far from Constitutional Demands*

Another scenario needs to be considered as well. It is possible that the political tension in combination with intense Eurosceptic populism, can lead to the paradox of more Europeanization. The latter, however, will *not* follow EU constitutional demands. On this matter, Lindseth notes that there is increasing potential for EU mobilization and integration in border controls since this is

about how long it took for the Commission to open infringements concerning the CEAS and about the low number of migration-related infringements against the overwhelming evidence of systematic violation, then political sensitivities do seem to play a role.

<sup>102</sup> This relates to Walker's explanation that '[s]ince Maastricht's innovative designs in monetary, social justice and foreign policy, Europe had undergone a period of rapid expansion of competences and regulatory infrastructure as well as of territory – an expansion that had taken the European project well beyond its initial comfort zone of an elite-driven "permissive consensus" on market-making and the consolidation of peace.' N Walker, 'Europe's Constitutional Overture' in NW Barber, M Cahill and R Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019) 177, 189.

<sup>103</sup> McCrea (n 4) 90: '[...] the level of political agreement on economic matters that existed in early decades of the integration process no longer applies. Indeed, the recent rise of populist parties who challenge the centrist Christian and Social Democratic parties that have long dominated politics in most EU states shows that the degree of political consensus is falling not rising.'

<sup>104</sup> McCrea (n 4) 72.

an area where pan-European politics align.<sup>105</sup> On the issue of border controls, Eurosceptic populists set the agenda since their ‘Europhilic confrères to the north and west [...] have needed to respond to the increasingly anti-immigration mood’.<sup>106</sup> As a result, populists threatening the core of the EU project have become ‘the unexpected (and certainly inadvertent) agents of Europeanization’.<sup>107</sup>

Such a type of Europeanization would be based on integrated administration with an emphasis on EU agencies, like the European Border and Coast Guard Agency and the European Asylum Support Office. This implies more Europe at the borders. Tsourdi has clarified how administrative integration with the involvement of these agencies would come with its own constitutional challenges and would require rethinking accountability processes in order to comply with procedural guarantees.<sup>108</sup> Tsourdi’s concerns are more than valid. We, however, think that the problem is of a much more general constitutional nature since more Europe at the borders and, accordingly, more Europeanization in the current political climate, would lead to more distancing from the EU constitutional demands as we now know them. Strengthening the means of exerting power and ensuring exclusion of migrants and refugees at the borders, risks exposing the most vulnerable to treatment in violation of fundamental rights (those in need of international protection and without means of legal entry to Europe). What is more, such Europeanization would necessarily reinforce the security dimension<sup>109</sup> of EU migration and asylum law and, as a result, it would take it further away from the cosmopolitan ethos which has been located at the core of the EU project.

Any call for more integration in the area of EU asylum and migration would thus have to address a series of issues. First, the empirical reality on the ground is such that persistent socio-economic differences between Member States exist and are likely to remain a continuing feature. Far from the past of homogenous European societies with similar politics and concerns, the EU now has to address potential harmonization in light of the antithetic conditions and politics existing across its twenty-seven Member States. What is more, the current political climate creates concerns regarding the future of

<sup>105</sup> P Lindseth, ‘Democratic Disconnect, Power-Legitimacy Nexus and the Future’ in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 526–527.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> E Tsourdi, ‘The Emerging Architecture of EU Asylum Policy’ in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 226.

<sup>109</sup> See also Tuori (n 94) 315–318.

law. To what extent can Member States reach an agreement which would take the EU project forward? The way forward should be shaped in light of the EU telos rather than in light of closer cooperation without accountability and human rights protection. Closer to the normative foundations of the EU constitutional order, EU migration and asylum law needs to evolve in light of the rights conferred to individuals and respect for the protection needs of the vulnerable. As a result, it might be more prudent for the EU to refrain from proposing changes in immigration and asylum law (such as those currently formulated in the New Pact), an area charged with political tensions at a time when populist parties seem to dominate the agenda setting.

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## 6

# Possibilities and Limits of European Union Action against Democratic Backsliding and Decline of Migrants' Rights in Member States

JAN WOUTERS AND MAAIKE DE RIDDER

### 6.1 INTRODUCTION

Over the last decade, the European Union (EU or Union) has faced numerous crises. Among the most notable are the financial and eurozone sovereign debt crises, the migration crisis and more recently, the COVID-19 crisis. As a result, the political landscape of the EU has changed tremendously. The Union's institutions and the Member States have undergone significant transformations as regards political majorities, policy priorities and compliance with EU fundamental values.

As to the latter, it should be reminded that the Union is based on a set of fundamental values that are not only binding upon the EU itself, but also are – or ought to be – ‘common to the Member States’, as indicated in Article 2 of the Treaty on European Union (TEU). According to this provision, these values consist of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (including the rights of persons belonging to minorities), pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.<sup>1</sup> Respect for, and a commitment to promote, these values have long been prerequisites to become an EU Member State (Article 49 TEU). After accession, however, the Union has only limited means available to ensure Member States' compliance with them.

<sup>1</sup> Consolidated version of the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1. On the question whether there is a legal distinction between the values mentioned in the first sentence of Article 2 TEU and those mentioned in the second sentence, see *inter alia* Jan Wouters, ‘Revisiting Article 2 of the TEU: A True Union of Values?’ (2020) 5(1) *European Papers* 255–277.

Specifically for this chapter our focus lies with the value of democracy. While it constitutes one of the foundational values of the EU,<sup>2</sup> in the past years it has set foot on a downward path in a trend that has been labelled as ‘democratic backsliding’ in multiple Member States.<sup>3</sup> Through this deterioration, the EU has been confronted with attacks on national judiciaries, censorship of national and international news outlets, the dismantling of multiple other rule of law foundations and restrictions of migrants’ rights.

In this chapter we aim to capture the substance and range of the EU’s toolbox in tackling the issues that arise out of democratic backsliding in its Member States and the limitations of these tools. The deterioration of democracy and, related to this, the rule of law have had significant consequences in the migration context, which will be taken into account in our analysis. In the first section, we look at the EU’s toolbox and whether these tools provide legal resilience in counteracting democratic backsliding. The second section evaluates the toolbox in a migration context and the third section discusses how the EU is currently bringing new initiatives forward to strengthen its democracy and legitimacy. We conclude with a number of suggestions *de lege lata* and *de lege ferenda* on how the EU’s toolbox could become more effective.

<sup>2</sup> It is beyond the scope of this chapter to analyse the concept of democracy in EU law. See *inter alia* Koen Lenaerts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) 62 *International & Comparative Law Quarterly* 271; Niels Petersen, ‘The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?’ in Philipp Dann and Michal Rynkowski (eds) *The Unity of the European Constitution. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol 186 (Springer Berlin 2006) 97–118.

<sup>3</sup> See *inter alia* Dariusz Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56(3) *Common Market Law Review* 623; Michael Blauburger and R. Daniel Kelemen, ‘Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU’ (2016) 24(3) *Journal of European Public Policy* 321; Staffan I Lindberg, ‘The Nature of Democratic Backsliding in Europe’, 24 July 2018, Carnegie Europe <<https://camegieeurope.eu/2018/07/24/nature-of-democratic-backsliding-in-europe-pub-76868>>; Bernd Schlipphak and Oliver Treib, ‘Playing the Blame Game on Brussels: the Domestic Political Effects of EU Interventions against Democratic Backsliding’ (2016) 24(3) *Journal of European Public Policy* 352; Ulrich Sedelmeier, ‘Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure’ (2017) 24 *Journal of European Public Policy* 337; Ingi Iusmen, ‘EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania’ (2015) 53 *Journal of Common Market Studies* 593; James Dawson and Seán Hanley, ‘Foreground Liberalism, Background Nationalism: A Discursive-Institutionalist Account of EU Leverage and “Democratic Backsliding” in East Central Europe’ (2019) 57 *Journal of Common Market Studies* 710; Nick Sitter and others, ‘Democratic Backsliding in the European Union’ [2019] Oxford Research Encyclopedia of Politics <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1476>>.

## 6.2 THE EU'S TOOLBOX FOR ACTION: A PARAGON OF LEGAL RESILIENCE?

Restrictions of migrants' rights and processes of democratic or rule of law backsliding do not always appear jointly.<sup>4</sup> However, if one takes a closer look at the current democratic decay in the EU, there appears to be a crucial link between migration and respect for democracy and the rule of law.<sup>5</sup> Concurrently with the EU migration crisis, we have witnessed an accelerated decrease in multiple Member States' respect for the values of democracy and the rule of law.<sup>6</sup> Adherence to these values has, nonetheless, proven essential in a context of large-scale immigration.<sup>7</sup> Democracy and the rule of law provide the basis for the protection of refugees and asylum seekers, as they ensure due process obligations, access to justice, respect for human rights and many other essential principles to safeguard migrants' rights in EU Member States.<sup>8</sup>

The EU has several tools available to deal with non-compliant Member States. However, not all of those tools are equally well-equipped to tackle the specific issues of democratic backsliding that have accompanied the rise of (authoritarian) populism – and the decline in migrants' rights – in some of its Member States. Bigotry towards immigrants is only one of the symptoms of the EU's democracy crisis, which is a much larger phenomenon.<sup>9</sup> Therefore, the focus of this chapter predominantly lies with the EU's apparatus for counteracting democratic decay and rule of law backsliding. We will discuss whether the EU's tools are effective and whether they can offer legal resilience against populist movements that threaten migrants' rights in EU Member States.

<sup>4</sup> Alexander T Aleinikoff, 'Inherent Instability: Immigration and Constitutional Democracies' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 478.

<sup>5</sup> Ibid.

<sup>6</sup> Milada Anna Vachudova, 'Ethnopolitism and Democratic Backsliding in Central Europe' (2020) 36 *East European Politics* 318, 321–323.

<sup>7</sup> Lina Vosyliute and Carmine Conte, 'Policy Option Brief March 2019: Crackdown on NGOs Assisting Refugees and Other Migrants' (Research Social Platform on Migration and Asylum (Resoma)) 4 <[www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/POBCrackdownonNGOs\\_o.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/POBCrackdownonNGOs_o.pdf)>.

<sup>8</sup> Maria O'Sullivan and Dallal Stevens, 'Access to Refugee Protection. Key Concepts and Contemporary Challenges' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing 2017) 20–25; Valsamis Mitsilegas, 'Decriminalising Migration in EU Law: Upholding Human Rights and the Rule of Law After Lisbon' in Valsamis Mitsilegas (ed), *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015) 109.

<sup>9</sup> Aleinikoff (n 4) 477–478.

### 6.2.1 *Infringement Proceedings under the TFEU*

A first path of action when a Member State is in breach of EU law, are the infringement proceedings that are provided by the Treaty on the Functioning of the European Union (TFEU). These procedures are foreseen for specific and concrete violations of EU law by otherwise compliant Member States.<sup>10</sup> Structural and persistent deviations from the Union's values listed in Article 2 TEU, however, often fall beyond the scope of what can be achieved with infringement actions.<sup>11</sup> When Member States decide to no longer conform to the demands of maintaining a democracy, they are probably violating more than one part of EU law at the same time: starting an infringement action to bring one violation to a halt will most likely have little effect on the bigger picture.<sup>12</sup>

#### 6.2.1.1 Article 258 TFEU

Article 258 TFEU gives the European Commission the possibility to deliver a reasoned opinion to a Member State that has failed its obligations under the Treaties, after giving the latter the opportunity to submit observations.<sup>13</sup> This is the so-called administrative stage.<sup>14</sup> If the Member State concerned gives no effect to the opinion, the judicial stage is entered, in which the Commission can bring the matter before the Court of Justice of the European Union (CJEU).

Important for all infringement proceedings under Article 258 TFEU is that the Commission enjoys full discretion as to when and whether it will commence a procedure and against which Member State it will do so.<sup>15</sup> It can never be forced to initiate proceedings. However, since the Commission has

<sup>10</sup> Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 108; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2015) 159–164.

<sup>11</sup> Lenaerts, Maselis and Gutman (n 10) 163.

<sup>12</sup> Scheppele (n 10).

<sup>13</sup> Article 258 TFEU; Melanie Smith, 'The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions and Circling' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Law* (Oxford University Press 2015) 352.

<sup>14</sup> Laurence W Gormley, 'Infringement Proceedings' in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 66.

<sup>15</sup> *Ibid.*, 69; Lenaerts, Maselis and Gutman (n 10) 197.



to monitor the application of EU law across twenty-seven Member States, it needs to pick its battles carefully in view of its lack of sufficient resources and of a complete overview.<sup>16</sup> The Commission will thus not be able to challenge every violation of EU law through infringement proceedings.

Article 258 TFEU offers a legal remedy to challenge infringements of the Union *acquis*. However, whether violations of Article 2 TEU can be considered part of the Union *acquis* is still being debated.<sup>17</sup> Many believe that the provision is insufficiently precise to generate legal obligations enforceable through judicial action, while others believe that Article 2 is clearly meant to be endowed with legal value.<sup>18</sup> Furthermore, the existence of a specific remedy designed for breaches of Article 2 TEU – namely Article 7 TEU – might also present itself as a hurdle for triggering legal action under Article 258 TFEU.<sup>19</sup> At the moment, it remains unlikely that the Commission would initiate an infringement action on the sole ground of Article 2 TEU without involving other concrete obligations under the EU Treaties or secondary law of the Union.<sup>20</sup> Indeed, on numerous occasions, the Commission has brought infringement actions against Member States for disrespecting EU values.<sup>21</sup> But it did not do so solely on the basis of Article 2 TEU. In *Commission v. Poland* (C-619/18), the Commission initiated infringement proceedings in response to a law that lowered the retirement age for Supreme Court Judges.<sup>22</sup> Poland clearly violated – as it currently still does – the rule of law under Article 2 TEU, but an infringement action based on this article alone has not been launched. Instead, the Commission relied on Article 19 TEU and Article 47 of the EU Charter of Fundamental Rights (Charter) to start the proceedings.

On 6 October 2020, the CJEU ruled against Hungary in a landmark judgment.<sup>23</sup> The case concerned an infringement procedure against Hungary's 'Lex CEU': a law introduced by the Orbán government with the

<sup>16</sup> Scheppele (n 10) 110.

<sup>17</sup> Olivier De Schutter, 'Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union' (Report Open Society Foundations 2017) 28.

<sup>18</sup> Dimity Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law* 153; De Schutter (n 17); Gormley (n 14).

<sup>19</sup> De Schutter (n 17).

<sup>20</sup> Gormley (n 14) 74.

<sup>21</sup> *Commission v. Hungary* [2014] ECJ C-288/12 ECLI:EU:C:2014:237; *Commission v. Poland* [2019] C-192/18 ECLI:EU:C:2019:924; *Commission v. Poland* [2018] ECJ C-619/18 R ECLI:EU:C:2018:1021; Carlos Closa, 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' (2019) 26 *Journal of European Public Policy* 697.

<sup>22</sup> *Commission v. Poland* [2019] ECJ C619/18 ECLI:EU:C:2018:910.

<sup>23</sup> *Commission v. Hungary* [2020] ECJ C-66/18 ECLI:EU:C:2020:792.

aim of chasing out the independent Central European University, founded by one of Orbán's opponents, George Soros. The CJEU found the law to be in breach of WTO commitments regarding services (GATS) and the Charter.<sup>24</sup> Although the judgment is of great importance to strengthen the legal protection of academic freedom, it came too late to bring about change in Hungary. The CEU had already relocated to Vienna.

In 2016 the European Parliament suggested that the Commission could launch a 'systemic infringement' action on democracy, the rule of law and fundamental rights.<sup>25</sup> This idea was originally brought up by Kim Lane Scheppele, who is convinced that the Commission should demonstrate the interconnectedness of specific issues to the larger pattern.<sup>26</sup> Systemic infringement actions should then enable the CJEU to spot this pattern and establish the existence of a threat to the EU's most fundamental of values. It remains to be seen whether the Commission will eventually bring a case before the CJEU solely based on Article 2 infringements and whether the CJEU will be willing to interpret an entire pattern of infringements under a single action.

#### 6.2.1.2 Article 259 TFEU

Article 259 TFEU foresees in a similar means of action, but this time the initiative lies with the other Member States. One Member State violating EU law inevitably impacts the entire Union and the mutual trust that is supposed to be ensured between its Members. Therefore, other Member States are given the opportunity to bring alleged violations before the CJEU.<sup>27</sup> However, before they can do so, they have to bring the matter before the Commission. Only after the Commission has given the respective State the opportunity to submit its observations and has issued a reasoned opinion, will action before the Court be possible.<sup>28</sup> If the Commission omits to give a

<sup>24</sup> 'Press Release No 66/20 The Conditions Introduced by Hungary to Enable Foreign Higher Education Institutions to Carry out Their Activities in Its Territory Are Incompatible with EU Law' (2020) <[www.curia.europa.eu](http://www.curia.europa.eu)> accessed 8 January 2021.

<sup>25</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

<sup>26</sup> Scheppele (n 10); Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) *Yearbook of European Law* 62–103.

<sup>27</sup> Kochenov (n 18) 154–157.

<sup>28</sup> Article 259 TFEU, Consolidated versions of the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

reasoned opinion within a three-month timeframe, the matter may be brought before the Court directly.<sup>29</sup>

So far only a handful of cases have been brought before the CJEU under Article 259 TFEU.<sup>30</sup> One of the reasons is that the political weight of one Member State bringing another Member State before the Court is rather significant. Additionally, the procedure still requires the involvement of the Commission, which could always use this information to launch a proceeding under Article 258 TFEU. Consequently, incentives for Member States to act on breaches of EU law themselves are very low.<sup>31</sup> Lastly, similar to the issue that arises with Article 258 TFEU, it is unclear whether cases would come to the Court that are solely based on infringements of EU fundamental values.<sup>32</sup> Interestingly, on 2 December 2020, the Dutch Parliament adopted a resolution requesting the Dutch government to start planning the deployment of Article 259 TFEU against Poland for disrespecting the rule of law.<sup>33</sup> If the Dutch government were to act upon the resolution – for which there is no indication at the time of writing – it would constitute a first use of the article in the specific context of the EU's crisis of values.<sup>34</sup>

### 6.2.2 The 'Nuclear' Option: Article 7 TEU

Apart from the legal remedies offered by Articles 258–260 TFEU, the Union also has a specific political remedy at its disposal, as opposed to a judicial one, in case a Member State acts in conflict with the EU's fundamental values: Article 7 TEU.<sup>35</sup> The article contains two procedures: a preventive one and a

<sup>29</sup> Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) *Yearbook of European Law* 98–99.

<sup>30</sup> See: *France v. UK* [1979] ECR 2923, C-141/78, ECLI:EU:C:1979:225; *Belgium v. Spain* [2000] ECR I-3123, C-388/95, ECLI:EU:C:2000:244; *Spain v. UK* [2006] ECR I-7917, C-145/04, ECLI:EU:C:2006:543; *Hungary v. Slovakia* [2012], C-364/10, ECLI:EU:C:2012:630.

<sup>31</sup> Kochenov (n 18).

<sup>32</sup> *Ibid.*, 165.

<sup>33</sup> Tweede Kamer der Staten-Generaal: Vaststelling van de begrotingsstaten van het Ministerie van Justitie en Veiligheid (VI) voor het jaar 2021; Motie van het Lid Groothuizen C.S. (35570 VI Nr. 58); Aleksandra Krzysztozek, 'Dutch Government Urged to Sue Poland in Top EU Court over Rule of Law Debacle' (1 December 2020).

<sup>34</sup> Scheppele, Kochenov and Grabowska-Moroz (n 26) 100.

<sup>35</sup> Leonard Besselink, 'The Bite, the Bark, and the Howl', in Jakab András and Dimitry Kochenov (eds.) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 128.

remedial one. They can be seen as separate, in the sense that one does not necessarily have to follow the other.<sup>36</sup>

### 6.2.2.1 The Preventive Procedure

Article 7(1) TEU outlines the preventive procedure. To begin proceedings, either one third of the Member States, the European Parliament or the Commission has to make a reasoned proposal to the Council.<sup>37</sup> Acting by a majority of four fifths and after obtaining consent from the European Parliament, the Council can then determine the existence of a clear risk of a serious breach of the values laid out in Article 2 TEU. Before doing so, the Council will hear the respective Member State and has the opportunity to address recommendations. These recommendations can also be issued before the existence of a risk has been determined.<sup>38</sup> The advantages of Article 7(1) are the range of possible initiators and the still somewhat attainable thresholds compared to Article 7(2) and (3) TEU. However, its effectiveness is still a concern, since it only serves as a basis for dialogue and recommendations. This is especially the case when combined with the Commission's Framework to Strengthen the Rule of Law (*infra*), which also foresees the possibility of informal dialogue and addressing recommendations in order to avoid triggering Article 7 TEU procedures.<sup>39</sup>

### 6.2.2.2 The Remedial Procedure

The remedial procedure laid down in Article 7(2) TEU is more problematic. It stipulates that the European Council, acting on a proposal of one third of the Member States or the Commission and after obtaining the consent from the European Parliament, can 'determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2'.<sup>40</sup> However, there are some impediments to reach this point. First of all,

<sup>36</sup> *Ibid.*, 133; Diego Lopez Garrido and Antonio Lopez Castillo, 'The EU Framework for Enforcing the Respect of the Rule of Law and the Union's Fundamental Principles and Values' (Policy Department for Citizens' Rights and Constitutional Affairs 2019) 14–16.

<sup>37</sup> Dana Burchardt, 'The Perils of Defending the Rule of Law through Dialogue' (2019) 15 *European Constitutional Law Review* 1, 1; Inger Österdahl, 'Article 7 TEU and the Rule of Law Mechanism: A Dissuasive Weapon or a Paper Tiger?' in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law* (Springer 2019) 242.

<sup>38</sup> Besselink (n 35) 134; Österdahl (n 37) 243.

<sup>39</sup> Dmitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) 2017/10 8.

<sup>40</sup> Article 7(2) Consolidated version of the Treaty of the European Union [2016] OJ C202/1.

unanimity is required within the European Council, which means that each Member State (represented by its Head of State or Government) has a veto. The Member State concerned does not have a vote but every single other Member State, even those not complying with EU values themselves, does. If a serious and persistent breach has been found, the procedure moves forward to the Council of the EU. The Council, acting by a qualified majority, can then, according to Article 7(3) TEU, ‘decide to suspend certain of the rights deriving from the application of the Treaties to the Member States in question’.<sup>41</sup>

The purpose of the remedial arm of Article 7 TEU – which is the oldest part of the article, inserted by the Treaty of Amsterdam – is the possibility to impose a political sanction on a Member State that commits a serious and persistent breach of one of the Union’s fundamental values.<sup>42</sup> Such a sanction could for example entail the loss of voting rights in the Council. The focus on ‘persistent’ in the article indicates that the aim is to only capture those violations that cannot be solved through national institutions or small corrections following infringement action or dialogue.<sup>43</sup>

Both the preventive and the remedial components of Article 7 TEU are fully political in nature. The CJEU has no involvement in any step of the procedures, the only exception being that if sanctions are decided upon, the Member State concerned can still challenge the decision before the Court.<sup>44</sup>

Article 7 TEU has often been coined as the ‘nuclear option’.<sup>45</sup> One of the reasons for this terminology is that the two procedures have high thresholds for their activation. The majorities or unanimity required are difficult or even impossible to obtain when more than a single Member State is at odds with the Union’s values, as is the case today. Another reason for the ‘nuclear’ terminology is the sanction that could follow a successful triggering of Article 7(3). Losing voting rights in the Council is the most serious political sanction the Union can impose on a Member State.<sup>46</sup> Since its inclusion in the TEU, following the Treaty of Nice, the mechanism of Article 7(1) TEU

<sup>41</sup> De Schutter (n 17) 35.

<sup>42</sup> Österdahl (n 37) 243.

<sup>43</sup> Kochenov (n 39) 10.

<sup>44</sup> De Schutter (n 17) 35.

<sup>45</sup> Kim Lane Scheppele and Laurent Pech, ‘Is Article 7 Really the EU’s “Nuclear Option”?’ (*Verfassungsblog*, 6 March 2018) <<https://verfassungsblog.de/is-article-7-really-the-eus-nuclear-option/>> accessed 8 January 2021; Kochenov (n 38); Endre Orbán, ‘Article 7 TEU Is a Nuclear Bomb – With All Its Consequences?’ (2016) 57 *Hungarian Journal of Legal Studies*, 119.

<sup>46</sup> Scheppele and Pech (n 45).

has only very recently been used (*infra*).<sup>47</sup> The remedial component of Article 7(2) TEU has so far remained unused.

On 20 December 2017, the European Commission started the procedure of Article 7(1) TEU for the first time in Union history. It submitted a reasoned proposal with regard to the rule of law in Poland as a result of the Polish government's disrespect for the independence of the Polish judiciary.<sup>48</sup> In September 2018 the same procedure was launched against Hungary. This time, it was the European Parliament which voted a resolution calling the Council to determine the existence of a clear risk.<sup>49</sup> It was preceded by numerous resolutions adopted by the Parliament between March 2011 and May 2017. The resolutions all related to concerns about judicial independence, freedom of expression, corruption, rights of minorities and, relevant to this volume, the situation of migrants and refugees in Hungary.<sup>50</sup> Although the initiation of these procedures constituted a strong political statement, Article 7(1) TEU was essentially triggered too late, as both countries had already been violating EU values for a long time. After launching the preventive phase of Article 7, the situation in Hungary and Poland has only deteriorated further.<sup>51</sup>

### 6.2.3 *The Commission's Rule of Law Review Cycle*

Between infringement proceedings with insufficient scope and Article 7 procedures with almost impossible thresholds, the European Commission felt the need to develop an additional tool. On 11 March 2014 it issued the 'EU Framework to Strengthen the Rule of Law'.<sup>52</sup> This allows it to engage in a

<sup>47</sup> Burchardt (n 37) 1.

<sup>48</sup> COM(2017)835; Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law; Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'Better Late Than Never? On the European Commission's Rule of Law Framework and Its First Activation' (2017) 54 *Journal of Common Market Studies* 1062; Armin von Bogdandy and others, 'A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines' (2018) 55 *Common Market Law Review* 983, 987.

<sup>49</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)); Burchardt (n 37) 1.

<sup>50</sup> 'Legislative Train 09.2020 Fundamental Rights' (2020) <[www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights](https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights)>.

<sup>51</sup> 'Rule of Law in Poland and Hungary Has Worsened' (*European Parliament Press Release*, 16 January 2020).

<sup>52</sup> COM(2014) 158 final; von Bogdandy and others (n 48) 987.

structured dialogue with Member States addressing and redressing ‘systemic threats’ to the rule of law, and consequently other values, in order to prevent the emergence of a clear risk of a serious breach.<sup>53</sup> The Framework is meant to be an early warning system to complement the procedures of Article 7 TEU and Articles 258–260 TFEU.<sup>54</sup>

As a result of encouragements by the European Parliament, the Commission issued a ‘Blueprint for Action’ in July 2019.<sup>55</sup> In this document it set out a new instrument called ‘the Rule of Law Review Cycle’. At the same time, the Commission proposed to publish a complementary Annual Rule of Law Report to promote an ongoing dialogue on the Rule of Law in the entire Union.<sup>56</sup> Unlike the Rule of Law Framework, the review encompasses all Member States instead of singling one or two out. On 30 September 2020 the Commission adopted its first annual review.<sup>57</sup> Regrettably, it was not the gamechanger many had hoped for. The Report uses soft and euphemistic language that understates the gravity of the situations that have unfolded in both Hungary and Poland and further fails to describe and offer recommendations for persistent rule of law backsliding.<sup>58</sup> As expressed by Daniel Kelemen, the Report is toothless and ‘fails to recognize – even at a conceptual level – the nature of the threat to the rule of law in the EU’.<sup>59</sup>

<sup>53</sup> Commission Communication ‘A new Framework to Strengthen the Rule of Law’ 1 COM (2014) 158.

<sup>54</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) *Cambridge Yearbook of European Legal Studies* 3, 10.

<sup>55</sup> European Parliament, Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 25 October 2016 (2015/2254(INL)); European Parliament, Resolution on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 7 November 2018 (2018/2886(RSP)); European Commission, ‘Communication from the Commission: Strengthening the rule of law within the Union, A blueprint for action’ COM (2019) 343 final.

<sup>56</sup> European Commission, ‘Communication from the Commission: Strengthening the rule of law within the Union, A blueprint for action’ COM (2019) 343 final.

<sup>57</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report: The Rule of Law Situation in the European Union COM(2020) 580 Final’ (2020) <[https://ec.europa.eu/info/sites/info/files/communication\\_2020\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf)> accessed 8 January 2021.

<sup>58</sup> Dan Kelemen, ‘Op-Ed: “You Can’t Fight Autocracy with Toothless Reports”’ by R. Daniel Kelemen – EU Law Live (*EU Law Live*, 9 October 2020); Daniel Hegedüs, ‘The European Commission’s Missed Rule-of-Law Opportunity’ (*The German Marshall Fund of the United States*, 1 October 2020) <[https://ec.europa.eu/info/sites/info/files/communication\\_2020\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf)> accessed 8 January 2021.

<sup>59</sup> Kelemen (n 65).

On 7 October 2020, the European Parliament overwhelmingly voted for a Resolution on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.<sup>60</sup> The Resolution aims to establish a more comprehensive and inter-institutional approach to tackle the deterioration of EU values instead of the fragmented instruments that have so far proven to be insufficient. The Resolution mentions how the Commission's Annual Rule of Law Report fails to encompass democracy and fundamental rights and does not cover the full scope of Article 2 TEU.<sup>61</sup> The new Mechanism widens the scope, streamlines several existing tools and also contains an Annual Monitoring Cycle, which now encompasses all Member States and all EU values. The Cycle is set to provide country-specific recommendations with timelines and targets linked to concrete measures by the respective powers of each of the institutions.<sup>62</sup> Findings of the annual review will thus be used to assess possibilities under Article 7 TEU, general infringement actions and, once adopted, budgetary conditionality measures (see *infra*).

### 6.3 THE LEGAL RESILIENCE OF THE EU'S TOOLBOX IN A MIGRATION CONTEXT

#### 6.3.1 *Infringement Actions and Article 7 TEU*

The tools discussed above can to some extent help the EU enforce its values. However, there are indisputable limitations to the legal resilience they provide vis-à-vis democratic decay or rule of law backsliding and, by extension, restrictive migration policies in the Member States.

As indicated above, a crumbling democracy and rule of law linked with present-day populism seems to have manifested itself also in the extreme limitation of migrants' rights.<sup>63</sup> Intolerance towards immigrants has become one of the symptoms in the EU's democracy crisis, in which Member States,

<sup>60</sup> European Parliament Resolution of 7 October 2020 on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

<sup>61</sup> *Ibid.* para 4.

<sup>62</sup> *Ibid.*; 'Parliament Demands a Legally Binding, Effective Mechanism to Protect EU Values | News | European Parliament' <[www.europarl.europa.eu/news/en/press-room/20201002IPR88432/parliament-demands-a-legally-binding-effective-mechanism-to-protect-eu-values](http://www.europarl.europa.eu/news/en/press-room/20201002IPR88432/parliament-demands-a-legally-binding-effective-mechanism-to-protect-eu-values)> accessed January 2021.

<sup>63</sup> Kim Lane Scheppele and R Daniel Kelemen, 'Defending Democracy in EU Member States beyond Article 7 TEU' in F Bignami (ed) *EU Law in Populist Times* (Cambridge University Press 2020) 413–414.



besides degenerating their democracy and rule of law standards, have adopted restrictive laws and policies towards migration and often use immigrants as the scapegoat for the societal issues on which they build their populist narratives.<sup>64</sup>

Infringement actions present an avenue for the Commission to react to violations of EU law. But, as discussed earlier, violations of EU values (Article 2 TEU) cannot currently serve as the only ground for such action. However, violations of primary and secondary EU law on migration and the Charter of Fundamental Rights can. The Commission has previously used this as a way of showing resilience against both democratic backsliding and restrictions of migrants' rights. It has initiated various infringement procedures based on a variety of legal grounds, including the treatment of migrants in breach of EU laws on asylum procedures, return procedures, reception conditions and several provisions of the Charter of Fundamental Rights.<sup>65</sup>

Presently, over forty infringement procedures have been initiated against Member States (mostly Hungary and Italy) for not or incorrectly applying the Common European Asylum System (CEAS).<sup>66</sup> Hungary, for example, has been dismantling both the rule of law and its asylum system while simultaneously restricting the right to access to its territory and asylum procedures since 2015.<sup>67</sup>

On 30 October 2020 the Commission opened a new infringement procedure – the fifth infringement action against Hungary related to asylum since 2015 – and this case clearly shows the link between migration and the crucial issues concerning the rule of law in Hungary.<sup>68</sup> Under the guise of COVID-19 emergency measures, Hungary had introduced new asylum procedures that further complicate the application procedure for asylum seekers. In doing so, it de facto removed itself from the EU asylum system and gravely deteriorated

<sup>64</sup> Commission v. Hungary [2018] C-808/18, ECLI:EU:C:2020:493; 'Migration: Commission Steps up Infringement against Hungary Concerning Its Asylum Law' (*Press release IP 17-5023*, 2017); European Commission Press Release IP/15/6228, Commission Opens Infringement Procedure against Hungary Concerning Its Asylum Law (10 December 2015); Aleinikoff (n 4) 477.

<sup>65</sup> 'Migration: Commission Steps up Infringement against Hungary Concerning Its Asylum Law' (n 71).

<sup>66</sup> Lopez Garrido and Lopez Castillo (n 36) 19.

<sup>67</sup> Krisztina Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) 13 *Politics in Central Europe* 35.

<sup>68</sup> 'October Infringements Package: Key Decisions – Letters of Formal Notice' (30 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/EN/INF\\_20\\_1687](https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_1687)> accessed January 2021; Astrid Lorenz and others, *Illiberal Trends and Anti-EU Politics in East Central Europe* in Astrid Lorenz and Lisa H Anders (eds) (Palgrave Macmillan, 2020) 147.

migrants' rights.<sup>69</sup> This misuse of emergency powers in Hungary, which has allowed the Orbán government to rule by decree, has negatively impacted the rule of law and democracy.<sup>70</sup> The Commission addressed a letter of formal notice to Hungary on the incorrect application of EU asylum legislation, interpreted in the light of the EU's fundamental rights.<sup>71</sup>

Another infringement action related to migration gave rise to a judgment of 2 April 2020. The CJEU ruled on three joined cases that the Commission had brought against Hungary, Poland and the Czech Republic for failing to execute their migrant relocation obligations.<sup>72</sup> Although these obligations had already expired, the Court still found the Member States to be in breach of their obligations under EU law.<sup>73</sup> Unfortunately, the consequences were entirely declaratory since the obligations had lapsed.

As for infringement actions under Article 259 TFEU, the chances of a Member State initiating infringement proceedings against another Member State for alleged violations of migrants' rights seem very slim, for all the earlier mentioned reasons (see *supra*). For those reasons, this tool does not offer much solace either.

After years of launching infringement procedures on migration and indirectly on rule of law or democratic concerns, actions have mostly proven insufficient in improving migrants' rights or respect for democracy and the rule of law.<sup>74</sup> When Article 7(1) TEU was triggered against Hungary, one of the twelve concerns at the root of the procedure related to the fundamental rights of migrants, asylum seekers and refugees.<sup>75</sup> However, as indicated above, even the preventive arm of Article 7 remains a heavy tool to lift and has so far failed to lead to any improvements, neither regarding democratic backsliding, nor as to the treatment of migrants.<sup>76</sup>

<sup>69</sup> 'Hungary: Closing in On Itself | European Council on Refugees and Exiles (ECRE)' <[www.ecre.org/hungary-closing-in-on-itself/](http://www.ecre.org/hungary-closing-in-on-itself/)> accessed January 2021.

<sup>70</sup> Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers' (6 April 2020) <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>> accessed 8 January 2021.

<sup>71</sup> 'October Infringements Package: Key Decisions – Letters of Formal Notice' (n 75).

<sup>72</sup> C-715/17, C-718/17 and C-719/17 [2020] ECJ, ECLI:EU:C:2020:257.

<sup>73</sup> Zocia Wanat, 'Top Court Rules Warsaw, Budapest and Prague Breached EU Law over Refugees' *POLITICO* (2 April 2020).

<sup>74</sup> Vision Europe Summit, 'Improving the Responses to the Migration and Refugee Crisis in Europe' (2016) 23.

<sup>75</sup> 'REPORT on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded' (2018) <[www.europarl.europa.eu/doceo/document/A-8-2018-0250\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html)>.

<sup>76</sup> 'Rule of Law in Poland and Hungary Has Worsened' (n 51).

The EU's tools, and how they are deployed, are far from a paragon for legal resilience and fail to weaponise the EU against authoritarian populism that impacts democratic values and threatens migrants' rights.

### 6.3.2 *The Implications of Infringements on the CEAS for Democracy and the Rule of Law*

The EU sees its legitimacy challenged when migrants' rights are restricted or violated contrary to its fundamental values.<sup>77</sup> This not only decreases trust in the Union's institutions, but also in its constitutional order, severely affecting the EU's position of promoting and enforcing respect for democracy and the rule of law.

One can wonder whether the EU itself has already considered these wider implications of negated migrants' rights on democratic and rule of law standards and its position in their enforcement in the Member States. The Commission has brought a considerable amount of infringement proceedings against Member States for violating the CEAS and migrants' rights. But despite these actions from the Commission, it is impossible to ignore some of the mixed signals the Union has sent in its policy on systemic violations of CEAS' protective norms over the years. In many ways the EU's migration policy (particularly the Dublin Regulations) has even enabled non-conforming Member States to further consolidate both their anti-migration and backsliding politics.<sup>78</sup>

The CEAS is based on the values of solidarity and respect for human rights and aims to align asylum procedures in the different Member States. The migration crisis exposed the severe shortcomings of the CEAS. As a consequence of the crisis and these shortcomings, the focus of the EU's migration and asylum policies has shifted from solidarity and protection of migrants' rights to control and security measures to protect the outer borders of the Union and the national sovereignty of States.<sup>79</sup> Countries, such as Hungary and Poland, that failed or refused to comply with the CEAS have only

<sup>77</sup> Katri Gadd, Viljam Engström and Barbara Grabowska-Moroz, 'Democratic Legitimacy in EU Migration Policies' 21 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)>.

<sup>78</sup> Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871; Pero Maldini and Marta Takahashi, 'Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European Integration?' (2017) 02 *Communication Management Review* 54.

<sup>79</sup> Maldini and Takahashi (n 85) 59.

benefitted from their non-compliance.<sup>80</sup> Their burden was shifted to other Member States, disrupting the idea of solidarity altogether and further delegitimising EU policies and institutions in the meantime. The abandonment among certain Member States of the CEAS and the principles of solidarity has inevitably impacted on democratic and rule of law backsliding.

Another example of a mixed signal is the infamous EU Turkey Declaration, through which the EU chose to cooperate with Turkey, a country with a poor human rights record, only because the intended outcome of the deal was beneficial for both the EU's external and internal migration policies. Since both policies had failed to contain the migration crisis within the borders of the EU, the Union now prioritised external border control over migrants' rights protection.<sup>81</sup>

Whether the EU itself perceives the infringements on migrants' rights as a direct threat to the rule of law and democracy is therefore not entirely clear. Migration was one of the twelve concerns on which the European Parliament triggered the Article 7 TEU procedure against Hungary (see *supra*) and CEAS violations are not ignored in infringement actions,<sup>82</sup> but an explicit consideration of the implications of national restrictions of migrants' rights on democracy and the rule of law does not seem to be present.

#### 6.4 SUGGESTIONS DE LEGE LATA AND DE LEGE FERENDA

Rule of law and democracy serve as a basis for all the other fundamental values of the Union. The EU's ability to uphold these two values in its Member States is therefore essential. Particularly in the context of guaranteeing migrants' rights, it is of great importance that central elements of the rule of law, like the independence of the judiciary and the equal application of the law, can be maintained. This applies especially when all Member States have to be able to trust each other's judiciaries in order to apply EU law correctly in the light of the Dublin Regulations and, more generally, the Area of Freedom, Security and Justice.<sup>83</sup>

<sup>80</sup> *Ibid.*, 61–63.

<sup>81</sup> Gadd, Engström and Grabowska-Moroz (n 84) 23.

<sup>82</sup> Julia Schmälder, 'A European Response to Non-Compliance: The Commission's Enforcement Efforts and the Common European Asylum System' (2018) 41 *West European Politics* 1330, 1348.

<sup>83</sup> Scheppele and Kelemen (n 70); Giulia Vicini, 'The Dublin Regulation Between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?' (2015) 8 *European Journal of Legal Studies* 50.

The current tools and their usage by the EU institutions are unable to discipline Member States violating the Union's values. Article 7(1) TEU is what many have already called 'a bark without a bite', which Member States are free to ignore since they know sanctions under Article 7(2) TEU will be unlikely to follow due to the unanimity requirement.<sup>84</sup> In utopian circumstances, an effective Treaty change could entail a lowering of the voting requirements in Article 7 TEU or introducing sanctions under Article 7 that go beyond merely political punishments, such as monetary sanctions.<sup>85</sup> None of these scenarios are realistic. Since the EU's fundamental values are crucial for the proper functioning of the Union itself and mutual trust between Member States, the enforcement of Article 2 TEU cannot be left to the workings of one political mechanism alone.

#### 6.4.1 *Effective Usage of the Tools at Hand*

To date, many suggestions have been made to expand the EU's toolbox. But options are limited. As Treaty change requires unanimous consent from all Member States and will thus not lead to any solutions in the near future, it seems preferable to use more effectively the tools that are already available to ensure adherence to the values of the EU.

As pointed out by Kim Lane Scheppele, the Commission should make better use of infringement actions by trying to bring a pattern of non-compliance to the attention of the CJEU.<sup>86</sup> Although infringement actions directly based on Article 2 TEU might still be considered a pipe dream, the CJEU seems to warm up to this possibility by using Article 19(1) TEU as a bypass.<sup>87</sup> Systemic infringements can also be tackled in combination with Article 4(3) TEU, which lays down the principle of sincere cooperation for Member States, and by invoking violations of the Charter of Fundamental Rights.<sup>88</sup> Strengthening the resilience of the Union's fundamental values

<sup>84</sup> Scheppele and Kelemen (n 70); Besselink (n 35).

<sup>85</sup> Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512, 526.

<sup>86</sup> Scheppele (n 10); Oliver Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law* (Springer International Publishing 2019) 159.

<sup>87</sup> The Court has already accepted this in two important cases: *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* [2018] C-64/16, ECLI:EU: C:2018:117; *Celmer* [2018] C-216/18 PPU, ECLI:EU:C:2018:586.

<sup>88</sup> The Commission has already applied this method (see, for example, European Commission Press Release IP/17/5023, Migration: Commission Steps Up Infringement against Hungary Concerning Its Asylum Law (7 December 2017); Scheppele and Kelemen (n 70) 438.

against autocratic Member State governments largely depends on the political will of the Commission to act more creatively and timely within the boundaries of infringement actions as set out by the TFEU and the CJEU in its case law.<sup>89</sup>

However, time sides with those who aim to deconstruct democracy and the rule of law, and so far the EU has not been able to keep up. Accelerated action alone could already make a difference in avoiding the further decline of these core values.<sup>90</sup> Not only infringement actions but also Article 7 TEU should be triggered much more quickly. Additionally, Article 7(1) TEU should only be used in cases where the risk has not (yet) developed into a breach. Otherwise, it will only waste time before any meaningful action can be taken. The EU institutions should be able to call a spade a spade and immediately revert to the use of Article 7(2) TEU when a Member State has breached fundamental values.<sup>91</sup>

#### 6.4.2 *Hitting Them Where It Hurts*

The biggest flaw in the EU's enforcement apparatus – or at least in the way the EU deploys it – has to do with the funding of Member States that are no longer committed to complying with the Union's fundamental values. Among the Member States that currently breach democratic standards most seriously are some of the largest beneficiaries of EU funds.<sup>92</sup> As other sanctions leave autocratic regimes unimpressed, the Union should – if it wants to challenge democratic backsliding successfully – withhold funds from those unwilling to align with its fundamental values.

Making EU funds conditional on value compliance should be a concrete measure of enforcement when serious deficiencies to the rule of law or democracy occur in a Member State. In 2018, the Commission made a first proposal for a regulation to this end as part of a package of proposals on the multiannual financial framework (MFF) for the years 2021 to 2027.<sup>93</sup> The

<sup>89</sup> *Ibid.*, 447–452.

<sup>90</sup> Laurent Pech and Dimitry Kochenov, 'RECONNECT Policy Brief – Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019).

<sup>91</sup> *Ibid.*

<sup>92</sup> 'European Commission: European Structural and Investment Funds 2014–2020: Official Texts and Commentaries' <[https://ec.europa.eu/regional\\_policy/sources/docgener/guides/blue\\_book/blueguide\\_en.pdf](https://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blueguide_en.pdf)> accessed 9 January 2021.

<sup>93</sup> 'Proposal for a Regulation of the European Parliament and of the Council on the Protection For the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States 2018/0136 (COD) COM(2018) 324 Final' (2018).

Regulation was eventually adopted on 16 December 2020 after multiple concessions regarding the rule of law conditionality scheme at the European Council of 10–11 December 2020 (see *infra*).<sup>94</sup> However, it has been submitted that the EU already had the possibility to link the allocation of funds to compliance with the rule of law under the Common Provision Regulation (CPR), which regulates the administration of European Structural and Investment Funds (ESIFs).<sup>95</sup> Article 142(a) of the CPR allows the Commission to withhold ESIFs where a Member States does not respect the rule of law.<sup>96</sup> The article provides that the procedure occurs in private dialogue with the Member States, which means that the Commission may already be doing this behind the scenes.<sup>97</sup> But, as pointed out by Kim Lane Scheppele and Daniel Kelemen, the question arises how useful a secret dialogue can be in deterring other Member States from going down the same path.<sup>98</sup> To effectively suspend the flow of funds and affect rule of law violations, the Commission will again have to show political will and leadership.

An important development in rule of law conditionality to funding happened at the European Council Summit that was held from 17 to 21 July 2020, to discuss the EU's economic response to the COVID-19 pandemic and the Multiannual Financial Framework for 2021–2027 (MFF). What stands out about the European Council Conclusions of 21 July 2020 is that they contain language that ties the distribution of resources to compliance with the rule of law in order to protect these funds from the effects of backsliding (such as corruption):<sup>99</sup> 'a regime of conditionality to protect the budget and Next

<sup>94</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020, L433/I/1.

<sup>95</sup> Scheppele and Kelemen (n 70) 442; Pech and Kochenov (n 97) 2.

<sup>96</sup> European Parliament and Council Regulation (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006; Scheppele and Kelemen (n 78) 442; Israel Butler, 'Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework' (*Civil Liberties Union for Europe*, March 2018) 11–12 <<https://drive.google.com/file/d/1UG4Plg7tObjUoK9tBKq3IdqCT-eB5iM9/view>>.

<sup>97</sup> 'EU Funds Worth \$1.8 Billion at Risk for Hungary Due to Irregularities: Report | Reuters' <[www.reuters.com/article/us-eu-hungary-budget/eu-funds-worth-18-billion-at-risk-for-hungary-due-to-irregularities-report-idUSKCN1M521H](http://www.reuters.com/article/us-eu-hungary-budget/eu-funds-worth-18-billion-at-risk-for-hungary-due-to-irregularities-report-idUSKCN1M521H)>.

<sup>98</sup> Scheppele and Kelemen (n 70) 443.

<sup>99</sup> 'Special Meeting of the European Council (17–21 July 2020)' – Conclusions EUCO 10/20 CO EUR 8 CONCL 4.

Generation EU will be introduced. In this context, the Commission will propose measures, in case of a breach, for adoption by the Council by a qualified majority'.<sup>100</sup>

On 30 September 2020, the Council shared its position on the proposal for the MFF legislation that was put forward by the Commission in 2018.<sup>101</sup> The Commission's proposal included reversed qualified majority voting, meaning that the majority of the Council would have to oppose the adoption of sanctions in order for them to be rejected.<sup>102</sup> The Council's proposal reversed the voting once again, which means that a qualified majority is now needed to adopt measures against a Member State. This raises the bar, as most Member States have been reluctant to openly target a colleague Member State in the past.<sup>103</sup> The Council's proposal faced considerable contention because of this change in voting system, but also because it introduced a 'brake' system which would allow the targeted Member State to call on the Council and stall the procedure. Many members considered the proposal a 'watered down version of what was agreed in July'.<sup>104</sup>

On 10 November 2020, the European Parliament and the Council, with the support of the Commission, reached an agreement on the EU's next long-term budget (MFF) and the Next Generation EU recovery fund.<sup>105</sup> The package includes the above-mentioned rule of law mechanism, which does not need unanimity to be adopted as law. However, the full package needed

<sup>100</sup> Ibid.

<sup>101</sup> 'Multiannual Financial Framework and Recovery Package: Council Agrees Mandate for Negotiations with Parliament on the Regulation for the Protection of the EU Budget – Consilium' <[www.consilium.europa.eu/en/press/press-releases/2020/09/30/multiannual-financial-framework-and-recovery-package-council-agrees-mandate-for-negotiations-with-parliament-on-the-regulation-for-the-protection-of-the-eu-budget/](http://www.consilium.europa.eu/en/press/press-releases/2020/09/30/multiannual-financial-framework-and-recovery-package-council-agrees-mandate-for-negotiations-with-parliament-on-the-regulation-for-the-protection-of-the-eu-budget/)>.

<sup>102</sup> 'Proposal for a Regulation of the European Parliament and of the Council on the Protection For the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States 2018/0136 (COD) COM(2018) 324 Final' (n 100).

<sup>103</sup> Jakub Jaraczewski, 'EU Budget Conditionality: Is the Rule of Law Being Sold Short?' | Democracy Reporting International' <<https://democracy-reporting.org/eu-budget-conditionality-is-the-rule-of-law-being-sold-short/>>.

<sup>104</sup> Sam Fleming and Mehreen Khan, 'EU at Loggerheads over Linking Budget Payments to Rule of Law' *Financial Times* (28 September 2020).

<sup>105</sup> European Commission, 'EU'S Next Long-Term Budget & NextGenerationEU: Key Facts and Figures' <[https://ec.europa.eu/info/sites/info/files/about\\_the\\_european\\_commission/eu\\_budget/mff\\_factsheet\\_agreement\\_en\\_web\\_20.11.pdf](https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf)> accessed 24 November 2020; 'Compromise on Long-Term EU Budget: EP Obtains €16 Billion More for Key Programmes | News | European Parliament' <[www.europarl.europa.eu/news/en/press-room/20201106IPR91014/](http://www.europarl.europa.eu/news/en/press-room/20201106IPR91014/)>; 'European Parliament Legislative Resolution of 16 December 2020 on the Draft Council Regulation Laying down the Multiannual Financial Framework for the Years 2021 to 2027' (09/970/2020 – C9-0409/2020 – 2018/0166(APP)).



unanimous support from all the Member States, and unsurprisingly this is where the shoe pinched.<sup>106</sup> Hungary and Poland retaliated against the rule of law conditionality scheme by vetoing the entire budgetary process. Orbán defended his veto by stating that the scheme only aims to target countries that reject migration: ‘[T]hey only view countries which let migrants in as those governed by the rule of law. Those who protect their borders cannot qualify as countries where rule of law prevails’.<sup>107</sup> Cynically, the statement once again illustrates how respect for the rule of law and the treatment of migrants are interlinked. The Slovenian Prime Minister Janez Janša supported the opposition of the two Member States by exclaiming that ‘[s]ome political groups in the European Parliament are openly threatening to use the instrument wrongly called “the rule of law” in order to discipline individual EU member states through a majority vote’.<sup>108</sup> The German Presidency led the negotiations that ended the deadlock, with various countries, in need of the recovery fund, being held hostage for ten weeks.<sup>109</sup> In its meeting of 10–11 December 2020, the European Council managed to seal a deal on the EU’s budget and Recovery Fund.<sup>110</sup> The rule of law conditionality scheme is still included, but various concessions have been made to the advantage of Hungary and Poland. This includes *inter alia* that (i) the Commission intends to develop guidelines on the way it will apply the Regulation in close consultation with the Member States, (ii) these guidelines will only be finalised after the CJEU renders its judgment should an action for annulment be introduced with regard to the Regulation, and that (iii) until the finalisation of the guidelines, the Commission will not propose measures under the Regulation.<sup>111</sup> As a result, the implementation of the Regulation could be pushed back for a number of years and might possibly be delayed until after the Hungarian

<sup>106</sup> ‘Shallow Self-Interest Shapes the EU Rule of Law Showdown’ *Financial Times* (22 November 2020).

<sup>107</sup> ‘Morawiecki and Orbán Step up Attacks on EU over Rule of Law Debate on Eve of Summit’ *Euronews* (19 November 2020).

<sup>108</sup> ‘Slovenia PM Backs Hungary, Poland in EU Rule of Law Row’ *EURACTIV* (18 November 2020).

<sup>109</sup> Jorge Valero, ‘Commission Considers Options for Recovery Fund without Hungary and Poland’ *EURACTIV* (2 December 2020).

<sup>110</sup> ‘Long-Term EU Budget 2021–2027 and Recovery Package’ <[www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/](http://www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/)>.

<sup>111</sup> [www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf](http://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf), 1–2; See also Alberto Alemanno and Merijn Chamón, ‘To Save the Rule of Law You Must Apparently Break It’ <<https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>>; Aleksejs Dimitrovs, ‘Op-Ed: “Rule of Law-Conditionality as Interpreted by EU Leaders” (2020) EU Law Live’ <<https://eulawlive.com/op-ed-rule-of-law-conditionality-as-interpreted-by-eu-leaders-by-aleksejs-dimitrovs/>>.

elections of 2022.<sup>112</sup> Furthermore, the mechanism will only apply to the 2021–2027 budget, exempting all future projects that will be realised under the previous budgetary framework.<sup>113</sup>

## 6.5 CONCLUSION

Multiple tools offer avenues for the EU to address democratic backsliding and the subsequent restrictive effect on migrants' rights in the Member States. But given how these tools are constructed and how the institutions make very limited use of them, they turn out to be insufficient in providing legal resilience against this phenomenon. We have discussed the legal proceedings provided for by Articles 258–260 TFEU, the political procedures of Article 7 TEU and the soft law instruments that were introduced by the Commission to contain the value crisis that continues to develop throughout the Union. All of these options show significant shortcomings that, cynically enough, seem to have benefitted authoritarian governments in Member States.

EU institutions have long reacted too haltingly to serious rule of law and democratic concerns, which has enabled certain governments to excessively restrict migrants' rights in the meantime. While the Von der Leyen Commission has committed to introduce new initiatives to strengthen democracy and respect for the rule of law in the Union and no longer tolerate shortcomings in this regard, it remains to be seen how successful its initiatives will be.

This chapter has shown that the new initiatives already face quite some challenges and that further political will and engagement will be needed to enhance the democratic functioning of the Union and uphold respect for its fundamental values. The damage caused by backsliding Member States is substantial and the EU will have to act upfront if it wants to avoid further deterioration. In our suggestions we first of all proposed that the EU makes better use of the tools that are available. Second, we proposed to sanction rogue Member States by tying EU funding to rule of law compliance. However, while in December 2020 a rule of law conditionality mechanism was adopted in relation to EU funds, its practicality and effectiveness have been attenuated considerably under the pressure of obstinate Member States.

<sup>112</sup> Jorge Valero, 'EU Leaders to Decide on Compromise to Unblock EU Budget Package' *EURACTIV* (10 December 2020); Lili Bayer, 'EU Budget Plan Lets Hungary, Poland off the Rule-of-Law Hook (for Now)' *POLITICO* (9 December 2020).

<sup>113</sup> Lili Bayer, 'EU Leaders Back Deal to End Budget Blockade by Hungary and Poland' *POLITICO* (10 December 2020).

## The Loss of Face for Everyone Concerned

### *EU Rule of Law in the Context of the 'Migration Crisis'*

BARBARA GRABOWSKA-MOROZ AND  
DIMITRY VLADIMIROVICH KOCHENOV

#### 7.1 INTRODUCTION

The European Union, which is officially established as an entity based on the rule of law<sup>1</sup> according to its own Article 2 TEU,<sup>2</sup> currently faces a 'rule of law crisis' in several Member States, where the system of checks and balances is being gradually dismantled, judicial independence is undermined and systemic corruption is flourishing.<sup>3</sup> Despite the availability of numerous instruments (e.g. Article 7 TEU, direct actions under Articles 258 and 259 TFEU, the financial repercussions of non-compliance under 260 TFEU, and many others)<sup>4</sup> intended to deal with such existential threats – a Union *not* composed of rule of law-based democracies respecting human rights would be a misnomer – the political will to apply the available tools in practice is missing.<sup>5</sup> The supranational side of the same coin has fared no better: while 'rule of law'

<sup>1</sup> Case 294/83, Judgment of the Court of 23 April 1986, *Parti écologiste 'Les Verts' v. European Parliament*, para 23.

<sup>2</sup> M. Klamert and D. Kochenov, 'Article 2' in M. Kellerbauer, M. Klamert and J. Tomkin, (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press) 23–30.

<sup>3</sup> Cf., e.g., A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski and M. Schmidt (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021); C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); A. Jakab and D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

<sup>4</sup> See, for an overview, K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 12–19 (and the literature cited therein).

<sup>5</sup> JCMS Symposium 2016: The Great Rule of Law Debate in the EU edited by Dimitry Kochenov, Amichai Magen and Laurent Pech, (2016) 54 (5) *Journal of Common Market Studies* 1045–1104.

emerged as the core rhetorical pretext for pushing for the unquestioned supremacy of EU law across the board,<sup>6</sup> this created apparent conflicts with the Strasbourg human rights protection system and resulted in the Union's failure to apply the same basic principles at the supranational level as it promotes at the national level, leading to the regrettable emergence of well-articulated double standards.<sup>7</sup> The most clear-cut of these is the non-application of the core elements of the rule of law – the irremovability of judges and security of tenure<sup>8</sup> – to the EU's highest Court, as is clarified by the Vice-President of the institution.<sup>9</sup> An embarrassing situation followed, calling into question the lawfulness of the composition of the Court.<sup>10</sup> The illegally ousted Advocate General, whose term of office, which is established in Primary Law, has not yet expired, issued brilliant 'shadow Opinions' – also pertaining to core issues of EU migration law<sup>11</sup> – in parallel to those presented by the person purported to be an 'Advocate General' by the Member States and sworn in by the President of the Court in apparent violation of the Treaties.

On the other side of the same coin, the EU has been facing a 'migration crisis' in recent years, which is directly related to an absolute fiasco of its neighbourhood policy.<sup>12</sup> Barroso's projected 'ring of friends' has effectively

<sup>6</sup> D. Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times' (2021) XL Polish Yearbook of International Law 197.

<sup>7</sup> Ibid.

<sup>8</sup> K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 *Yearbook of European Law* 3; P. Bogdanowicz and M. Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*' (2020) 16(2) *European Constitutional Law Review* 306.

<sup>9</sup> Case C-423/20 P(R), Order of the Vice-President of the Court, *Council v. Sharpston*, ECLI:EU:C:2020:700 (10 September 2020); Case C-424/20 P(R) Order of the Vice-President of the Court, *Représentants des Gouvernements des États membres v. Sharpston*, ECLI:EU:C:2020:705 (10 September 2020).

<sup>10</sup> D. Kochenov and G. Butler, 'The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution' Jean Monnet Working Paper 2/20.

<sup>11</sup> Shadow Opinion of Advocate-General Eleanor Sharpston QC, Case C-194/19 HA, on the appeal rights of asylum seekers in the Dublin system: <http://eulawanalysis.blogspot.com/2021/02/case-c19419-h.html>.

<sup>12</sup> E. Basheska and D. Kochenov, 'EuroMed, Migration and Frenemy-Ship: Pretending to Deepen Cooperation Across the Mediterranean' in F. Ippolito and S. Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2015), 41. For more on the 'migration crisis', the causes of which are beyond the scope of this chapter, see Agustín José Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22(4) *European Law Journal* 388; Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding the

become (or at best remained) a renewed défilé of dictatorships or, in part, an unstable warzone, finding the EU and its Member States utterly unprepared for this reality, including the migration pressures it could generate: so much for the 'promotion of values' abroad – including in EU's own backyard.<sup>13</sup> The 'migration crisis', which came as a testimony to unpreparedness and deep failure of foreign policy over the years and focused on dictator appeasement combined with ignoring powerful interests and *de facto* spheres of influence, presented a seemingly novel challenge: its mitigation needed to follow the Union's values, such as solidarity and the rule of law. This proved extremely difficult to achieve, as politically and also legally, deep intolerance to the migrant other became the new normal in the EU, often targeting not only third-country nationals, but also EU citizens, as Sarah Ganty has demonstrated.<sup>14</sup> This reality ranges from border walls to pushbacks on land and at sea – sometimes with the full knowledge, if not the assistance, of FRONTEX<sup>15</sup> – as well as broad acceptance of 'culture' and 'integration' tests.<sup>16</sup> Europe today is without any doubt far removed from being a welcoming place, as thousands drown at sea from year to year, children are pushed to die in wintry forests and millions of hours are wasted by countless immigrants forced to learn 'the local customs and language' in an *again* intolerant Europe.<sup>17</sup> At a more global level, the EU, although officially created with lasting peace in mind, has been traditionally markedly ineffective in promoting peace in the European continent and around it.<sup>18</sup> The emerging picture is a disheartening one. It is difficult to decide what about the newly created post of the Commission Vice President for the 'European Way of Life' is a better

Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871.

<sup>13</sup> D. Kochenov and E. Basheska, 'ENP's Values Conditionality from Enlargements to Post-Crimea' in S. Poli (ed.), *The EU and Its Values in the Neighbourhood* (Routledge 2016) 145.

<sup>14</sup> S. Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'UE. Critique d'une intégration choisie*, Larcier 2021.

<sup>15</sup> EP FRONTEX Scrutiny Working Group (FSWG) was appointed by the Committee on Civil Liberties, Justice and Home Affairs. The Group convened to deal with the alleged chronic violation of fundamental rights of asylum seekers by the agency. Cf. Ian Urbina, 'The Secretive Prisons that Keep Migrants out of Europe' *The New Yorker* (6 December 2021).

<sup>16</sup> S. Ganty, 'Silence Is Not (Always) Golden: A Criticism of the ECJ's Approach towards Integration Conditions for Family Reunification' (2021) 23(2) *European Journal of Migration and Law* 176.

<sup>17</sup> A. Favell, 'Integration: Twelve Propositions after Schinkel' (2019) 21 *Journal of Comparative Migration Studies* 1; D. Kochenov, *Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, EUI Working Paper, EUI RSCAS, 2011/06.

<sup>18</sup> A. Williams, *The Ethos of Europe* (Cambridge University Press 2009) Chapter 2.

illustration of just how bad this situation is: the fact that it exists, or the fact that it was thought to be a good idea.<sup>19</sup>

Against the above backdrop, this contribution focuses on the link between the rule of law and migration in the particularly poisonous context of democratic and rule of law backsliding in the EU.<sup>20</sup> Our analysis draws on the Hungarian case study,<sup>21</sup> where overall institutional changes introduced since 2010 have led to the establishment of a regime described as ‘illiberal’ by some and as ‘authoritarian’ by others.<sup>22</sup> We argue that Hungarian asylum policy is essentially designed with one key goal in mind: to deprive people of the right to seek asylum in breach of the international obligations of Hungary and of EU law. Introduced in response to the ‘migration crisis’ in 2015, it was a direct result of the broader process of rule of law backsliding. The Hungarian case study proves that the unresolved rule of law backsliding flourishing in some EU Member States affects both the practical implementation of EU basic values (e.g. solidarity) and the proper functioning of the EU policies (e.g. asylum policy).

Our hypothesis is that the rule of law is not secured sufficiently, either in the EU or by the EU, causing all concerned to lose face: EU values deserve better. Given how much the basic values of the EU, and especially the rule of law, are intertwined with the functioning of EU policies, we argue that reinforcement of the rule of law broadly conceived needs to be a part of the

<sup>19</sup> M. Peel, ‘EU Commission Faces Showdown over “European Way of Life” Job’, 11 September 2019 [www.ft.com/content/1c3ab880-d492-11e9-a0bd-ab8ec6435630](http://www.ft.com/content/1c3ab880-d492-11e9-a0bd-ab8ec6435630); D. Herszenhorn and M. de La Baume, ‘Outrage over “Protecting Our European Way of Life” Job Title’ Politico 11 September 2019, [www.politico.eu/article/outrage-over-protecting-our-european-way-of-life-job-title/](http://www.politico.eu/article/outrage-over-protecting-our-european-way-of-life-job-title/); S. in ‘t Veld, Threat to ‘European Way of Life’ Is Not Migrants. It’s Populists, Politico 12 September 2019, [www.politico.eu/article/populist-threat-to-european-way-of-life-sophie-int-veld-ursula-von-der-leyen/](http://www.politico.eu/article/populist-threat-to-european-way-of-life-sophie-int-veld-ursula-von-der-leyen/).

<sup>20</sup> L. Pech and K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) Cambridge Yearbook of European Legal Studies 19, 3–47.

<sup>21</sup> See also Chapter 8 in this volume. Cf. B. Nagy, ‘Investment Migration and Corruption: The Case of Hungary’ in D. Kochenov and K. Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of* (Cambridge University Press 2022 (forthcoming)).

<sup>22</sup> ‘Ten Million EU Citizens Now Live under Authoritarian Rule’. K. Roth, Stopping the Authoritarian Rot in Europe, EUObserver 23 April 2020, <https://euobserver.com/opinion/148147>; K. Kovács, and K.L. Scheppele, ‘The Fragility of an Independent Judiciary: Lessons from Hungary and Poland and the European Union’ (2018) 51 *Communist and Post-Communist Studies* 189; Z. Szente, ‘Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them’ in A. Jakab and D. Kochenov (eds.) *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Cambridge University Press 2017); Gábor Halmai, Illiberalism in East-Central Europe, EUI Department of Law Research Paper No. 2019/05.

answer to the 'migration crisis' in the EU. Any substandard response in the field of the rule of law leads to deterioration of migrants' rights and vice versa: anti-migration rhetoric and politics help entrench attacks on the rule of law in the backsliding Member States of the Union. Crucially, embracing a systemic connection between the responses to the two interrelated 'crises' should become a priority *both* at the EU and at the Member State level.

## 7.2 THE STATUS OF VALUES IN THE EU LEGAL SYSTEM

The amendments introduced into the Treaties in the 1990s strengthened the visibility, status and the role of values, such as democracy, fundamental rights and rule of law, building on their antecedents, lingering among the unwritten principles and informal resources of the *acquis*.<sup>23</sup> At least on paper and as inspirational ideals, full compliance with the *acquis* at that time still had little to do, strictly legally speaking, with compliance with 'values'<sup>24</sup> – hence the need for the 'Copenhagen political criteria' in the context of recent enlargement preparations.<sup>25</sup> The aftermath of enlargement proved that their practical implementation faces numerous legal and political obstacles.

Despite the fact that the Rule of Law is closely linked with the development of the European Communities as confirmed on numerous occasions in the case law of the Court of Justice,<sup>26</sup> the Member States tend to question its status, justiciability, meaning and function.<sup>27</sup> This questioning is not always without merit, given the complexity of the multilevel system of European

<sup>23</sup> D. Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?' (2005) 9(6) *European Integration online Papers (EIoP)* 1; M. Klamert and D. Kochenov, 'Article 2' in M. Kellerbauer, M. Klamert and J. Tomkin (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press) 23–30.

<sup>24</sup> D. Kochenov, 'The Acquis and Its Principles. The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 9–27.

<sup>25</sup> C. Hilion, *EU Enlargement. A Legal Approach* (Hart Publishing 2004); D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

<sup>26</sup> Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 14(5) *Fordham International Law Journal* 1340.

<sup>27</sup> J. Grogan, L. Pech et al, 'Unity and Diversity in National Understandings of the Rule of Law in the EU' RECONNECT Deliverable 7.1., April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7-1-1.pdf>; Paul Blokker et al, 'The Democracy and Rule of Law Crises in the European Union and Its Member States' RECONNECT Deliverable 14.1., April 2021, <https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf>.

constitutionalism.<sup>28</sup> That said, Laurent Pech managed to demonstrate quite convincingly that even the occasional differences in the articulation of its meaning notwithstanding,<sup>29</sup> the wholesome core of the rule of law is unquestionably sound.<sup>30</sup>

It is thus not the ‘meaning game’ that we need to riddle, when the EU’s rule of law problems come to be illuminated. Rather, there seem to be two aspects of the rule of law crisis. The first is that some Member States deliberately undermine the existing system of checks and balances which allows the governments in power to amend and/or abuse the existing rules in order to remain in power, no matter what, through harnessing the apparatus of the state.<sup>31</sup> The second aspect of the crisis consists in the fact that the European Union has been rather anæmic in its attempts to counteract rule of law backsliding in the Member States.<sup>32</sup> Such an approach undermines the principle of the rule of law understood as a foundation of the EU and does not ensure that the Union is truly composed of rule of law-abiding democracies respecting human rights. Despite being codified in primary EU law, fundamental rights have enjoyed limited scope of application,<sup>33</sup> since they are addressed to the Member States only when they are implementing Union law. Furthermore, the verification of their practical implementation by Member States is limited due to the principle of mutual trust between EU

<sup>28</sup> G. Palombella, ‘Beyond Legality – Before Democracy: Rule of law Caveats in the EU Two-Level System’ in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 36–58. We refer to multilevel constitutionalism as discussed and defined by I. Pernice. See I. Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) 11(3) *European Constitutional Law Review* 541.

<sup>29</sup> E.g. L. Pech, ‘Promoting the Rule of Law Abroad: on the EU’s Limited Contribution to the Shaping of an International Understanding of the Rule of Law’ in D. Kochenov and F. Amtenbrink (eds.), *The European Union’s Shaping of the International Legal Order* (Cambridge University Press 2014) 108.

<sup>30</sup> L. Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ Jean Monnet Working Paper 04/09; L. Pech, J. Grogan et al, ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’ RECONNECT Deliverable 7.1, April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>.

<sup>31</sup> L. Pech and K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) *Cambridge Yearbook of European Legal Studies* 19. For a detailed case study, see W. Sadurski, *Polish Constitutional Breakdown* (Oxford University Press 2019).

<sup>32</sup> For a detailed account and further literature, see e.g. K. L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39 *Yearbook of European Law* 3.

<sup>33</sup> See Article 51 of the Charter.



Member States and the principle of autonomy of EU law.<sup>34</sup> The Charter of Fundamental Rights guarantees the right to asylum in a scope provided for by the Geneva Convention and in accordance with the EU Treaties.<sup>35</sup> In this sense attempts to limit the right to asylum are not only about violations of EU law, but also, significantly, about undermining globally recognised human rights instruments. From this perspective, the 'migration crisis' (also described as a 'refugee crisis' or 'asylum crisis') can be considered as a crisis of fundamental rights protection in the EU. From the institutional perspective it is 'a crisis of the CEAS'.<sup>36</sup>

EU integration has been facing numerous challenges in the recent years, some of which have been described as 'crises', while others – as 'deficits'.<sup>37</sup> Such crises-deficits result in a situation in which the law is both contested – for good or bad reasons – and disapplied – again, for good or bad reasons. The Dublin Regulation, which is famously flawed, does not work in practice, leaving the problems it purported to alleviate unresolved, while unquestionably remaining 'law'. Article 7 TEU, similarly, fails to protect, not only against authoritarian turns – but also against the undermining of legal rules.<sup>38</sup> There is also an important 'populist element' present in both cases.<sup>39</sup> This concerns both anti-elitism – and this includes rallying against courts and judges in the name of 'democracy' pursuing the goal of undermining judicial independence; and anti-otherness, targeting today not only 'illegal immigrants' – but also EU citizens with immigrant background in their family histories. How else does one protect 'our European way of life'? The worse off here are the most vulnerable – the refugees. 'Democratic' fighting for 'our way of life' can thus build on the dismantlement of the rule of law with anti-refugee

<sup>34</sup> Opinion 2/13. Mutual trust based on the presumption of general adherence to the values where only the trust, but not the actual adherence is enforced is highly problematic. See D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 88.

<sup>35</sup> Lock, T. 'Article 18 of the Charter of Fundamental Rights' in M. Kellerbauer, M. Klamert and J. Tomkin (eds). *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 2155.

<sup>36</sup> A. Niemann and N. Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56(1) *Journal of Common Market Studies* 3.

<sup>37</sup> E.g. D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

<sup>38</sup> B. Bugarič, 'Protecting Democracy Inside the EU: On Article 7 and the Hungarian Turn to Authoritarianism' in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 82–102.

<sup>39</sup> Cf. D. Kochenov and B. Grabowska-Moroz, 'Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined' in M. Krygier, A. Czarnota, and W. Sadurski (eds), *Populism and the Rule of Law* (Cambridge University Press 2021).

sentiments as the main driver deployed by the backsliding governments and gradually transferred to the European discourse and practice. Both the failure to tackle the problems of the dysfunctional Dublin system and the creation of the Commission Vice-Presidency focused on the ‘European way of life’ are thus parts of the same anti-rule of law populist drive, which saw Hungary and Poland in a free fall in all the democracy and rule of law indexes. The ‘will of the people’, sometimes expressed via a referendum,<sup>40</sup> is frequently one of the main instruments in the re-charting of law and politics along anti-rule of law and anti-immigrant lines. The two emerged in ‘our European way of life’ as two sides of the same coin, and both levels of government – supranational and national – are to blame. Furthermore, the populist critique of human rights also refers to the ‘people’, arguing that the ‘human rights project’ has given up on this mission and has started to serve particular groups and promote particular agendas.<sup>41</sup> Such rhetoric directly undermines pluralism, a foundational value in the EU project.<sup>42</sup> Lastly, it goes without saying that the challenges described above erode the core fabric of which EU law is woven: the principle of mutual trust.<sup>43</sup>

### 7.3 WHEN RULE OF LAW BACKSLIDING MEETS ‘MIGRATION CRISIS’: HUNGARIAN ASYLUM LAW BEFORE THE COURT OF JUSTICE

Commissioner Viviane Reding, when discussing the ‘rule of law crisis’ in 2013, referred to three examples: ‘the Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law

<sup>40</sup> E.g., When discussing EU-Turkey deal Viktor Orbán stated that ‘we cannot make decisions over people’s heads, that change their lives and that of future generations’ (C. Kroet, ‘Viktor Orbán says EU-Turkey deal is “an illusion”’ Politico 25 February 2016, [www.politico.eu/article/viktor-orban-says-eu-turkey-deal-is-an-illusion-hungary-germany-merkel-summit/](http://www.politico.eu/article/viktor-orban-says-eu-turkey-deal-is-an-illusion-hungary-germany-merkel-summit/)).

<sup>41</sup> P. Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15 *European Constitutional Law Review* 518; D. Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *Common Market Law Review* 623; V. Bílková, ‘Populism and Human Rights’ (2018), *Netherlands Yearbook of International Law* 161.

<sup>42</sup> Ironically, anti-pluralism and nationalist preferences can actually produce pluralist results, as is illustrated by the regulation of citizenship in Europe: D. Kochenov and J. Lindeboom, ‘Pluralism through Its Denial: The Success of EU Citizenship’ in G. Davies and M. Avbelj (eds.) *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

<sup>43</sup> C. Rizcallah, *Le principe de confiance mutuelle en droit de l’Union européenne. Un principe essentiel à l’épreuve d’une crise de valeurs*, Larcier 2020.

crisis in the summer of 2012'.<sup>44</sup> After ten years the Hungarian crisis has led to the establishment of the first autocracy in the European Union – a 'Partly Free' EU Member State.<sup>45</sup> Institutional arrangements undertaken by the government in Hungary since 2010 have strengthened the executive against any independent entity. Such an institutional, procedural and political shift allowed the government to introduce numerous policies directly affecting fundamental rights and freedoms – freedom of association, academic freedom, and right to asylum.<sup>46</sup>

There are no effective checks and balances which would control and supervise whether a policy is reasonable, effective or acceptable in the light of Constitution, international law or the moral values of a given society. Using the 'migration crisis' to ramp up populist sentiments, the Hungarian government introduced an asylum policy which *de facto* limited the right to asylum to a degree where there could be no such right in practice. The populist othering game went as far as the criminalisation of those 'assisting migrants' and large-scale PR campaigns against the figures criticising the government, from George Soros, the founder of the CEU, to key figures at the European Commission.<sup>47</sup> 'Othering' is popular and can become a banner under which the rule of law is destroyed.

A barbed-wire fence was erected along the country's southern border; crossing the border fence became a criminal act; two transit zones were established, where people were kept without any 'detention order'; the courts'

<sup>44</sup> Viviane Reding, Speech: The EU and the Rule of Law – What next?, 4 September 2013, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_677](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677).

<sup>45</sup> Freedom in the World 2019, Democracy in Retreat, Freedom House: <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat>.

<sup>46</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)).

<sup>47</sup> 'Stop Soros' started with coordinated media campaign (see Judith Mischke, George Soros accuses Hungary of 'anti-Semitic' attack campaign, Politico 20 November 2017), followed by the publication of a draft law on NGOs providing support to asylum seekers (see K. Than, Hungary submits anti-immigration 'Stop Soros' bill to parliament, Reuters 14 February 2018, [www.reuters.com/article/us-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUSKCN1FY1JE](http://www.reuters.com/article/us-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUSKCN1FY1JE)) and a new law on higher education, which primarily targeted the status of the Central European University, established and financed by G. Soros. Finally, 'Stop Soros' campaign covered also President of the European Commission, Jean-Claude Juncker (see L. Bayer, Hungary Launches Campaign Targeting Jean-Claude Juncker, Politico 18 February 2019, [www.politico.eu/article/hungary-launches-campaign-targeting-jean-claude-juncker-george-soros/](http://www.politico.eu/article/hungary-launches-campaign-targeting-jean-claude-juncker-george-soros/)). Legislation adopted as a part of 'Stop Soros' resulted in infringement actions: C-78/18 (Lex NGO), C-821/19 and C-66/18 (Lex CEU).

competences were limited;<sup>48</sup> a ‘pushback’ policy was implemented; since 2018 all asylum applications were automatically declared inadmissible if the applicant had transited Serbia;<sup>49</sup> and finally, as mentioned above, providing assistance to asylum-seekers also became a criminal act. In 2016 alone, the Hungarian government spent approximately twenty-eight million euros on its large-scale xenophobic anti-immigrant campaign.<sup>50</sup> In October 2018 a referendum was held in Hungary in which the Hungarians were asked ‘Do you want the European Union to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly?’ Despite the low turnout, Viktor Orbán announced that ‘Hungarians decided that only we Hungarians can decide with whom we want to live’.<sup>51</sup>

The very idea of migration, especially ‘non-Western’ migration, came to be immensely politicised. The politicisation of migration<sup>52</sup> diagnosed in numerous Member States, was a result of the polarisation of attitudes towards EU migration policy,<sup>53</sup> and without any doubt was also a reaction to the very essence of what the EU has stood for from its inception: a Union in which the internal market is the main objective and the core element of achieving it is open internal borders and the strict enforcement of the principle of non-discrimination on the basis of nationality. Unthinkable elsewhere in the world, given the nationality’s main function – it would be absurd to claim that any of the Member States enjoys any control over its borders or its population.<sup>54</sup> No nationalist would like this, of course, and Orbán has been

<sup>48</sup> Judgment of the Court (Grand Chamber) of 29 July 2019, *Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2019:626.

<sup>49</sup> Valerie Hopkins, James Shotter, Michael Peel, ECJ Ruling Deals Blow to Hungary’s Asylum Process, *Financial Times* 17 December 2020: [www.ft.com/content/a5c13b76-a53e-4b02-8247-8959ec02d363](http://www.ft.com/content/a5c13b76-a53e-4b02-8247-8959ec02d363).

<sup>50</sup> E. M. Goździak, Using Fear of the ‘Other’, Orbán Reshapes Migration Policy in a Hungary Built on Cultural Diversity, October 10, 2019 [www.migrationpolicy.org/article/orb%C3%Aun-reshapes-migration-policy-hungary](http://www.migrationpolicy.org/article/orb%C3%Aun-reshapes-migration-policy-hungary).

<sup>51</sup> Krisztina Than and Gergely Szakacs, ‘Hungary’s Orban to Seek EU of Strong Nations after Landslide Re-election’ *Reuters* 10 April 2018, [www.reuters.com/article/news-us-hungary-election-orban-idCAKBN1HH12A-OCATP](http://www.reuters.com/article/news-us-hungary-election-orban-idCAKBN1HH12A-OCATP).

<sup>52</sup> Felipe González Morales, ‘Hungary: Government’s Declared Migrant “Crisis” Does Not Correspond to Reality and Leads to Human Rights Violations, Says UN expert’ *BUDAPEST* (17 July 2019), [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E).

<sup>53</sup> F. Pasetti and B. Garcés-Mascareñas, ‘Who Is Responsible, for What and to Whom? Patterns of Politicisation on Refugees and the European Solidarity Crisis’ (2018) 16 *Ceaseval Research on the Common European Asylum* 7.

<sup>54</sup> D. Kochenov and J. Lindeboom, ‘Pluralism through Its Denial: The Success of EU Citizenship’ in G. Davies and M. Avbelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

very skilful in riding the wave of hate he fuelled in full knowledge of the outright nihilistic, at least legally speaking, nature of his referendum, combined with all the PR activity: by joining the EU, Hungary had surrendered the right, precisely, to determine essentially who will inhabit its territory.<sup>55</sup> The law was thus not on the 'othering' populists' side.

Would it be surprising, then, that the officially endorsed and madly serialised narrative offered by the Hungarian government rests heavily on creating a link between 'rule of law' and 'migration' – suggesting that criticism based on 'rule of law' aims at forcing Hungary to 'let illegal migrants in',<sup>56</sup> and as a result the procedure initiated under Article 7 TEU, constitutes a 'revenge campaign of the pro-migration elite'.<sup>57</sup> Insofar as the EU is bound to ensure that its law's claim to supremacy succeeds<sup>58</sup> and that an effective right of asylum is indeed provided in the EU – however flawed its problematic legal framework may be on the subject<sup>59</sup> – Orbán's propaganda has thus got several key points about the nature of the EU right. Indeed, Hungary cannot in the majority of cases decide who will live in Hungary and yes, it is against the law to try to do so without taking EU legal instruments fully into account.

The second point that the Orbán propaganda machine got across relates to the criticism of 'migration' *per se*, which is presented as a threat to Hungary,<sup>60</sup> resulting in the 'securitisation' of migration<sup>61</sup> and the humiliation of migrants.

<sup>55</sup> D. Kochenov, 'Rounding Up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' EUI RSCAS Working Paper 2010/23.

<sup>56</sup> F. Kaszás, 'Hungarian Gov't Has Few Allies in Fight against Rule of Law Criteria' <https://hungarytoday.hu/orban-hungary-argument-rule-of-law-allies/>. The Prime Minister said that 'those who protect their borders and their countries from migration are no longer considered by Brussels to be rule-governed states'.

<sup>57</sup> E. Zalan, 'Hungary Claims EU "Witch-Hunt" Over Rule of Law Hearing' EUObserver Brussels, 17 September 2019. Minister Varga said that 'the pro-migration liberal elite continued to repeat the same baseless, untruthful, unfounded accusations that are echoed in the liberal, mostly western European media'. See also, Z. Kovács, 'This Is How "Rule of Law" became a Weapon against Countries That Oppose Migration' 20 November 2020, <http://abouthungary.hu/blog/this-is-how-rule-of-law-became-a-weapon-against-countries-that-oppose-migration/>.

<sup>58</sup> J. Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *Oxford Journal of Legal Studies* 328.

<sup>59</sup> E. Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9(1) *Utrecht Law Review* 135; S. Peers, 'Reconciling the Dublin System with European Fundamental Rights and the Charter' (2014) 15 *ERA Forum* 485.

<sup>60</sup> Lili Bayer, 'Hungary's "Zero Refugee" Strategy' Politico 20 September 2016 [www.politico.eu/article/hungary-zero-refugee-strategy-viktor-orban-europe-migration-crisis/](http://www.politico.eu/article/hungary-zero-refugee-strategy-viktor-orban-europe-migration-crisis/). Hungary: Government's declared migrant 'crisis' does not correspond to reality and leads to human rights violations, says UN expert, Budapest (17 July 2019): [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E).

<sup>61</sup> P. Maldini and M. Takahashi, 'Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European

Hungary is not alone here – take the UK<sup>62</sup> or Denmark<sup>63</sup> as other examples – but Hungary is notorious for bringing this basic point to an extreme. For Fidesz, the crux of the matter is not even ‘Britishness’ or ‘the knowledge of the Danish language and culture’: any act of migration by ‘non-Western’ ‘others’ is presented in the official narrative as a direct threat to ‘Christian values’ – never mind the religion of the migrants – thus justifying the rhetorical need of protecting these values.<sup>64</sup> The only value enjoying protection here is boring old racism – not an atypical stance in the contemporary ‘West’ of the passport apartheid,<sup>65</sup> but probably somewhat more clearly articulated in Hungary than, say, Denmark, and thus a little bit more obnoxious. Orbán even employs the term ‘Christian democracy’ to describe a regime which he used to name ‘illiberal democracy’.<sup>66</sup> This description of course advanced despite the fact that the functioning of Hungarian ‘transit zones’ can hardly be linked to any ‘Christian standard’,<sup>67</sup> not to mention the fact that Hungarian ‘democracy’, to quote András Sajó’s brilliant recent account, is ‘Ruling by Cheating’.<sup>68</sup>

The anti-migration policy adopted by the Hungarian government since 2015 became the subject of numerous infringement actions initiated by the

Integration?’ (2017) 2 *Communication Management Review* 67; Hungary: Government’s Declared Migrant ‘Crisis’ Does Not Correspond to Reality and Leads to Human Rights Violations, Says UN Expert, BUDAPEST (17 July 2019), [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E).

<sup>62</sup> C. O’Brien, ‘Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit’ (2021) 58 *Common Market Law Review* 431; D. Kochenov, ‘EU Citizenship and Withdrawals from the Union. How Inevitable Is the Radical Downgrading of Rights?’ in C. Closa (ed) *Secession from a Member State and Withdrawal from the European Union. Troubled Membership* (Cambridge University Press 2017).

<sup>63</sup> S. Ganty, ‘Silence Is Not (Always) Golden: A Criticism of the ECJ’s Approach towards Integration Conditions for Family Reunification’ (2021) 23 *European Journal of Migration and Law* 176.

<sup>64</sup> M. Karnitschnig, ‘Orbán Says Migrants Threaten “Christian” Europe’, Politico Europe, 3 September 2015, [www.politico.eu/article/orban-migrants-threaten-christian-europeidentity-refugees-asylum-crisis/](http://www.politico.eu/article/orban-migrants-threaten-christian-europeidentity-refugees-asylum-crisis/).

<sup>65</sup> D. Kochenov, ‘Ending the Passport Apartheid: The Alternative to Citizenship Is No Citizenship’ (2020) 18(4) *International Journal of Constitutional Law* 1525.

<sup>66</sup> S. Walker, Orbán Deploys Christianity with a Twist to Tighten Grip in Hungary, 14 July 2019 [www.theguardian.com/world/2019/jul/14/viktor-orban-budapest-hungary-christianity-with-a-twist](http://www.theguardian.com/world/2019/jul/14/viktor-orban-budapest-hungary-christianity-with-a-twist); Viktor Orbán’s full speech for the beginning of his fourth mandate, Visegrad Post May 12, 2018 <https://visegradpost.com/en/2018/05/12/viktor-orbans-full-speech-for-the-beginning-of-his-fourth-mandate/>

<sup>67</sup> Gabor Ivanyi, There’s Nothing Christian about Orban’s Democratic Values, Euronews 30 December 2019, [www.euronews.com/2018/09/05/there-s-nothing-christian-about-orban-s-democratic-values-view](http://www.euronews.com/2018/09/05/there-s-nothing-christian-about-orban-s-democratic-values-view); Rejection, starvation, creating bureaucratic and legal hurdles, and spreading false news about asylum seekers is particularly un-Christian behaviour.

<sup>68</sup> A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press 2021).

European Commission. The first concerned the opposition to fulfil the relocation plan adopted in 2015 as a part of the 'European Agenda on Migration'.<sup>69</sup> The aim of the relocation programme was to support Greece and Italy and relocate almost 1,600,000 refugees to other Member States. The programme operated on the basis of two Council decisions<sup>70</sup> which were challenged by the Czech Republic and Hungary<sup>71</sup> before the Court of Justice.<sup>72</sup> One reason for the reluctant response to EU initiatives, such as the relocation scheme in many EU countries, has been the rise of nationalistic populist parties in national elections in several EU Member States.<sup>73</sup> In the proceedings before the Court, the Polish government argued, for example, that the relocation scheme was disproportionate with respect to states that are 'virtually ethnically homogeneous, like Poland' and 'whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory'.<sup>74</sup> The Court's ruling, which dismissed this reasoning, was seen as a milestone since solidarity and burden-sharing were framed for the first time as obligations, rather than as discretionary.<sup>75</sup>

Following the unsuccessful challenge of legality of the relocation scheme, Hungary (alongside Poland and the Czech Republic) faced proceedings regarding their failure to fulfil obligations under the relocation decisions.<sup>76</sup> Hungary, Poland and the Czech Republic argued that their actions – refusal

<sup>69</sup> European Commission, Communication to the European Parliament, the European Council and the Council. Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, Brussels, 23.9.2015, COM(2015) 490 final. The European Agenda for Migration mentioned numerous actions, such as hotspot system (filtering people and categorising them as asylum seekers or 'economic migrants'), a relocation mechanism, and external deals (e.g. with Turkey and Libya).

<sup>70</sup> Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601.

<sup>71</sup> K. Groenendijk, B. Nagy, Hungary's Appeal against Relocation to the CJEU: Upfront Attack or Rear Guard Battle? 16 December 2015, <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>.

<sup>72</sup> A challenge to the legality of Decision 2015/1601 was unsuccessful – Judgment of 6 September 2017, *Slovak Republic and Hungary v. Council*, C-643/15 and C-647/15, EU:C:2017:631.

<sup>73</sup> I.P. Karolewski and R. Benedikter, 'Europe's Migration Predicament: The European Union's Refugees' Relocation Scheme versus the Defiant Central Eastern European Visegrad Group (2018) *Journal of Inter-Regional Studies: Regional and Global Perspective* 40; Katri Gadd, Viljam Engström and Barbara Grabowska-Moroz, Democratic Legitimacy in EU Migration Policies, RECONNECT Working Paper 13.2, 31.

<sup>74</sup> Judgment of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovakia v. Council*, para. 302.

<sup>75</sup> B. de Witte and E. Tsourdi, 'Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union (2017) 55(5) *Common Market Law Review* 1493.

<sup>76</sup> Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland*.

to accept refugees under the relocation scheme – were justified due to the ineffectiveness of the scheme and the need to safeguard internal security. The governments argued that such ‘withdrawal’ from the realm of legal obligations directly binding on them was acceptable in the light of Article 72 TFEU, which specifies that ‘This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’. The Court disagreed with this argument and underlined that Article 72 TFEU must be interpreted strictly<sup>77</sup> and ‘cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities’.<sup>78</sup> It further underlined that Member States cannot rely on their ‘unilateral assessment’ to avoid their obligations.<sup>79</sup> This was in particular due to the binding nature of the Decisions and from the perspective of their *aim* – solidarity, finding that ‘in a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness’.<sup>80</sup> Advocate General Sharpston was as simple on this matter as she was clear: ‘respect for the rule of law implies compliance with one’s legal obligations’.<sup>81</sup> She added that ‘solidarity is the lifeblood of the European project’, which ‘requires one to shoulder collective responsibilities and (yes) burdens to further the common good’.<sup>82</sup>

There is also an important ‘political aspect’ to the relocation story – that ‘consensus in the EU has to be formed on the political level’,<sup>83</sup> to forestall legal challenges of its crucial elements. The media reported that outside the legal proceedings, it was being suggested that the relocation decisions themselves, rather than the lawless behaviour of the recalcitrant Member States, were the ‘original sin’ that broke trust between the Commission and Eastern and Central European governments.<sup>84</sup> The lack of an actual will to cooperate and genuinely act in solidarity with other EU Member States is seen as one of

<sup>77</sup> *Ibid.* para. 143.

<sup>78</sup> Para. 145.

<sup>79</sup> Para. 180.

<sup>80</sup> Para. 139.

<sup>81</sup> Opinion of Advocate General Sharpston delivered on 31 October 2019 Case C-715/17 *European Commission v. Republic of Poland*; Case C-718/17 *European Commission v. Republic of Hungary*; Case C-719/17 *European Commission v. Czech Republic*, para. 241.

<sup>82</sup> Para. 253.

<sup>83</sup> N. Kirst, ‘Protecting the Formal Rule of Law in the EU’s Asylum Policy: The CJEU’s Judgment on the Asylum Relocation Mechanism’ EU Law Analysis Blog 20 June 2020: <http://eulawanalysis.blogspot.com/2020/06/protecting-formal-rule-of-law-in-eus.html>.

<sup>84</sup> E. Zalan, ‘Three Countries Broke EU Law on Migrant Relocation’ EUObserver 2 April 2020: <https://euobserver-com.proxy-ub.rug.nl/migration/147971>.



the reasons why the relocation system failed.<sup>85</sup> This legal fight reinforced the position of the 'anti-immigrant' leaders at home: connecting the destruction of the rule of law with anti-immigration policies has seemingly paid off.<sup>86</sup>

The main elements of the new asylum policy were subject of the second infringement procedure against Hungary, initiated already in 2015, but did not reach the Court until 2018.<sup>87</sup> The case covered the most disturbing elements of the 'asylum procedures' applied in two 'transit zones'. Access to the asylum procedure was 'systematically and drastically' limited,<sup>88</sup> which was found to be incompatible with Article 6(1) of Directive 2013/32. The obligation to remain in the transit zones (surrounded by a high fence and barbed wire) was recognised as 'detention',<sup>89</sup> which had not been ordered on a case-by-case basis<sup>90</sup> and was thus contrary to numerous provisions of Directive 2013/32.<sup>91</sup> The Court also found that the so called pushback policies violated EU law. However, according to the Hungarian Helsinki Committee, the policy is still in use.<sup>92</sup> As a result FRONTEX – an EU agency currently under EP investigation for, precisely, pushbacks elsewhere – decided to suspend operations in Hungary.<sup>93</sup> This is a puzzling decision, given the growing evidence of FRONTEX's own involvement in pushbacks and harassment, in attempts to prevent the effective protection of rights.

The third infringement action deals with the legislation that criminalises organising activities with a view to 'enabling asylum proceedings to be brought in Hungary by a person who is not persecuted in his or her country of nationality, country of habitual residence or any other country via which he or she arrived [...] or who does not have a well-founded fear of direct persecution'. The Commission argued that such legislation violates EU law and in 2019 brought the infringement case to the Court.<sup>94</sup> The Opinion in this

<sup>85</sup> S. Progin-Theuerkauf and Vincent Zufferey, 'Aucune justification du refus de participer au mécanisme temporaire de relocalisation de demandeurs d'une protection internationale' (2020) 5 *European Papers* 587.

<sup>86</sup> For a very nuanced approach contextualising the stance of the Central and Eastern European Countries, see, Paul Blokker, 'The Democracy and Rule of Law Crises in the European Union and Its Member States' (RECONNECT 2021).

<sup>87</sup> Judgment of 17 December 2020, *Commission v. Hungary*, Case C-808/18, para. 60 and 67.

<sup>88</sup> *Ibid.*, para. 118.

<sup>89</sup> *Ibid.*, para. 160 and 166.

<sup>90</sup> *Ibid.*, para. 176.

<sup>91</sup> *Ibid.*, para. 186.

<sup>92</sup> N. Nielsen, 'Hungary "Ignoring EU Court Ruling on asylum"' *EUObserver* 11 January 2021.

<sup>93</sup> N. Nielsen, 'Frontex Suspends Operations in Hungary' *EUObserver* 27 January 2021.

<sup>94</sup> Action brought on 8 November 2019, *European Commission v. Hungary*, Case C-821/19.

case was delivered by ‘AG’ Rantos.<sup>95</sup> He found that the Hungarian government had breached EU law<sup>96</sup> by criminalising activities designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting international protection established by national law.<sup>97</sup> The Hungarian authorities argued that the challenged provision of domestic law must be interpreted in light of the clarification provided by the Hungarian Constitutional Court, which had ruled that the provision ‘does not penalise negligent conduct, but exclusively acts which are committed deliberately’.<sup>98</sup> It is, however, up to the authorities to decide whether the action meets the criteria of being ‘deliberate’. The Greek gentleman wrote that ‘in any event, criminalising assistance provided to applicants for international protection could have a particularly significant deterrent effect on all persons or organisations who, knowingly, try to promote a change in legislation or a more flexible interpretation of national law, or even claim that the relevant national law is incompatible with EU law’.<sup>99</sup> As a result, the challenged provision ‘de facto prevents or, at the very least, significantly restricts any activity providing assistance to applicants for international protection carried out by persons or organisations’.<sup>100</sup> The above finding seems to be even more evident if the analysis is concentrated on the asylum seeker directly. As Advocate General Sharpston underlined in her Shadow Opinion in the case of *H.A.*,<sup>101</sup> dealing

<sup>95</sup> Mr Rantos was appointed to the position of AG by the Member States notwithstanding the lack of a vacancy and as a result, as per the decision of the Vice President of the Court of Justice, that such an action of the Member States as masters of the Treaties was not reviewable by the Court of Justice. The tenure of Advocate General Sharpston was consequently terminated in direct breach of the Treaties and the Statute of the Court as well as of the Court’s newly minted case law on the importance of judicial irremovability and independence. For a detailed analysis of the case and judicial challenges of this decision, see D. Kochenov and G. Butler, ‘The Independence of the Court of Justice of the European Union: Unchecked Member States’ Power after the Sharpston Affair’ (2022) 28 *European Law Journal*. By supporting the attack of the Member States on its own independence the Court has seemingly opened a Pandora’s box, since ECtHR case law on the matter is unequivocal, especially following the seminal decision in *Xero Flor*: a body containing usurpers appointed to the bench in the absence of a vacancy is not a court or tribunal established by law.

<sup>96</sup> E.g., provisions of Directive 2013/32 on common procedures for granting and withdrawing international protection and Directive 2013/33/EU on standards for the reception of applicants for international protection.

<sup>97</sup> Opinion of 25 February 2021, *Commission v. Hungary*, Case C-821/19.

<sup>98</sup> *Ibid.*, para. 33.

<sup>99</sup> *Ibid.*, para. 36.

<sup>100</sup> *Ibid.*, para. 44.

<sup>101</sup> Case C-194/19.

with the Dublin system, '[a]n applicant for international protection is not a statistic. He or she is a human being, who has the right to be treated fairly and with dignity'.<sup>102</sup> Limiting access to legal assistance renders meaningless the right to be treated fairly.

All the hard work of the Court of Justice, including the infringement actions and preliminary rulings in response to the requests from the Hungarian courts quite expectedly failed to produce any major policy shifts on the ground: Hungary remains closed to refugees. As a result of preliminary references, however, the Court acquired a chance to rule on the main elements of the Hungarian asylum law before the infringement actions confirmed those findings.<sup>103</sup> Consider transit zones – the Court in *FMS* had already found in May 2020 that placement in transit zones amounted to unlawful detention.<sup>104</sup> The Government criticised the ruling as 'dangerous', arguing that it 'poses a security risk to all of Europe',<sup>105</sup> but also decided to close the transit zones in May 2020.<sup>106</sup> It shows, first and foremost, how important the time factor is in the decision-making process of the European Commission – the guardian of the Treaties – regarding initiating infringement actions against Member States. Second, the role of the independent domestic courts, indispensable actors in guaranteeing rule of law standards, cannot be overstated, especially in the context of asylum cases.

#### 7.4 WHY SOLVING THE 'MIGRATION CRISIS' REQUIRES EU RULE OF LAW RESILIENCE

It is well known that the existing EU asylum legal framework does not constitute an effective tool to ensure that the fundamental rights of all those concerned are safeguarded. Indeed, it has been abundantly confirmed that the

<sup>102</sup> Shadow Opinion of Eleanor Sharpston QC – Case C-194/19 *HA*, on appeal rights of asylum seekers in the Dublin system published at EU Law Analysis Blog, 12 February 2021, <http://eulawanalysis.blogspot.com/2021/02/case-c19419-h.html>.

<sup>103</sup> A. Léderer and M. Pardavi, 'Still Waters Run Deep: The CJEU Finds Pushbacks in Hungary Illegal' *VerfBlog*, <https://verfassungsblog.de/still-waters-run-deep/>.

<sup>104</sup> Judgment of the Court (Grand Chamber) 14 May 2020, Joined Cases C-924/19 *PPU* and C-925/19 *PPU, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*.

<sup>105</sup> Gergely Gulyás on the European Court of Justice's new ruling on immigration: It's dangerous for all of Europe, 21 May 2020, <http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/>.

<sup>106</sup> R. Uitz, 'Don't Be Fooled by Its Sudden Compliance. Hungary Is Helping to Unravel the EU's Legal Order' *Euronews* 28 May 2020, [www.euronews.com/2020/05/28/don-t-be-fooled-by-its-sudden-compliance-hungary-is-helping-to-unravel-the-eu-s-legal-orde](http://www.euronews.com/2020/05/28/don-t-be-fooled-by-its-sudden-compliance-hungary-is-helping-to-unravel-the-eu-s-legal-orde).

Dublin Regulation does not produce such results,<sup>107</sup> which constitutes a huge challenge for the rule of law. It is a result of two constitutional problems with the rule of law in the European Union. The first is a ‘design problem’ which amounts to the fact that the rule of law is not really an EU institutional ideal.<sup>108</sup> Later claims notwithstanding, it was not a foundational value and its understanding is often limited to the requirement of legality. The *jurisdictio-gubernaculum* divide is missing in the EU legal system.<sup>109</sup> This all led to a situation where Article 2 TEU tends not to be regarded – mistakenly in our view – as part of the ordinary EU *acquis*.<sup>110</sup> The second issue is a ‘functionality problem’ – the inability to enforce EU values effectively, neither politically nor legally.<sup>111</sup> This is notwithstanding the overwhelming progress made over recent years in the area of the rule of law, especially by the Court of Justice.<sup>112</sup> The existing tools have been ineffective in the face of all the deliberate attempts to undermine checks and balances in some EU Member States. Interestingly enough, similar design and enforcement shortcomings have also been highlighted with regard to the ‘migration crisis.’<sup>113</sup> In short, on top of the Hungarian mockery of the law described above, it is fundamental to realise that the rule of law and migration contexts are also intertwined because the EU law in question is absolutely inadequate and – which could be even worse for our purposes – its rigorous enforcement could be presented as much of a threat to the rule of law and the protection of fundamental rights as breaking it.

<sup>107</sup> A. Dembach, ‘Germany Suspends Dublin Agreement for Syrian Refugees’ Euractiv 26 August 2015, [www.euractiv.com/section/economy-jobs/news/germany-suspends-dublin-agreement-for-syrian-refugees/](http://www.euractiv.com/section/economy-jobs/news/germany-suspends-dublin-agreement-for-syrian-refugees/).

<sup>108</sup> G. Palombella, ‘The Rule of Law as an Institutional Ideal’, in L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010) 3.

<sup>109</sup> D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 *Yearbook of European Law*. Cf G. Palombella, ‘The Rule of Law and Its Core’ in G. Palombella, N. Walker (eds.) *Relocating the Rule of Law* (Hart Publishing 2009).

<sup>110</sup> M. Klamert and D. Kochenov, ‘Article 2’ in M. Kellerbauer, M. Klamert, J. Tomkin, (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 23–30; K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39 *Yearbook of European Law* 12–19.

<sup>111</sup> D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 *Yearbook of European Law* 89.

<sup>112</sup> For a detailed analysis, see, L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case Law of the Court of Justice: A Casebook Overview of the Key Judgments since the Portuguese Judges Case* (SIEPS, 2021).

<sup>113</sup> D. Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy (2016) 53(6) *Common Market Law Review* 1549.

The EU actions, including infringement actions and Article 7 TEU procedure, did not solve the rule of law backsliding in Hungary. Dismantlement of the checks and balances gave the public authorities a broad discretion regarding public policies, including protection of fundamental rights and the right to asylum. As a result, the Commission had to initiate numerous infringements regarding violations of EU asylum law, dealing with such basic issues as access to asylum procedure or access to legal assistance. In our opinion such basic violations of the right to asylum would not have been introduced if the rule of law backsliding was tackled effectively in Hungary. Despite the Commission's small juridical victories, the infringement actions did not change the essence of the Hungarian asylum policy, which makes seeking asylum in Hungary highly challenging, especially for the Mediterranean route migrants. In other words, we are dealing with yet another instance of what we have characterised elsewhere as 'losing by winning', writing with Kim Scheppele.<sup>114</sup> The Commission's Court victories change absolutely nothing at the systemic level. Worse still, given the shortcomings of the Dublin system, ideal compliance with EU law would be prone to producing chronic violations of the right to seek asylum – we will turn to this point below. Such a 'vicious circle' shows that solving 'migration crisis' is directly linked with the need to handle the rule of law backsliding in EU Member States, as well as addressing the justice deficit and other flaws plaguing EU law at the supranational level.

It goes without saying that the inability of the EU to address rule of law backsliding is only one side of the coin. The second, once again, is that EU law *per se* does not offer the basic rule of law standards required to guarantee asylum rights. The so-called EU-Turkey deal, one of the main tools aimed at dealing with the 'migration crisis', provides an interesting example of such EU rule of law shortcomings. The deal was reached in 2016 and aimed at limiting the number of people seeking asylum who reached the EU Member States from the Mediterranean area.<sup>115</sup> It was a part of the EU Migration Agenda.<sup>116</sup> According to the agreement all new irregular migrants crossing from Turkey

<sup>114</sup> K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law*.

<sup>115</sup> EU-Turkey Statement of 18 March 2016, [www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/).

<sup>116</sup> Communication to the European Parliament, the European Council, the Council, Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration, Brussels, 23.9.2015, COM(2015) 490 final.

into the Greek islands from 20 March 2016 would be returned to Turkey.<sup>117</sup> In return the EU distributed 3 billion euros to the Facility for Refugees in Turkey. The focus of criticism of the deal was the danger of human rights abuses in Turkey.<sup>118</sup> In 2017 an annulment action was brought to the General Court by three persons who had travelled from Turkey to Greece, where they submitted applications for asylum. Under the EU-Turkey deal they could be returned to Turkey if their applications for asylum were rejected. They argued that the EU-Turkey deal is an international agreement that the European Council, as an institution acting in the name of the EU, concluded with the Republic of Turkey. The obvious unstated objective of such agreement is to annihilate the right to seek asylum in the EU. The General Court, however, ruled that it lacks jurisdiction to hear and determine these actions under Article 263 TFEU, reaching the conclusion that it was not the EU but its Member States which conducted negotiations with Turkey and the Court did not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States.<sup>119</sup> The Court of Justice dismissed<sup>120</sup> the appeals after finding them ‘incoherent’,<sup>121</sup> ‘worded in a vague and ambiguous manner’,<sup>122</sup> ‘lacking any coherent structure’.<sup>123</sup> Switching off the fundamental rights guaranteed in EU and international law in direct breach of what both these legal orders purport to guarantee is thus absolutely fine in the EU system of the rule of law, freeing the Member States to demonise asylum seekers, view them as a threat and are unwilling to adhere to the really quite low standard of protection guaranteed by EU and international law. The desire of the Member States not to honour clear obligations *is* the law, as the world has learned from the Court’s engagement with the EU-Turkey deal.

<sup>117</sup> The other points of the deal were: migrants arriving in the Greek islands would be duly registered and any application for asylum would be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive; migrants not applying for asylum or whose application for asylum had been found to be unfounded or inadmissible would be returned to Turkey; for every Syrian being returned to Turkey from the Greek islands, another Syrian would be resettled from Turkey to the European Union.

<sup>118</sup> A. Geddes, ‘The Politics of European Union Migration Governance’ (2018) 56 *Journal of Common Market Studies* 120, 123; J. Monar, ‘Justice and Home Affairs’ (2017) 7 *Journal of Common Market Studies* 102; R. Bauböck, ‘Refugee Protection and Burden-Sharing in the European Union’ (2018) 56 *Journal of Common Market Studies* 141.

<sup>119</sup> Orders of 28 February 2017 in Cases T-192/16 *NF v. European Council*, T-193/16 *NG v. European Council*, and T-257/16 *NM v. European Council*.

<sup>120</sup> Order of the Court (First Chamber) 12 September 2018, Joined Cases C-208/17 P to C-210/17 P, ECLI:EU:C:2018:705.

<sup>121</sup> *Ibid.*, para. 16.

<sup>122</sup> *Ibid.*, para. 13.

<sup>123</sup> *Ibid.*, para. 14.

The apparent supranational rule of law problems were further exacerbated by the positions adopted by the institutions in the context of this litigation. The EU institutions denied before the General Court that they participated in signing the agreement with Turkey despite the wording of the press release, which referred to the 'EU-Turkey Statement'. The EU has done all it could to hide a mass assault on the rights of asylum seekers that it had orchestrated behind truly ingenious and flimsy excuses, amplifying serious concerns about the accountability of the European Union institutions and the Union as a whole.<sup>124</sup> Approached from this vantage point, Orbán's government in Hungary is a model pupil in the EU's school of values with the only difference being that it does not claim that 'it was not Hungary' that built a barbed-wire fence and engaged in the systematic abuse of asylum seekers to void their rights of any content. The EU is seeking the same results, but under the juvenile banner that 'it was not me'. An international agreement reached outside the legal framework required by the Treaties, affecting fundamental rights and freedoms to the point of *de facto* threatening to eliminate them, and remaining outside the jurisdiction of the Court, constitutes a huge challenge to the idea that the rule of law is a foundational value of the EU: just another example of how mythical the fable of the completeness of the system of legal remedies in the EU is. Numerous examples beyond Turkey prove the same point: paying Libyan thugs to enslave people for ransom with the use of EU intelligence as the *New Yorker* reported is also "our way of life". It is thus beyond any doubt that the problematic tandem of waning rule of law and migrants' rights deterioration is not merely acute in the context of the analysis of the situation in the backsliding EU Member States, but it should also be taken seriously when considering the supranational level.

The image of the EU emerging in this context is directly opposite to the 'Union based on the rule of law', let alone a Union giving full respect to the rights of asylum seekers and compliance with EU law. The supranational level flaws affecting the rule of law picture and adding to its complexity, thus further came to light. The rationale behind the double standards in how the Court of Justice treats Union institutions as opposed to the individual Member States embarking on exactly the same exercise of robbing the most needy of all their

<sup>124</sup> S. Carrera, L. den Hertog and M. Stefan, 'It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal', CEPS Policy Insights No 2017-15/April 2017, 2: 'By rejecting ownership of and responsibility for the Statement before the Court – while still being complicit in its origins and implementation – the European Council, the Council and the Commission failed to play the roles attributed to them by the Lisbon Treaty.'

rights and sometimes of their lives, will need to be explained by the Court in its future case law.

## 7.5 CONCLUSION

The rule of law is purported to be one of the core values on which the EU is founded. The same applies to respect for human rights, especially those set out in the Charter of Fundamental Rights and entering the EU legal system from the ECHR. Those most basic aspects of European law are currently facing the biggest political and legal challenges, frequently described as ‘crises’: a rule of law ‘crisis’ and a migration ‘crisis’. Crises can be perceived as an important stage of development or progress, emerging as true turning points. Political will both at the supranational and at the national level emerges, however, as an indispensable factor to turn the ‘rule of law’ into a truly foundational and constitutional value of the EU and make it work *for* rather than *against* safeguarding the rights of all those entangled in the ‘migration crisis’. As our analysis has shown, both the national – as illustrated by Hungary – and the EU regulatory levels have demonstrated eagerness to annihilate fundamental rights, undermining the basics of the rule of law and obfuscating the levels of legal and political responsibility for ‘crisis’-inspired actions aimed at harming rights. The recurrent connection between migration and the rule of law has thus been feeding a dangerous vicious circle, lowering the level of rights protection and eroding rule of law guarantees, as well as undoubtedly the legitimacy of the Union as a whole. Should this trend not be reversed, all Europeans – just like the foreigners at our shores – are going to be markedly worse off as a result, while our ideals are being progressively turned into empty proclamations by the European Union and its Hungaries alike.



PART III

Resilience at the National Level: Case Studies



## In the Hands of a Populist Authoritarian

### *The Agony of the Hungarian Asylum System and the Possible Ways of Recovery*

KRISZTA KOVÁCS AND BOLDIZSÁR NAGY

#### 8.1 INTRODUCTION

EU constitutional rules require member states to be constitutional democracies. Yet, a populist authoritarian has, following Carl Schmitt's rule-book, captured the constitutional state in Hungary and turned it into an autocracy. It need not have happened, the 2015 'migration crisis' notwithstanding. The new authoritarian regime and its brutal anti-immigration rules serve the sole purpose: to secure prime minister Viktor Orbán's firm hold on power.

European Union politicians hold the assumption that every EU member state is a functioning democracy. Therefore, member states are permitted to ignore each other's faults, knowing that democracies are self-correcting. While it is true that democracies are capable of self-correction, today, Hungary cannot correct its constitutional problems itself.<sup>1</sup> In the 2010 election, the Fidesz-KDNP party got 52.73% of the list votes, but – due to the individual districts where the winner takes all – in Parliament gained 67.88% of the seats that secured constitutional supermajority, which it has mostly retained to the present day.<sup>2</sup>

Since returning to office (he had led the Hungarian government previously, from 1998 to 2002), Orbán has been working toward creating an authoritarian system.<sup>3</sup> His autocracy is not as dramatic as its predecessors,

<sup>1</sup> We use the term 'constitutional' to include the problems concerning the protection of human rights, democracy, and the rule of law.

<sup>2</sup> Homepage of the National Election Committee <https://www.valasztas.hu/web/national-election-office/elections>.

<sup>3</sup> J Kis, *Alkotmányos demokrácia* [Constitutional Democracy] (Kalligram 2019) 531; J Kornai, 'The System Paradigm Revisited' (2017) 1–2 *Revue D'Études Comparatives Est-Ouest* 239; GA Tóth, 'Constitutional Markers of Authoritarianism' (2019) 1 *Hague Journal of Rule Law* 37.

the twentieth-century style authoritarian systems. Opposition parties and candidates are not yet banned, and the regime does not keep hundreds in prison for political dissent. It is still possible to ‘protest by word of mouth . . . , or if all else fails, by the extreme form of exit, leaving the country’.<sup>4</sup> Yet, the election law tricks,<sup>5</sup> the campaign finance laws,<sup>6</sup> and the electoral bodies dominated by persons loyal to the leader may cast doubt on the fairness of the elections.<sup>7</sup> Moreover, there are no functioning checks on the executive. Many observers doubt the ordinary judiciary’s independence,<sup>8</sup> and hold that the Constitutional Court is effectively neutralised as a check on governmental power.<sup>9</sup>

The rise of authoritarianism is closely related to Orbán’s political calculations, driven by a sole purpose: to retain power and control. The restrictive asylum laws and policies are just one instrument among the many used when convenient to serve this goal. The restrictions are not a result of the domestic law’s organic development or impacts of the EU *acquis*. They need not have happened, all the transit through Hungary of large numbers of irregular

According to Way and Levitsky, Hungary is a prime example of a competitive autocracy. LA Way and S Levitsky, ‘How Autocrats Can Rig the Game and Damage Democracy’ *Washington Post* 4 January 2019. Other scholars describe and name the brave new Hungarian regime in a different way. Bálint Magyar identifies it as a Mafia state, emphasising the cynicism and pragmatism of the regime. B Magyar, *Post-Communist Mafia State: The Case of Hungary* (CEU Press 2016). Yet another terminology is ‘plebiscitary leader democracy’ suggested by one-time leading Fidesz ideologue, A Körösenyi ‘The Theory and Practice of Plebiscitary Leadership: Weber and the Orbán Regime’ (2018) 33 *East European Politics and Societies and Cultures* 280.

<sup>4</sup> Komai, *supra* note 3, 279.

<sup>5</sup> For instance, the so-called winner compensation, gerrymandering, voting rights of the out-of-country Hungarians. R László, ‘The New Hungarian Election System’s Beneficiaries’ <<https://cens.ceu.edu/sites/cens.ceu.edu/files/attachment/article/579/laszlo-thenehungarianelectionsystemsbeneficiaries.pdf>> 1–3.

<sup>6</sup> *Ibid.*, 5–7.

<sup>7</sup> OSCE pronounced both the 2014 and 2018 general elections free but unfair. [www.osce.org/odihr/elections/hungary](http://www.osce.org/odihr/elections/hungary). Besides, electoral clientelism in rural Hungary played a role in the enduring success of Fidesz party in the 2014 elections and the 2018 elections. I Mares and L Young, ‘Varieties of Clientelism in Hungarian Elections’ (2019) 3 *Comparative Politics* 449.

<sup>8</sup> See, e.g., K Kovács and K L Scheppele, ‘The Fragility of an Independent Judiciary: Lessons from Hungary and Poland and the European Union’ in PH Solomon and K Gadowska (eds), *Legal Change in Post-Communist States: Progress, Reversions, Explanations* (ibidem Press 2019).

<sup>9</sup> *Ibid.*, 60–64. Venice Commission, *Opinion on the New Constitution of Hungary* CDL–AD (2011)016, para 102. Venice Commission, *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary* CDL–AD(2012)009, para 10. K Kovács, ‘Constitutional Continuity Disrupted’ in B Majtényi and M Feischmidt, *The Rise of Populist Nationalism* (CEU Press 2020) 30.

migrants in 2015 notwithstanding. Since 2010, Hungary's approach to forced migration has been changed substantially: a genuine international commitment gave way to an exclusionist, ethnicist position.<sup>10</sup> This development has been coupled with the discourse of the 'threatening other'. The 'migrant' in the political discourse is separated from its scholarly or legal meaning and is identified with a potential terrorist or at least a criminal, who at the same time threatens to overwhelm the thousand-year-old national 'Christian' culture and replace it with their own.

This chapter, first, locates this Orbanian discourse and measures it in a Schmittian paradigm. The theory of Carl Schmitt helps us make sense of Hungarian constitutional developments because Orbán has continuously concentrated on the political friend and the foe to maintain a permanent 'crisis' situation. Second, the chapter shows how the authoritarian goals determined the management of regular migration and the control of irregular migration and especially asylum. Most of the rules applicable during the fictitious 'state of crisis caused by mass immigration' contradict the EU measures and breach international asylum law. The changes introduced under the pretext of anti-pandemic measures in July 2020 eliminated access to protection.

One might wonder whether it makes a difference that all this is happening in an EU member state. The chapter argues that this 'external constraining force' is relevant both in the context of migration and the possibilities of democratic resistance.<sup>11</sup> There is a potential for legal resistance on the international and EU level, and domestically, techniques of resistance developed during feudalism (e.g., the tradition of free cities or 'passive resistance') and socialism (e.g., *samizdat*) are to be mixed with those based on the leftover of the rule of law regime.

<sup>10</sup> Byrne, Noll and Vedsted-Hansen, in a recent article, have an interesting blind spot: whereas they call for a historic turn in explaining the roots of the present crisis of EU law and find some of them in the accession process and how asylum law was forced on the new member states they completely ignore the specific situation of Hungary that has in fact provided protection to tens of thousands of refugees first, coming from Romania and then escaping the war in Yugoslavia, and so the historical conditioning of Hungary was substantially different from the other new member states. R Byrne, G Noll & J Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871.

<sup>11</sup> We use quotation mark because Bozóki and Hegedűs argue that Hungary is a regime externally constrained by the EU, but we think that EU principles and laws are an internal and integral part of the Hungarian legal system. A Bozóki and D Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 *Democratization* 1174.

## 8.2 FOLLOWING THE SCHMITTIAN RULEBOOK

Today, scholars identify the behaviour of authoritarian nationalists with the term ‘populism’. For instance, Lazaridis and Konsta<sup>12</sup> – after noting the divergent interpretations of the term ‘populism’<sup>13</sup> – set out three general characteristics of today’s populists: they speak on behalf of the national community as if it was a culturally, religiously, and linguistically homogenous genuine community sharing the same values; they accuse the political elite and the intellectuals of being undemocratic, ‘incapable, unproductive, and privileged, distant or alienated from the people, or lacking in the plebiscitarian quality of common sense’;<sup>14</sup> and identify a threatening other – one or more groups whose members allegedly undermine the community’s values or prosperity.

Indeed, today’s populist authoritarian nationalists concentrate on the concept of identity as a tool for determining who belongs to the mass that may be defined in ethnic, religious or linguistic terms. They use the language of the malign ‘other’, in which the other is a group considered not to belong to the mass because it differs in some key characteristics. However, this claim of today’s populist authoritarian nationalists is not new. They go back at least to Carl Schmitt’s interwar theory of ‘democracy’,<sup>15</sup> at the heart of which is the idea of a unified will of the homogeneous people, embodied in the unitary sovereign’s distinction between the friend and foe.<sup>16</sup> Schmitt held that democracy, properly understood, is an attempt to establish a ‘genuine identity’ between rulers and the ruled.<sup>17</sup> The ruled are the people who exist in their

<sup>12</sup> G Lazaridis and AM Konsta, ‘Identitarian Populism: Securitization of Migration and the Far Right in Times of Economic Crisis in Greece and the UK’ in G Lazaridis and W Khurshheed (eds), *The Securitisation of Migration in the EU* (Palgrave Macmillan 2015) 185–7.

<sup>13</sup> For a more recent account see B Bugarić, ‘The Two Faces of Populism: Between Authoritarian and Democratic Populism’ (2019) 20 *German Law Journal* 390.

<sup>14</sup> Lazaridis and Konsta, *supra* note 12, 186.

<sup>15</sup> M Kumm, ‘How Populist Authoritarian Nationalism Threatens Constitutionalism or: Why Constitutional Resilience Is a Key Issue of Our Time’ (*VerfassungsBlog*, 6 December 2018) <<https://verfassungsblog.de/how-populist-authoritarian-nationalism-threatens-constitutionalism-or-why-constitutional-resilience-is-a-key-issue-of-our-time/>. Schmitt does not call his system ‘sovereign dictatorship’, rather he reinterprets ‘democracy’, because he accepts the inevitability of democracy. C Schmitt, *The Crisis of Parliamentary Democracy* (E Kennedy tr, Massachusetts Institute of Technology 2000) 22.

<sup>16</sup> C Schmitt, *The Concept of the Political* (Chicago University Press 2007) 26.

<sup>17</sup> B Scheuerman, ‘Is Parliamentarism in Crisis? A Response to Carl Schmitt’ (1995) 1 *Theory and Society* 138.

ethnic and cultural ‘oneness’,<sup>18</sup> which ensures the community’s strict internal homogeneity. The ruler may be a directly elected unitary sovereign who acts as an authentic representative of the people by symbolically incarnating the identity of the people and whose primary mission is to guarantee the political entity’s self-preservation.

The most appealing part of the Schmittian conception for today’s populist authoritarian nationalists is that at the basis of every constitution is an indispensable, unitary sovereign, who, at the moment of an unpredictable crisis, can break free of the rule of law and assert his pre-legal authority. This situation is what Schmitt calls the state of exception (*Ausnahmezustand*), which refers to a completely abnormal situation, where the continued application of the normal legal rules and rights prevents effective action from ending the exception.

Notably, there is a difference between the state of emergency and the state of exception. The notion of the state of emergency refers to public emergencies in democracies, such as national security crises, including, for instance, terrorist attacks, but also economic catastrophes and technological or natural disasters, such as pandemics. During a state of emergency, democratic state institutions function normally, although the distribution of power is modified in favour of the executive to manage the crisis. But a state of emergency provides only the conditions for exercising otherwise legitimate power. It is an underlying principle that ‘the executive is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system’.<sup>19</sup> Thus, in a case of emergency, a democratic regime is typically a temporarily modified constitutional democracy. Some constitutional rights are restricted, with the primary purpose of emergency being to restore the democratic legal order and the full enjoyment of human rights.

*Ausnahmezustand*, however, is a lawless void when there is an order, but the order is not a normative, rather a factual one, where ‘the state remains, whereas law recedes’.<sup>20</sup> The application of the normal legal rules and rights is suspended by the unitary sovereign’s decision on the ground that the situation is abnormal: ‘The exception is that which cannot be subsumed: it defies general codification, but it simultaneously reveals a specifically juristic

<sup>18</sup> U K Preuss, ‘Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution’ in M Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy* (Duke University Press 1995) 153–4.

<sup>19</sup> J Ferejohn and P Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *International Journal of Constitutional Law* 210, 211.

<sup>20</sup> C Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (Chicago University Press 2005) 12.

element – the decision in absolute purity'.<sup>21</sup> The unitary 'sovereign is he who decides on the exception'<sup>22</sup> and on 'whether the constitution needs to be suspended in its entirety'.<sup>23</sup> Thus, the state of exception is constituted by the sovereign's personal decision: the sovereign decides both when there is a state of exception and how best to respond to that situation. That decision for Schmitt is one which is based on the political consideration of who is a friend and who is an enemy of the state.<sup>24</sup> Instead of openly discussing competing ideas in public, the uncontrolled sovereign has the exclusive power to make political distinctions between friend and foe constantly. Schmitt asserted that the differentiation of the people from the foe was inevitable because the foe threatened the existence of the political entity. However, the 'existential' enemy need not be an external one; he can very well be a domestic political opponent;<sup>25</sup> furthermore, he 'need not be morally evil or aesthetically ugly, he need not appear as economic competitors, and it may even be advantageous to engage with him in business transactions'.<sup>26</sup>

Hence, the distinction between the political friend and foe is needed to create a 'crisis' situation, where the ordinary norms are suspended. As we will see in the next section, a whole array of processes has been created in Hungary since 2010 in response to some 'crisis' situation.

### 8.3 IN A PERMANENT STATE OF CRISIS

Already the 2011 constitution of the Orbán regime – officially named 'Fundamental Law' – was adopted with reference to a crisis: the 2008 global financial crisis and its consequences.<sup>27</sup> A couple of years later, citing the 2015 migrant crisis threat, the Hungarian government, alone in the EU, declared a mass migration emergency. Migration was not among the constitutionally listed situations that might justify the introduction of emergency rule. So, the government used article 15(1) of the Fundamental Law – 'The government shall exercise powers which are not expressly conferred by laws on another state body' – to declare a 'state of crisis caused by mass

<sup>21</sup> *Ibid.*, 13.

<sup>22</sup> *Ibid.*, 5.

<sup>23</sup> *Ibid.*, 7.

<sup>24</sup> Schmitt *supra* note 16, 26.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, 27.

<sup>27</sup> K Kovács, 'After the Economic Crisis – In a State of Exception?' Venice Commission Report CDL-JU(2014)013.



immigration',<sup>28</sup> entitling itself to suspend or deny fundamental rights not only to the 'migrants' but to the inhabitants of the country as well. The conditions of introducing the state of crisis have never been met, as neither the numbers required for its introduction materialised nor the threats that would entitle the government to announce it even if the number of arriving irregular migrants was below the threshold.<sup>29</sup> No other EU member state declared a state of crisis to deal with the refugee problem, not even states that were the ultimate destination of asylum-seekers. Although in 2019, the European Commission declared the migrant crisis to be over,<sup>30</sup> the Hungarian state of crisis is still in effect. The government renews it every six months, most recently on 3 September 2021, even though the border with Serbia is hermetically sealed, and in principle not a single irregular migrant can enter Hungary's territory.<sup>31</sup>

In addition to the 'state of crisis caused by mass immigration', a constitutional amendment was adopted to make it possible to declare a 'state of a terrorist threat' to 'manage the adverse results from the migration crisis, including threats of terrorism'. This amendment followed the Schmittian tradition: it allowed the government to declare the 'state of a terrorist threat' on its own, and there was no need to have the Parliament's approval; so the government could decide both that there was a threat and how to respond to it. All this happened in a country that has not seen a severe terror attack within its borders yet. Although the government, in a demagogic way, has connected the issue of migration with the problems of terrorism, militant fundamentalism is absent in the country.<sup>32</sup>

Since 2015, Hungary has been in a permanent 'state of crisis caused by mass immigration'. On top of that, in 2020, the government declared the 'state of danger due to the coronavirus pandemic', and later a third one, a 'state of medical preparedness'.<sup>33</sup> And with a constitutional amendment,<sup>34</sup> a further

<sup>28</sup> Government Decree 41/2016 on declaring a state of crisis caused by mass immigration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis.

<sup>29</sup> The number of irregular migrants required to trigger a state of crisis is described in Section 80/A of the Asylum Act LXXX of 2007.

<sup>30</sup> European Commission, 'Progress Report on the Implementation of the European Agenda on Migration' Brussels, 6 March 2019 COM(2019) 126 final, 14.

<sup>31</sup> Governmental Decree 509/2021; E Inotai, 'Pandemic-Hit Hungary Harps on About "Migrant Crisis"' (2020) *Balkaninsight* March 19 <<https://balkaninsight.com/2020/03/19/pandemic-hit-hungary-harps-on-about-migrant-crisis/>>. In reality, however, people manage to cross the fence.

<sup>32</sup> GA Tóth, 'Judging Fears in Refugee Crisis' (*VerfassungsBlog*, 26 September 2015) <<http://verfassungsblog.de/judging-fears-in-refugee-crisis/>>.

<sup>33</sup> Government decree 40/2020; Government decree 478/2020.

<sup>34</sup> Ninth amendment of the Fundamental Law of 22 December 2020, Hungarian Official Gazette 2020/285, 10128.

step has been taken on the road to full-out authoritarianism. It broadens the situation in which emergencies can be declared, and government decrees become the default because the amendment erased any meaningful role for the Parliament.

In short, this section demonstrated that the way Hungary has declared a 'state of crisis' displays characteristics of the Schmittian state of exception<sup>35</sup> characterised by a de facto unlimited authority of the executive. Looking at the interrelationship of the democratic decay and the restrictive rules on forced migration facts suggest that the restrictive rules on migration emerged as part of the larger scheme aiming at the concentration of power and generating a loyal constituency, the loyalty of which derives from the vision of a leader who protects it from the 'foe'.

## 8.4 AUTOCRATISATION IN THE CONTEXT OF MIGRATION

### 8.4.1 *Constitutional Narratives and Developments*

A discourse that securitises the 'migrant',<sup>36</sup> and represents the arriving irregular migrants as the threatening 'other' has dominated the Hungarian political scene since the 2015 arrival of asylum seekers.<sup>37</sup> The government has treated asylum seekers as foes labelling them as 'migrants',<sup>38</sup> and launched national consultations on 'illegal migration' and terrorism.<sup>39</sup> However, the threatening other is not just the 'migrant', but the 'forces' behind the migrant: the 'financiers', especially George Soros, the 'pro-refugee' NGOs in alliance with

<sup>35</sup> Schmitt supra note 16.

<sup>36</sup> B Nagy, 'Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Cooperation' (2016) 17 *German Law Journal* 1053; B Nagy, 'From Reluctance to Total Denial. Asylum Policy in Hungary 2015–2018' in V Stoyanova and E Karageorgiou (eds) *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 23–31.

<sup>37</sup> See, e.g., B Simonovits, 'The Public Perception of the Migration Crisis from the Hungarian Point of View: Evidence from the Field' in B Glorius and J Doornik (eds) *Geographies of Asylum in Europe and the Role of European Localities* (Springer 2020); B Mendelski, 'The Rhetoric of Hungarian Premier Victor Orban: Inside X Outside in the Context of Immigration Crisis' in S Ratuva (eds) *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan 2019).

<sup>38</sup> In some instances, the term 'migrant' retained its original meaning encompassing regular migration for work and other legitimate purposes.

<sup>39</sup> The so-called national consultation serves as a substitute for the democratic institution of the referendum. Unaudited questionnaires are sent out to the electorate with several questions put by the government. There is no independent verification of either the number of surveys returned to the government or the answers, and the government refuses to allow outside verification of its claims regarding the results.

the political left.<sup>40</sup> The EU ('Brussels') is also the threatening other in the field of immigration, against which a firm immigration policy must be upheld.<sup>41</sup> Besides, those who insist on the idea of an open society and promote the ever closer union of the people of the EU are also collaborators against whom the 'real' patriots must ally.<sup>42</sup>

This discourse enables the oppression of various democratic actors, including human rights defenders and NGOs helping refugees and creates synergies with other legal measures destroying constitutional democracy.<sup>43</sup> The protagonist of this discourse, Orbán's government, claims to be the only force capable of containing the threat, with the help of the exceptional powers they vindicate.

A quick look at the constitutional developments related to migration and asylum reveals how the approach to migration has changed over time, how a genuine international commitment gave way to an exclusionist, ethnicist position. Until the 1989 democratic transition, the Hungarian constitution promised to 'grant' asylum to those who are persecuted for their activities promoting 'democratic behaviour, social progress, the liberation of people and the defence of peace'.<sup>44</sup> The 1989 democratic constitution led to the gradual incorporation of the essential elements of the Geneva Convention relating to the Status of Refugees, albeit until 1997 it also recognised persecution based on 'language'.<sup>45</sup> Asylum became a right, not an optionally 'granted' privilege. In 1997, a limitation on the right to asylum was introduced in the constitution based on the twin concepts of a safe country of origin and a safe third country. Asylum was to be granted only to those to whom these did not apply.<sup>46</sup> This restriction was in line with the emerging rules within the European Community as it was.<sup>47</sup>

<sup>40</sup> Mendelski came to the same conclusion. Mendelski *supra* note 37, 1.

<sup>41</sup> Viktor Orbán's 'State of the Nation' address <[www.miniszterelnok.hu/prime-minister-viktor-orbans-state-of-the-nation-address-3/](http://www.miniszterelnok.hu/prime-minister-viktor-orbans-state-of-the-nation-address-3/)>; Viktor Orbán's speech at the launch event for the Fidesz-KDNP European Parliament election programme <[www.miniszterelnok.hu/speech-by-viktor-orban-at-the-launch-event-for-the-fidesz-kdnp-european-parliament-election-programme/](http://www.miniszterelnok.hu/speech-by-viktor-orban-at-the-launch-event-for-the-fidesz-kdnp-european-parliament-election-programme/)>.

<sup>42</sup> Viktor Orbán's speech on the 63rd anniversary of the 1956 Revolution and Freedom Fight <<https://miniszterelnok.hu/prime-minister-viktor-orbans-commemoration-speech-on-the-63rd-anniversary-of-the-1956-revolution-and-freedom-fight/>>.

<sup>43</sup> For a review of the measures see 8.4.3.4.

<sup>44</sup> Article 67 of the Constitution in its post-1972 version.

<sup>45</sup> Act XXXI of 1989 effectively re-wrote the whole constitution, but technically the old number was retained.

<sup>46</sup> Section 13 of Act LIX of 1997.

<sup>47</sup> R Byrne, G Noll and J Vedsted-Hansen (eds) *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer 2002) 17–27.

For years, the Fundamental Law contained the definition of the Geneva Convention entitling to asylum (with the above two exceptions) and the prohibition of mass expulsion and *refoulement*.<sup>48</sup> The text had not changed until 2018, when the Fundamental Law's seventh amendment entered into force, introducing new rules on regular migration and asylum.<sup>49</sup> They stipulate in Article XIV (1), 'No foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities.' The first sentence does not make sense since 'foreign population' is not an expression defined anywhere in Hungarian law, and 'settling in' does not have a meaning under migration law.<sup>50</sup> Thus, the whole sentence is a populist slogan with the undertone of protesting against possible relocation or resettlement due to an EU decision.<sup>51</sup>

Paragraph (4) of the same article re-wrote asylum law and deviated from the Geneva Convention by adding the qualifier 'direct' to persecution. So 'well-founded fear of direct persecution' is required to qualify as a refugee. The rule contains another serious deviation from international law, as it excludes from refugee status and asylum any person who 'arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution'. That is much less than a safe third country concept, especially as codified in the EU's Procedure Directive (PD).<sup>52</sup> Subsidiary protection did not find its way into the Fundamental law; only minimalist non-*refoulement* rule is found in Article XIV (3).

#### 8.4.2 Regular Migration

In the context of regular migration, the Hungarian immigration policy is ethnicist and economically utilitarian. In principle, the government has a

<sup>48</sup> Fundamental Law, Article XIV as in 2012.

<sup>49</sup> Seventh amendment of the Fundamental law of 28 June 2018, Hungarian Official Gazette 2018/97, 4714.

<sup>50</sup> J'Tóth, 'Mi fán terem a (kényszer)betelepítés? [Where on Earth Does Forced Settling in Come from?]' (2017) 1 *Magyar Jogi Nyelv* 17.

<sup>51</sup> The official justification sharing the rationale behind the seventh amendment was clear on this: 'The mass immigration hitting Europe and the activities of pro-immigration forces threaten the national sovereignty of Hungary. Brussels plans to introduce a compulsory fixed-quota scheme for the relocation of migrants residing or arriving in Europe, which presents a danger to the security of our country and would change the population and culture of Hungary forever.' The justification of Bill T/332 <[www.parlament.hu/irom41/00332/00332.pdf](http://www.parlament.hu/irom41/00332/00332.pdf)>.

<sup>52</sup> Article 38 of the PD. The ECJ found the rule infringing EU law: Judgment of the Court (First Chamber) of 19 March 2020 Case C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkügyi Bíróság*, ECLI:EU:C:2020:218.

migration policy<sup>53</sup> – at least with regards to inward migration – but the government never invokes that document, and the public discourse eliminates it as well.<sup>54</sup> Consequently, the Hungarian migration policy can only be deduced from the rules and the legal practices that, notably, entirely contradict the government rhetoric that condemns ‘migration’ in all of its forms.<sup>55</sup> In practice, Hungary encourages certain types of regular migration and actively seeks certain migrants from third countries. The ethnonationalist element is evident in the encouragement of the migration of those who were ‘formerly a Hungarian citizen and whose citizenship was terminated, or whose ascendant is or was a Hungarian citizen’.

The indirect inducement to immigration is also evident in the enhanced naturalisation of those ‘whose ascendant was a Hungarian citizen or who is able to substantiate of being of Hungarian origin . . . if he/she proves that he/she is sufficiently proficient in the Hungarian language’.<sup>56</sup> The rule’s focus is not on descendants of those former Hungarian citizens who became citizens of another country because of political changes they could not control but generally on transborder minorities. Since no time frame would restrict the tracing of Hungarian ancestry, the rule led to the naturalisation of more than one million foreigners, who are entitled to settle in Hungary.<sup>57</sup> They may also vote in the national elections without moving to Hungary.<sup>58</sup>

Other examples of how Hungary encourages immigration include the ‘Stipendium Hungaricum’ program that aims at third-country nationals of less

<sup>53</sup> The Migration Strategy and the seven-year strategic document related to Asylum and Migration Fund established by the EU for the years 2014–20 mentioned, but not reproduced in Government resolution 1698/2013 <[belugyalapok.hu/alapok/sites/default/files/Migration%20Strategy%20Hungary.pdf](http://belugyalapok.hu/alapok/sites/default/files/Migration%20Strategy%20Hungary.pdf)>.

<sup>54</sup> Krisztina Juhász recalls that in June 2015, the government spokesperson Zoltán Kovács stated that the Migration Strategy was out-of-date and needed to be amended. Nothing has happened ever since. K Juhász, ‘Assessing Hungary’s Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies’ (2017) *Politics in Central Europe* 52.

<sup>55</sup> ‘Hungarian Prime Minister Says Migrants Are “Poison” and “Not Needed”’ *Guardian* (London, 27 July 2016) <[www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump](http://www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump)>.

<sup>56</sup> Act LV of 1993 on Hungarian Citizenship Section 4(3).

<sup>57</sup> Precise data are hard to find, as there is no official site publishing them, nor does the National Statistical Office produce them. In response to an MP, the competent state secretary responded that 877,653 persons underwent the beneficial naturalization process between 1 January 2011 and 31 January 2018, and another 135,000 persons living abroad got a certificate of existing Hungarian nationality or were re-nationalised. Response to parliament question K/19616 <[www.parlament.hu/irom40/19615/19615-0001.pdf](http://www.parlament.hu/irom40/19615/19615-0001.pdf)>.

<sup>58</sup> For details, see B Nagy, ‘Nationality as a Stigma. The Drawbacks of Nationality (What Do I Have to Do with the Book-Burners?)’ (2014) *Corvinus Journal of Sociology and Social Policy* 5 (2) 31–64.

developed countries;<sup>59</sup> active programs to recruit foreign workers from third countries, like Serbia and Ukraine;<sup>60</sup> and the Hungarian Residency Bond Program that existed between 2013 and 2017.<sup>61</sup>

### 8.4.3 Asylum

Whereas regular migration is governed with ethnicist or utilitarian economic preferences, without being admitted in government communication, the measures affecting asylum seekers and their helpers perfectly reflect the government's intentions. It turns merciless when it comes to the so-called 'irregular' migrants.<sup>62</sup> The process may be dissected into four branches, each one of which will be addressed below.

#### 8.4.3.1 The Ordinary Asylum System

The Asylum Act has been amended twenty-one times between January 2013 and August 2020, its implementing regulation twenty-three times.<sup>63</sup> The last amendment of the Act genuinely seeking harmony with the EU acquis was adopted in 2015 and improved asylum seekers' access to the labour market, eliminated the concept of manifestly unfounded applications and replaced it with different accelerated procedures,<sup>64</sup> reflecting those in the PD.<sup>65</sup> Unaccompanied minors got better protection. The chance to re-open an abandoned procedure was also granted. All amendments after the Summer of 2015 were either technical (reflecting changes in the rules of administrative

<sup>59</sup> <<http://studyinhungary.hu/study-in-hungary/menu/stipendium-hungaricum-scholarship-programme>>.

<sup>60</sup> OECD, *International Migration Outlook* (OECD Publishing 2018) 246.

<sup>61</sup> R Field, 'Settlement Bond Program Gives 20,000 Foreigners Right to Settle in Hungary, Schengen Region' *The Budapest Beacon* (Budapest, 14 December 2017) <<https://budapestbeacon.com/settlement-bond-program-gives-20000-foreigners-right-to-settle-in-hungary-schengen-region/>>.

<sup>62</sup> On the total destruction of the Hungarian asylum system see B Nagy 2019, *supra* note 36.; Sz Borbély, 'Integration of Refugees in Greece, Hungary and Italy Annex 2: Country Case Study Hungary' (2017) European Parliament Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, IP/A/EMPL/2016–18 PE 614.196.

<sup>63</sup> Act LXXX of 2007 on Asylum (Asylum Act), Government decree 301/2007, on its implementation. Figures from J Tóth, Preface of the editor to the special issue of *Állam- és Jogtudomány* on Asylum (2019) 4, are adjusted for 2020.

<sup>64</sup> Act CXXVII of 2015.

<sup>65</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, 60–95).

procedure and organisation) or were steps in destroying a fair and dignity-respecting asylum system.

The regular refugee status determination procedure still exists even if it has been rarely applied since 2015. It incorporates critical points that are relevant to the discussion of restrictive practices. Undocumented asylum-seekers who invoke persecution by a non-state actor may be obliged to contact their home country to prove their own identity.<sup>66</sup> Asylum detention was applied too widely.<sup>67</sup> Certain deadlines are very short. Appeals have no suspensive effect except in safe third-country cases and late-submission cases. Inadmissible are not only applications where the safe third-country clause could be invoked, but also in case the applicant arrived ‘through a country where he/she is not exposed to persecution ... or to serious harm ... or in the country through which the applicant arrived in Hungary adequate level of protection is available’.<sup>68</sup> A major concern was that courts had no right to overturn the administrative decision and recognise the applicant as a person in need of protection in an appeal against refusal at the administrative level. They could only return the case to the authority and order a new administrative procedure.<sup>69</sup> The ECJ in the *Torubarov and PG cases* found this in breach of the right to an effective remedy.<sup>70</sup> The ECJ declared that national courts must overturn the denials of protection if the case returns to them for a second time, after the administrative authority again rejects the application, in disregard of the first decision of the court overturning the original administrative decision. It can also be mentioned that in 2016, practically all integration assistance to persons recognised in need of protection was taken away.<sup>71</sup> Beneficiaries of international protection are allowed to stay in a reception centre for one month and receive fundamental health care for half a year. That is all.

The above concerns tend to be abstract in 2021 as the applicability of the rules to which they relate is essentially denied by the rules adopted in July

<sup>66</sup> Asylum Act, Section 5(3).

<sup>67</sup> AIDA, ‘Country report Hungary 2018’ (2019) 83, 85; *OM v. Hungary* App no 9912/15 (ECHR, 5 October 2016).

<sup>68</sup> Asylum Act, Section 51(2)f. This clause is beyond those recognised in the EU *acquis* and – as mentioned above – was found to infringe EU law Judgment of the Court /First Chamber of 19 March 2020 Case C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal* Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság ECLI:EU:C:2020:218.

<sup>69</sup> Asylum Act, Section 68(5).

<sup>70</sup> Case C-556/17, *Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal*, Grand Chamber Judgment of 29 July 2019 confirmed by C-406/18 *PG v. Bevándorlási és Menekültügyi Hivatal*, Judgment of 19 March 2020.

<sup>71</sup> Act XXXIX of 2016 on amending the Asylum Act.

2020 to be discussed in the next Section. But even before 2021, they were hardly applied as most people were subject to the exceptional regime in place at times of ‘the state of crisis caused by mass immigration’.

#### 8.4.3.2 The System Applicable during a ‘State of Crisis Caused by Mass Immigration’

The system established by Sections 80/A–80/K of the Asylum Act includes rules and measures that are incompatible with human rights principles and the international and EU asylum laws that bind Hungary.<sup>72</sup>

The fence at the Hungarian-Serbian and the Hungarian-Croatian border was completed in 2015. They prevent access to the territory. Even if contacted by persons on the other side of the fences, the authorities ignore any expression of the wish to seek international protection in Hungary. According to Article 80/J, anyone found in an irregular situation within Hungary is to be ‘led through’ a gate in the fence, without the start of an asylum procedure or an aliens’ law procedure.<sup>73</sup> The removal measures are taken in the absence of any prior administrative or judicial decision. In essence, that is an extra-legal collective expulsion without any rule of law guarantee and any official record. Hence, asylum seekers are prevented from entering or are forcibly and informally removed.

After the Grand Chamber judgment in *ND and NT v. Spain* that unequivocally established Spanish jurisdiction in respect of those storming the Melilla fence, there remains no doubt that persons on either side of the fence are under Hungarian jurisdiction (especially as they are on Hungarian territory on the Serbian side of the fence as well).<sup>74</sup> Therefore, being sent back to Serbia against their will – while being under the exclusive and continuous control of the Hungarian authorities – amounts to ‘expulsion’ for Article 4 of Protocol No 4. Moreover, this is corroborated by the judgement in the *MK and others v. Poland* case,<sup>75</sup> which leaves no doubt that returning asylum seekers from the border amounts to collective expulsion even in the case where a brief

<sup>72</sup> This section is written with the view that the application of the rules at the moment of submission of the manuscript is suspended. Therefore, it speaks of the rules, which are still part of the law in the present tense. However, when we analyse the practice, we use the past tense as that practice is momentarily stopped.

<sup>73</sup> FRA, ‘Periodic data collection on the migration situation in the EU February Highlights (1 December 2017 to 31 January 2018)’ <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-february-periodic-migration-report-highlights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-february-periodic-migration-report-highlights_en.pdf)> 15.

<sup>74</sup> *N.D. and N.T. v. Spain* App no 8675/15 and 8697/15 (ECHR, 13 February 2020) para 109.

<sup>75</sup> *M.K. and Others v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020).



interview is conducted with them and the fact notwithstanding that the expulsion on each occasion may only affect a few persons.<sup>76</sup>

The Grand Chamber's reasoning in *ND and NT* that led to the finding that Spain has not violated the prohibition on collective expulsion does *not* apply to the Hungarian situation. In contrast to the Spanish situation (as interpreted by the Grand Chamber) in Hungary, there are no genuine and effective legal ways open to submit an asylum application when arriving at the border, and the individuals escorted to the border from inland had not been involved in a violent storming of the fence. At no point are apprehended persons subjected to any procedure, other than the 'escort' back to the door in the fence.<sup>77</sup>

Moreover, it was recognised in the Grand Chamber judgment in the *Ilias and Ahmed* case that the return of asylum seekers from Hungary to Serbia entailed a threat of breach of Article 3 ECHR, and therefore could amount to refoulement, which was not the case in *ND and NT* in respect of Morocco.<sup>78</sup>

Pushbacks have been accompanied by violent acts against irregular migrants.<sup>79</sup> Non-access to territory is accompanied by non-access to the procedure. Only one person per working day was admitted to each transit zone, limiting the applications to ten per week.<sup>80</sup> That practice certainly did not meet the requirement set out in the *ND and NT* judgment: the Schengen external border states must

make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention.<sup>81</sup>

The practice was that people forced back to Serbia have to wait months, if not years, to be allowed to enter the transit zone.<sup>82</sup>

Even those who finally managed to enter the transit zone and submit an application faced further grave breaches of their human rights and EU

<sup>76</sup> *Ibid.*, para 210.

<sup>77</sup> Terminology of Section 5 of the Act LXXXIX of 2007 on State Border.

<sup>78</sup> *Ilias and Ahmed v. Hungary* App no 47287/15 (ECHR, 21 November 2019) para 260.

<sup>79</sup> FRA, 'Migration, key fundamental rights concerns' Quarterly Bulletin 1 July 2019–30 September 2019, 11. Report of the fact-finding mission by Ambassador Tomáš Boček, 'Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary' 12–16 June 2017, point III/ 2.

<sup>80</sup> *Ibid.*, 2 and 17.

<sup>81</sup> *N.D. and N.T. v. Spain*, para 209.

<sup>82</sup> AIDA *supra* note 67, 17–18.

entitlements. First, they were subjected to a procedure that is incompatible with the border procedure as enshrined in Article 43 of the PD, as the Hungarian ‘crisis procedure’ does not limit the detention to four weeks.<sup>83</sup> Second, the national procedure is incompatible with the rules on the detention of asylum seekers, as enshrined in Articles 8–11 of the RCD since it is extended to persons who do not fall into the taxatively listed six groups.<sup>84</sup> Moreover, the automatic detention of all asylum seekers entering from the Serbian side breached the obligation to consider alternatives to detention and to consider the option of detention only after an individual assessment.<sup>85</sup> Minors aged between fourteen and eighteen were also detained, which is not compatible with rules on persons with special reception needs.

Notably, the finding that the detention under the ‘crisis procedure’ is illegal does not contradict the ECtHR Grand Chamber judgment in the *Ilias and Ahmed v. Hungary* case.<sup>86</sup> That case dealt with detention in the border procedure and was related to a twenty-three-day-long holding of the two applicants in the transit zone. The court’s finding of no breach of Article 5 of the ECHR was based on a set of conditions, which are not present in the ‘crisis procedure’. This was clearly stated in *FMS and others*, the case in which the ECJ differentiated between the border procedure assessed in *Ilias and Ahmed* and the system applied during a ‘state of crisis caused by mass immigration.’<sup>87</sup> The ECJ found that the detention until the end of the procedure in merit following the admissibility phase is incompatible with both the PD and the RCD, as it is neither a border procedure nor does it meet the requirements of necessity and proportionality.<sup>88</sup>

Another breach, going beyond illegal detention within the transit zone, was related to the treatment of the asylum seekers. Not only was the whole militarised set-up re-traumatising, especially to minors, but inhuman treatment was recurrent.<sup>89</sup> Asylum seekers whose application was declared

<sup>83</sup> Section 71/A of the Asylum Act extends the border procedure to those intercepted within 8 km from the Schengen external border, but still contains the four weeks limitation.

<sup>84</sup> Article 8(3) of the RCD.

<sup>85</sup> Article 8(3) of the RCD.

<sup>86</sup> Supra note 78.

<sup>87</sup> *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020.

<sup>88</sup> For a more detailed review of the judgment, see B Nagy, ‘A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FMZ and the Legislation Adopted by Hungary in Its Wake’ (*Eumigrationlawblog*, 15 June 2020).

<sup>89</sup> OHCHR, ‘End of Visit Statement of the UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales’ 17 July 2019, 2 <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E)>.

inadmissible based on the presumption that Serbia had the responsibility to conduct their asylum procedure were repeatedly starved.<sup>90</sup> Initially, even those whose judicial appeal was still pending were deprived of food. Later the deprivation was limited to those whose application was finally rejected, and awaited removal.<sup>91</sup>

Finally, the procedure followed during the ‘state of crisis caused by mass immigration’ as described here is incompatible with the PD and the more general human right to the fair procedure and the right to be heard. The Commission brought a case to the ECJ in 2018<sup>92</sup> in an infringement procedure that started in 2015.<sup>93</sup> In its 2020 judgment, the ECJ found that the extremely limited access to the transit zones and the impossibility to submit an application elsewhere, the detention in the transit zone and the pushback to Serbia were contrary to Articles 6, 24(3), 43 and 46(5) of the PD, Articles 8, 9 and 11 of the RD and Articles 5, 6(1), 12(1) and 13(1) of the Return Directive.<sup>94</sup>

#### 8.4.3.3 The Total Exclusion of Access to the Procedure and the Abolition of the Transit Zone System

The pandemic led to the total abolition of the access to procedure within the country, excluding even the transit zone, at first temporarily, till 31 December 2020 and later extended till 30 June 2021.<sup>95</sup> Accordingly, both the regular procedure and the crisis procedure remained part of the law; just their application is suspended in favour of a system, now incorporated into the Act LVIII on the Epidemiological Preparedness.<sup>96</sup> According to the Act, asylum applications cannot be submitted within Hungary unless someone is

<sup>90</sup> Hungarian Helsinki Committee, ‘Hungary Continues to Starve Detainees in the Transit Zones’ 23 April 2019 <[www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf](http://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf)>.

<sup>91</sup> Bear in mind that these rejections do not relate to the substance of the claim. The starved rejected asylum seeker may well be a refugee since his/her case was found inadmissible only with a view of Serbia being competent to conduct the refugee status determination.

<sup>92</sup> C-808/18 *European Commission v. Hungary*.

<sup>93</sup> Infringement no. 20152201, reported in IP/15/6228 on 10 December 2015.

<sup>94</sup> C-808/18 *European Commission v. Hungary*, Judgment of 17 December 2020.

<sup>95</sup> The ‘Provisional rules on the asylum procedures’ were introduced by Articles 267–275 of Act LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness (2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről), 18 June 2020. They were extended until 31 December 2022 by Act CXX of 2021.

<sup>96</sup> Act LVIII of 2020 as mentioned above. Its implementing rules are: Government Decree 292/2020 on the designation of embassies in connection with the statement of intent to lodge an application for asylum and Minister of Interior Decree 16/2020 on the procedure related to the statement of intent to lodge an application for asylum.

already enjoying subsidiary protection in Hungary, is a family member of a person enjoying international protection in Hungary, or is subjected to a law enforcement measure affecting her liberty. Every asylum seeker not belonging to these groups announcing her intention to seek protection is removed from Hungary in a summary procedure without any formality. The law is conspicuously silent about those legally present in Hungary and intending to submit an application. According to the rules, the only legal way to trigger an asylum procedure is by submitting a 'declaration of intent' at the Hungarian embassy in Kyiv or Belgrade. That embassy decides within sixty days whether to have a travel document issued to the future applicant, who then may travel to Hungary and express her intention to submit an actual asylum application.<sup>97</sup> The person may be detained for four weeks without any individual deliberation of the necessity and proportionality of detention. The fact that she arrived legally with the travel document issued by the Hungarian embassy is irrelevant.<sup>98</sup> Both the UNHCR and the Hungarian Helsinki Committee were quick to condemn the new system and demand its withdrawal.<sup>99</sup>

#### 8.4.3.4 Criminalisation of Migrants and NGOs and Other Threats

Hungary is not the only state that adopts ever more measures to exclude asylum seekers and shift responsibility to third countries. What is relatively specific in its process of autocratisation is that Hungary also attacks NGOs and other actors that may help secure the exercise of human rights and refugee rights.<sup>100</sup>

Securitisation comes hand in hand with crimmigration,<sup>101</sup> the introduction of criminal law tools to govern migration and deter stakeholders who oppose

<sup>97</sup> On 19 February 2021, the Commission sent a reasoned opinion to Hungary on this new asylum procedure. [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_441](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441).

<sup>98</sup> The procedure is regulated in Sections 267–275 of Act LVIII of 2020, that is, these rules do not appear in the Asylum Act.

<sup>99</sup> See the UNHCR's position on the new Act at <[www.refworld.org/docid/5ef5c0614.html](http://www.refworld.org/docid/5ef5c0614.html)>; Hungarian Helsinki Committee, 'Hungary de facto removes itself from the common European asylum system (CEAS)' 12 August 2020 <[www.helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf](http://www.helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf)>.

<sup>100</sup> Other states also started to attack humanitarians. See EU Fundamental Rights Agency: *December 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them* <<https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal#TabPubOverview>> and S Carrera, V Mitsilegas, J Allsopp, & L Vosyliute, *Policing Humanitarianism: EU Policies Against Human Smuggling and Their Impact on Civil Society* (Hart Publishing 2020) especially 57–103.

<sup>101</sup> For a Hungary-relevant interpretation, see Nagy (2016) *supra* note 36, 1044 and 1065–67.

government policies. Migration control is an administrative (public law) matter as is amply corroborated by the ECtHR practice in its refusal to apply Article 6 of the ECHR to it. Nevertheless, in 2015, Hungary reverted to the criminalisation of irregular border crossing at sections where there was a fence. A maximum of three years imprisonment threatens all who cross the fence illegally. Not only are the asylum seekers criminalised, which is contrary to Article 31 of the Geneva Convention, but NGOs assisting asylum seekers also face criminal threats. On top of human smuggling and facilitation of illegal residence, ‘aiding and abetting illegal immigration’ also became a crime,<sup>102</sup> the core of which is ‘organisational activity’ that is perpetrated in order to

- (a) enable the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, is not exposed to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of direct persecution is not well-founded,
- (b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit.

Organisational activity is not defined exhaustively, but includes border surveillance, producing or commissioning information material or the dissemination thereof, and ‘building or operating a network’.<sup>103</sup>

This crime has a clear goal: general deterrence, not aimed at criminals but at NGOs providing information and assistance to irregular migrants of whom they cannot yet know if they will apply for international protection in Hungary, and if they do apply, whether they will be recognised. The new crime contains terms that can hardly be operationalised to establish beyond a reasonable doubt that the crime had been committed; therefore, it may deter from a wide range of actions that should normally be perfectly legal, like informing asylum seekers about their rights or feeding them. The Commission has started an infringement procedure that was referred to the ECJ on 29 July 2019.<sup>104</sup> The Hungarian Constitutional Court, however, maintained the semantic fog when it did not quash down the crime as unconstitutional but exempted from the crime the conduct that amounts to

<sup>102</sup> Codified at Section 353/A of the Act C of 2012 on the Criminal Code.

<sup>103</sup> Text summarising or quoting Section 353/A.

<sup>104</sup> Case C-821/19 *European Commission v. Hungary*. Judgment of 16 November 2021. The ECJ ruled that Hungary had violated EU law by restricting access to asylum and criminalising assistance to asylum seekers <https://curia.europa.eu/juris/liste.jsf?num=C-821/19>.

‘carrying out the altruistic obligation of helping the vulnerable and the poor’.<sup>105</sup>

There are two more measures against civil society indicative of an autocratisation. Act LXXVI of 2017 on the ‘transparency’ of organisations that receive support from abroad in the value of 27,000 euros or more per year requires civil society organisations – except for sports, religious and minority associations and foundations – to register and reveal their supporters. They are also obliged to indicate on all publications and web appearances that they are supported from abroad. A month after adopting the Act, the Commission started an infringement procedure that led the ECJ to conclude that it ‘has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations’.<sup>106</sup>

In addition to the criminalisation of assistance, a ‘special tax on immigration’ was introduced. It is to be levied on ‘immigration supporting activities’ as ‘carrying out media campaigns and media seminars and participating in such activities; organising education; building and operating networks or propaganda activities that portray immigration in a positive light’ that is directly or indirectly aimed at promoting immigration defined in the Act as ‘the permanent relocation of people from their country of residence to another country’ except in case of persons enjoying EU free movement rights.<sup>107</sup> This tax is a means to deter as its formal applicability is minimal. In principle, the twenty-five per cent tax was only to be levied on activities supporting the permanent immigration of third-country nationals in Hungary; however, the meaning of ‘permanent relocation’ is unclear and fluid.

The criminalisation of civil society organisations is yet another link between democratic decay and restrictive migration policy. The government did not need it to limit the number of arriving asylum seekers – that could be achieved by the fence, the criminalisation of their irregular entry through it and the systemic detention and return to Serbia. Threatening the civil society organisations with criminal sanctions and punitive taxes is part of the Schmittian political project of creating foes, identifying the ‘mercenaries of [George] Soros’ against whom the leader protects his nation.<sup>108</sup>

<sup>105</sup> Decision 3/2019.

<sup>106</sup> Case C-78/18, *European Commission v. Hungary* Judgment of 18 June 2020, para 145. Since Hungary has not repealed the Act, on 18 February 2021, the Commission sent a letter of formal notice for Hungary to implement the judgment.

<sup>107</sup> Act XLI of 2018, Section 253.

<sup>108</sup> Beáta Bakó also assumes that the targeted legislation against NGOs constituted ‘lex enemies’ and came as a reaction of them criticising the curtailing of the rule of law. B Bakó, ‘Hungary’s Latest Experiences with Article 2 TEU: The Need for “Informed” EU Sanctions’ in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States Taking Stock of Europe’s Actions* (Springer 2021) 40.

## 8.5 POSSIBILITIES FOR DEMOCRATIC AND LEGAL RESISTANCE

The democratic decay and the dismantling of the rule of law leaves little room for legal resistance and resilience. It promotes (so far peaceful) forms of democratic resistance. Let us briefly mention the latter before turning to the possibilities of the legal action.

According to medieval traditions, free cities may function as islands of freedom and may even exercise self-governance.<sup>109</sup> The cities under opposition rule may stop the harassment of visible minorities, press the law enforcement agencies to take measures against xenophobic insults or crimes and offer NGO's various forms of material support such as office space and access to local media. Symbolic measures of the mayor and the cities' counsellors may refute and delegitimise the government's ethnicist, populist propaganda. An example of such a measure is raising the EU flag again on local government buildings that had disappeared from the Parliament and the central government's buildings long ago. Cities may shelter those few refugees who were recognised but had to leave the reception centre after thirty days without any integration assistance. Human dignity, freedom, democracy, equality, the rule of (local) law and respect for human rights, including the rights of persons belonging to minorities, may be respected and exercised locally.

Yet another form of resistance (widespread during Socialism) is maintaining an 'alternative' sphere of public information. Social media partly naturally provides it, but a 'samizdat' is again in circulation, and Radio Free Europe is back on the scene.<sup>110</sup> Besides, German state broadcaster Deutsche Welle announced the launch of Hungarian-language news programmes.<sup>111</sup> Solidarity, among NGOs under pressure has gained importance, as seen, for example, in the concerted refusal to register as foreign-funded organisations.

Turning to the classical legal tactics, one may note that on the ruins of the rule of law, a few remaining independent regular courts may still protect the integrity of EU law and the interest of asylum seekers to find protection, for example, by finding that Serbia is not a safe third country, contrary to the claims of the government. Similarly, not ordering detention is within the

<sup>109</sup> On 16 December 2019, the so-called Free Cities Pact was signed by the mayors of Bratislava, Budapest, Prague and Warsaw to demonstrate their commitment to democratic values and increase their leverage against national governments <[www.themayor.eu/en/mayors-of-bratislava-budapest-prague-and-warsaw-sign-free-cities-pact](http://www.themayor.eu/en/mayors-of-bratislava-budapest-prague-and-warsaw-sign-free-cities-pact)>.

<sup>110</sup> 'RFE/RL Relaunches Operations in Hungary Amid Drop in Media Freedom' 8 September 2020 <[www.rferl.org/a/rfe-rl-relaunches-operations-in-hungary-amid-drop-in-media-freedom/30826537.html](http://www.rferl.org/a/rfe-rl-relaunches-operations-in-hungary-amid-drop-in-media-freedom/30826537.html)>.

<sup>111</sup> <[www.ardaudiothek.de/medienmagazin/klubr-di/86534998](http://www.ardaudiothek.de/medienmagazin/klubr-di/86534998)>.

power of an independent judge. After the *Torubarov* judgment, courts once again may overturn the administrative decision if the authority does not change it to recognition after the first sending back.

It is clear, though, that domestic democratic resistance would not be viable without external support. For instance, EU institutions might take a more decisive role in supporting Hungary's re-democratisation. The reality of the ongoing Article 7(1) procedure against Hungary to date is anything but 'nuclear'.<sup>112</sup> It so far somewhat resembles a blunt arrow. Yet, replacing Article 7 with newer mechanisms like the 'peer review procedure' entailing a regular review of each member state's rule of law performance is not a solution. Instead, European politicians should use the existing tools and improve Article 7 procedure by working transparently and using internal expertise of the European Parliament and external expertise of Council of Europe bodies. All the three major institutions of the EU (Commission, Council and the Parliament) are currently subject to serious criticism concerning their inefficient actions to stop autocratisation. It is not the task here to engage the literature on strengthening the EU to reinstate the rule of law and respect of the European values.<sup>113</sup> Nevertheless, four short remarks may be appropriate.

First, if the *effet utile* principle was to be applied, Hungary cannot veto the application of Article 7(2) TEU. According to this provision, the European Council may determine the existence of a serious and persistent breach by a member state of the values referred to in Article 2 TEU. After that, the Council could adopt effective sanctions.

Second, as guardian of the Treaty, the Commission has a duty to ensure the uniform enforcement of EU law, including the rule of law. The best tool the Commission has at its disposal to enforce it is the infringement action, which may be made more powerful to be 'systemic'.<sup>114</sup> While infringement actions have not so far been used effectively to challenge the autocratic consolidation of a member state, the ECJ has strongly hinted that it would be open to such a challenge.<sup>115</sup>

Third, the intensified use of interstate disputes under Article 259 TFEU might also be used more frequently. The article allows the EU member

<sup>112</sup> KL Scheppele and L Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (*VerfassungsBlog*, 6 March 2018).

<sup>113</sup> For an authoritative restatement of the issues see: KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) *Yearbook of European Law* 1.

<sup>114</sup> *Ibid.*

<sup>115</sup> For instance, in the case *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* (C-64/16, 27 February 2018), the ECJ threw out a lifeline to the other European institutions seeking to fight the destruction of judicial independence in a member state.



states to take action even when the EU Commission does not support the claim.<sup>116</sup>

Fourth, budget conditionality rules linked to the rule of law are now one of the EU toolbox items. Disbursement of EU funds from the budget and Next Generation EU is tied to respect for the rule of law standards. However, its application is suspended until the ECJ has greenlighted it,<sup>117</sup> which is legally questionable and in violation of the EU's system of checks and balances.<sup>118</sup>

Significantly, however, external support in re-democratisation is not limited to the EU. European and global institutions are instrumental, although their role cannot be examined here in detail.

The ECtHR is certainly a candidate to act as a force resisting democratic decay and restrictive migration policy. Until the Grand Chamber decision in *Ilias and Ahmed*, it did well in condemning the protean forms of detention of asylum seekers and migrants without the right to stay in Hungary, but on the more general front of resisting democratic backsliding, its record is less impressive.<sup>119</sup> The ECtHR has never addressed the structural constitutional changes that happened during the last decade in Hungary. A few ECtHR judgements affected various aspects of the Hungarian autocratisation process, but either they failed to require the government to make structural changes,<sup>120</sup> or the government refused the legal change required by the ECtHR.<sup>121</sup>

Another short remark relates to the relative passivity of UNHCR that runs an office in Budapest and is, therefore, a close witness of the agony of the Hungarian asylum system. True, at crucial points, UNHCR has raised its voice. However, UNHCR has not been part of the visible public discourse regarding the situation; its representatives do not sit on public panels; neither

<sup>116</sup> L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' June 2019 <<https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>> 6.

<sup>117</sup> The CJEU dismissed the actions brought by Hungary and Poland against the conditionality mechanism which makes the receipt of financing from the Union budget subject to the respect by the Member States for the principles of the rule of law. C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*, Judgment of 16 February 2022.

<sup>118</sup> A Alemanno and M Charmon, 'To Save the Rule of Law You Must Apparently Break It' *Verfassungsblog* 2020/12/11.

<sup>119</sup> B Nagy, 'Hungary, in Front of Her Judges' in P Minderhoud, S Mantu and K Zwaan (eds) *Caught in Between Borders: Citizens, Migrants, Humans. Liber Amicorum in Honour of Prof. Dr. Elspeth Guild Tilburg* (Wolf Publishers 2019) 251–257 discussing the ECtHR practice.

<sup>120</sup> In the *Baka v. Hungary* App no 20231/12 (ECHR, 23 June 2016), the government paid the compensation to Chief Justice Baka that the ECtHR ordered but did not ensure that in the future, judicial speech is not used for disciplining judges.

<sup>121</sup> In the *Szabó and Vissy v. Hungary* App no 37138/14 (ECHR, 12 January 2016), the ECtHR found that the unlimited surveillance powers of the government's anti-terrorism police violated the Convention. Still, the government refused to change the law.

do they give interviews. The reason is that UNHCR fears that it would lose access to the transit zones if it had a less low-key policy. UNHCR also believes that no rational debate with government propaganda is possible at the moment. That may be true, but one still wonders if a more direct challenge of the government could not improve the public image of asylum seekers and refugees and undermine the stream of fake news and the xenophobic framing that is part of the government indoctrination.

## 8.6 CONCLUSION

The rise of ethnonational populism and the phenomenon of autocratisation are subject to an ocean of literature. Most of it describes and analyses the Hungarian constitutional and legal changes, and some search for their causes. This chapter does not focus on these matters; instead, it gives an overview of the constitutional changes regarding migration, the abolition of the functioning asylum system and the framing of migration as a threat against which Hungary must 'protect' itself.

The chapter argues that the constitutional changes introduced by Orbán's authoritarian regime can be interpreted in a Schmittian paradigm. An ever-increasing number of enemies had to be found against which the government (relying on its overweight in Parliament) equipped itself with practically unlimited powers, by way of introducing special legal orders (more specifically, by declaring a state of crisis), either by amending the Fundamental Law, or merely *de facto*, by ordinary Acts or even government decrees. The government has used the 'crisis' that has never existed to 'justify' the exceptional and inhuman practice developed in the transit zone, which has recently been replaced by a total ban on applying for asylum in Hungary or at its borders.

The chapter suggests that the abolition of the asylum system did not follow either from the development of the EU *acquis* or the large-scale arrivals in 2015, which only led to around 5000 substantive refugee status determination procedures that year and much less in the following years.<sup>122</sup> Other states where large numbers of asylum applications were submitted may have tried to avoid the increase in numbers. However, contrary to Hungary, they have not given up on the idea of a fully-fledged refugee status determination procedure. The elimination of a regular procedure guaranteeing the required reception did not follow from an internal 'organic' development of the Hungarian

<sup>122</sup> Nagy 2019 *supra* note 36, 20.

refugee law either. Hungarian asylum law was generous in some periods, especially in the early nineties and then again after the first formal Asylum Act. It only gradually became tighter, but still within the bounds of the EU acquis, perhaps except the extensive use of detention.<sup>123</sup>

Finally, the chapter addresses the strategies the civil society and the remaining independent institutions may consider when resisting autocratisation. As it is clear by now, Orbán has sacrificed the rule of law and the functioning democracy with a decent asylum system and presented migration as a threat to perpetuate a crisis that calls for the leader with extra-ordinary capabilities to protect his people. In exchange, blind trust and exceptional powers were to be offered, replacing rational discourse and a state operating within the bounds of fundamental rights, democracy, and the rule of law. The minority of the voters wanted that, but due to the electoral system, most parliamentarians are willing to maintain it in exchange for the goodwill (and rewards) offered by their (party) leader. Under these circumstances, democratic resistance and legal action may be needed. Both have limited and ever-narrowing space. As doubts arose concerning the meaningful support from the international and EU institutions, no guarantee is within sight against the continuing autocratisation that only used restrictive migration and asylum law and policy as a vehicle to promote its purely political, Schmittian goals, essentially determined by the person of Viktor Orbán.

<sup>123</sup> B Nagy, *A magyar menekültjog és menekültügy a rendszerváltozástól az Európai Unióba lépésig. Erkölcsi, politikai-filozófiai és jogi vizsgálódások* [Hungarian refugee law and refugee affairs from the system change in the late eighties until accession to the European Union. Moral, political-philosophical and legal investigations] (Gondolat 2012).

## 'Good Change' and Migration Policy in Poland

### *In a Trap of Democracy*

BARBARA MIKOŁAJCZYK AND MARIUSZ JAGIELSKI

#### 9.1 INTRODUCTION

In 2009, Professor Mirosław Wyrzykowski published a text in which he hypothetically considered whether a crisis in the democratic order could occur in a particular Member State of the European Union, and whether there are sufficient resources to protect liberal democracy from deformation.<sup>1</sup> He encouraged the reader to imagine that, as a result of democratic and free elections, a party (or a coalition) would come to power with revolutionary slogans, even if the revolution would take place only in the moral sphere, under the slogan of restoring 'public morality' (whatever that means). He noted that the victory of a political party proclaiming such slogans of a moral revolution, or a fundamental change in the existing status quo, usually followed a well-known pattern. Therefore, there would have to be a relatively large proportion of the population dissatisfied with the existing status quo, either lost or frustrated. At the same time, a significant number of people would not trust in the capabilities of civil society and would not understand that the modern model of power is not based on hierarchy and personification, but on cooperation and respect for the rules, that is to say, the rule of law, and not the individuals holding power.<sup>2</sup>

Professor Wyrzykowski argued that such a revolution would presuppose total control over state institutions, elements of a democratic society, the media and the judiciary. However, such a revolution would encounter obstacles, the first of which would be the constitution, as an amendment would

<sup>1</sup> Mirosław Wyrzykowski, 'Polityka a sądownictwo konstytucyjne – lekcja najnowszej historii RP' in Hanna Machińska (ed.), *60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych* (Oficyna Prawa Polskiego, 2009) 91–106.

<sup>2</sup> *Ibid.*, 94.

require either a qualified parliamentary majority or a referendum. Since it would be difficult to achieve sufficient support, political changes would have to be made by means of ordinary legislation. As the constitution and the whole state system is guarded by a constitutional court, the first thing to do was to make changes to that court, and then to the entire judiciary.<sup>3</sup>

Until recently, such a scenario seemed to be political fiction, but then it became a reality. When Jarosław Kaczyński's party, Law and Justice (Prawo i Sprawiedliwość – PiS), took over power in 2015, it led to a clear decay of liberal democracy. The policy of what was known as the 'good change' (the main slogan of PiS) affected respect for the human rights of the whole society, and certainly the rights of migrants, particularly asylum seekers.

What is more, the migration issue became the most significant element of the electoral campaigns in 2015 and 2018–2019,<sup>4</sup> as the parliamentary and local elections coincided with the mass influx of voluntary and involuntary migrants to Europe, as well as terrorist attacks in France (2015) and in Belgium (2016). In general, the migration crisis was significant in helping the Law and Justice party to win elections in 2015.

The new, populist attitude to the migration crisis and asylum seekers appeared to be a litmus test of the resilience of democratic values and human rights. It was used to check how far the policy of division into 'us' and 'them', 'nation' and 'aliens', 'common welfare' and 'betrayal of national interests' would catch on in society, and whether it could be pursued in further politics. Unfortunately, this policy and model of narration has come to be seen as a successful tactic in elections and has been continued with other minority groups (e.g. LGBT).<sup>5</sup>

It is important to note that in Poland, we are not just dealing with an increase in the influence of a populist force on the political scene that is adverse to refugees and migrants, but with the takeover of all state institutions by the ruling majority. The capture of all (or almost all) of the state institutions means creating both a new internal and external policy, which is why the authors decided to consider this issue from an internal and external perspective, as Poland's attitude to the migration phenomenon and its failure to meet

<sup>3</sup> *Ibid.*, 97.

<sup>4</sup> Agnieszka Mikulska-Jolles, 'Migranci, uchodźcy i ksenofobia w kampanii wyborczej 2018 – raport z monitoringu' (Helsińska Fundacja Praw Człowieka 2018) <[www.hfhr.pl/wp-content/uploads/2018/12/Kampania\\_raport\\_2.pdf](http://www.hfhr.pl/wp-content/uploads/2018/12/Kampania_raport_2.pdf)> accessed 23 January 2021.

<sup>5</sup> Agnieszka Mikulska-Jolles, 'Fake newsy i dezinformacja w kampaniach wyborczych w Polsce w 2019 roku - raport z obserwacji' (Helsińska Fundacja Praw Człowieka 2020), 7ff <[www.hfhr.pl/wp-content/uploads/2020/02/Fake-newsy-i-dezinformacja\\_final.pdf](http://www.hfhr.pl/wp-content/uploads/2020/02/Fake-newsy-i-dezinformacja_final.pdf)> accessed 23 January 2021.

its international obligations in the discussed area have appeared on international and European agendas.

In this study, the authors intend to prove that the legal and factual situation as of June/Spring 2021 does not allow the influence of the ‘good change’ on citizens to be separated from its influence on migrants (this chapter was written prior to the migration crisis at the Polish–Belorussian border of 2021). The approach to migrants’ rights must therefore be analysed in a broader pattern, in light of democratic decay as it coincides with a restrictive policy towards asylum seekers.

For this reason, the first part of the paper will show the consequences of the key organs of power being taken over by people who are not open to migrant rights. Then the problem of the interplay between the crisis of democracy caused by Law and Justice and the migration law and policies of the Polish state will be discussed. The second part is dedicated exclusively to the current policy towards migrants, and the consequences of that policy within the country and on international forums. Finally, the authors will attempt to indicate a remedy that will safeguard migrants’ rights (especially those of asylum seekers) against further erosion.

## 9.2 CONSTITUTIONAL AND POLITICAL BACKGROUND

### 9.2.1 *Constitutional Principles and the Decay of Democracy*

‘[T]he robustness of democratic institutions under the rule of law cannot be disentangled from the character and motivations of those elected or appointed to high office.’<sup>6</sup> This general truth about the way the state and its organs operate is crucial to obtain an understanding of the current approach to migrants and migration policy in Poland. After the fall of communism in 1989, the Polish state was organised along the lines of the West.<sup>7</sup> A series of reforms carried out in 1989–1997 led to the introduction of a constitutional system corresponding to the one developed on the western side of the Iron Curtain after World War II.<sup>8</sup> Among other things, this meant building the system of governance on such principles as the supremacy of the constitution, the rule of law, the separation of powers, the independence of the judiciary, the apolitical nature of the bureaucracy and extensive guarantees of human

<sup>6</sup> Aziz Z. Huq, ‘Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design’ (2018) 65 *UCLA L Rev* 1506, 1530.

<sup>7</sup> Wojciech Sokolewicz, ‘Democracy, Rule of Law, and Constitutionality in Post-Communist Society of Eastern Europe’ (1990) 86 *Droit Polonais Contemporain* 5, 5–6.

<sup>8</sup> Daniel H. Cole, ‘Poland’s 1997 Constitution in Its Historical Context’ (1998) 1998 *St Louis-Warsaw Transatlantic Law Journal* 1, 28ff.

rights.<sup>9</sup> Migration was not a priority issue at that time, as Poland's economic backwardness meant it was not a destination country for migrants. Nevertheless, the Constitution adopted in 1997 introduced two forms of protection for involuntary migrants – asylum (granted under domestic law) and refugee status (modelled on Western solutions).<sup>10</sup> The wider development of migration regulations (at a statutory level) came out of Poland's aspiration to integrate with the European Union and the country's gradual adaptation to the European pattern.<sup>11</sup> In fact, Poland's accession to the European Union in 2004 resulted in the construction of a whole new national migration law from scratch, which then became the showcase of the democratic transformation. To sum up, taking the year 2015 as a reference point, Polish regulations concerning the rule of law, human rights and migration at that time did not differ much from those operating in Western Europe. However, that year saw a political party come to power in Poland with unequivocally anti-immigrant slogans on its agenda. This was Law and Justice, led by Jarosław Kaczyński. By winning the presidential and then parliamentary elections, Law and Justice seized power not only over the office of president and both chambers of parliament, but also gained the possibility to appoint government officials, which means, among other things, taking control over a wide variety of executive branches. Using this ability, PiS gradually captured key judicial bodies (the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court) along with independent agencies that were appointed by those bodies, for example, the Supreme Audit Office, the Personal Data Protection Office and the National Council of Radio Broadcasting and Television.

While this takeover was not directly related to the issue of migration and migrants' rights,<sup>12</sup> it undoubtedly had an important impact in this field. Having a decisive influence on the legislative, executive, judiciary and control bodies, as well as independent agencies, Law and Justice possessed virtually unlimited and uncontrolled power to shape the state's migration policies. It is

<sup>9</sup> Andrzej Bałaban, 'The New Role of Polish Constitution of 2 April 1997' in Kazimierz Działocha, Ryszard Mojak and Krzysztof Wójtowicz (eds), *Ten Years of the Democratic Constitutionalism in Central and Eastern Europe* (Morpol 2001), 46ff.

<sup>10</sup> The Constitution of the Republic of Poland 1997, s 56.

<sup>11</sup> Michał Kowalski, 'From a Different Angle – Poland and the Mediterranean Refugee Crisis' (2016) 17 *German Law Journal* 967, 971.

<sup>12</sup> It has already been described in detail in the literature: Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2020). See also Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) 1 *Revista Forumul Judecatorilor* 104.

impossible to understand the linkage between the decay of democracy in Poland after 2015 and the country's policy towards migrants without realising this phenomenon.

### 9.2.2 'Good Change' in Action

To illustrate these processes, we will refer to some of the bodies and offices influencing the migration policy. First of all, the role of the media is crucial, as it has a significant impact on public opinion, and is therefore used by those who rule to shape the views of the population.<sup>13</sup> One of the first steps taken by the PiS government was to create a new media order in Poland. This was done by establishing a new organ – the Council of National Media – a body not provided for in the Constitution. This Council was given numerous powers previously wielded by the National Council of Radio Broadcasting and Television, a body provided for the Constitution as safeguarding media freedom. In this way, Law and Justice took full control over the public media in Poland.<sup>14</sup> State channels very quickly became a government propaganda mouthpiece, but in the absence of independent bodies controlling the broadcast content, Law and Justice could freely use them to manipulate the public's mood in the area of migration, as will be discussed below.

The takeover of governmental offices, agencies and bureaucratic bodies responsible for migration issues allowed Kaczyński's party to shape policies in this area. For example, in 2013, the Government Plenipotentiary for Equal Treatment had announced the National Action Programme for Equal Treatment for the years 2013–2016. This programme included goals like ensuring the equal treatment of migrants on the labour market and reducing barriers to education for migrant children.<sup>15</sup> After PiS came to power, the programme was never updated, although the migration crisis was at stake. What is more, when the plan expired in 2016, no new programme was ever developed. Finally, the Plenipotentiary was shuffled from the Chancellery of

<sup>13</sup> Alicja Kononowicz, 'Populizm a ochrona praw migrantów' (2000) 31 *Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne* 93, 108 <<https://wuw.pl/sppae/article/view/11867/10790>> accessed 23 January 2021.

<sup>14</sup> Stanisław Jędrzejewski, 'Od "konserwatywnego kiczu" po "niestrawną propagandową papkę". Jak upadły media publiczne' (OKO.press, 6 February 2019) <<https://oko.press/od-konserwatywnego-kiczu-po-niestrawna-propagandowa-papke-jak-media-publiczne-znalazly-sie-tu-gdzie-sa/>> accessed 23 January 2021.

<sup>15</sup> Pełnomocnik Rządu ds. Równego Traktowania, *Krajowy program działań na rzecz równego traktowania na lata 2013–2016* (Warszawa 10 grudnia 2013) <[www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Poland\\_National-Action-Program-for-Equal-Treatment-2013-2016.pdf](http://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Poland_National-Action-Program-for-Equal-Treatment-2013-2016.pdf)> accessed 23 January 2021.



the Prime Minister to the Ministry of Family and Social Policy in January 2020, a sharp decline in its standing that leaves the office insignificant.<sup>16</sup> Therefore, the takeover of the office of Plenipotentiary by PiS not only meant that the previously planned pro-migration activities failed to be implemented, but also resulted in the marginalisation of a potentially important institution of democratic life. The Plenipotentiary was a thorn in the side of PiS that had to be dealt with. Not only because of the Plenipotentiary's policy in support of migrants, but also due to PiS's antipathy towards the Plenipotentiary's progressive approach to minority rights,<sup>17</sup> which PiS treats as an ideological concept (especially 'gender ideology' and 'LGBT ideology').<sup>18</sup> So, as we can see, migrants were placed in line with other groups stigmatised by 'good change'.

The same applies to the Commissioner for Children's Rights – Marek Michalak – who had been elected in 2013 and was actively advocating for children's rights during the migration crisis.<sup>19</sup> After his term ended in 2018, his successor, Mikołaj Pawlak, appointed by PiS, no longer undertook such activities, instead choosing other priorities for action. 'Good change' in this field did not mean that migrants' problems were totally abandoned, but they had certainly been marginalised, with issues closer to the ideology of the ruling party jumping ahead on the agenda.<sup>20</sup>

For the time being, the only remaining constitutional body active in protecting human rights in general that has not been taken over by Law and Justice is the Commissioner for Human Rights.<sup>21</sup> According to the Polish Constitution, the Commissioner safeguards the freedoms and rights of everyone under the Polish jurisdiction (not only of Polish citizens), specified in any normative acts (not only those indicated in the Constitution).<sup>22</sup> Due to this

<sup>16</sup> Magdalena Chrzczonowicz, 'PiS po cichu wymienił Pełnomocnika ds. Równego Traktowania. A urząd do reszty zmarginalizował' (OKO.press, 4 March 2020) <<https://oko.press/wymienili-pełnomocnika-do-spraw-rownego-tractowania/>> accessed 23 January 2021.

<sup>17</sup> Łukasz Woźnicki, 'Pełnomocniczka rządu ds. równego traktowania: Mniejszości próbują narzucić prawa większości' (Gazeta Wyborcza, 27 August 2020) <<https://wyborcza.pl/7,75398,26246110,pełnomocniczka-rządu-od-rownego-tractowania-mniejszosci-probuja.html>> accessed 23 January 2021.

<sup>18</sup> Elżbieta Korolczuk, 'The Fight against "Gender" and "LGBT Ideology": New Developments in Poland' (2020) 3 *European Journal of Politics and Gender* 165, 165–167.

<sup>19</sup> Numerous presentations in 2015–2018. See information about the activities available on the website <<http://bip.brpd.gov.pl/informacja-o-dzialalnosci-rpd>> accessed 23 January 2021.

<sup>20</sup> See information about the activities in 2019 <<https://brpd.gov.pl/wp-content/uploads/2020/05/Informacja-o-dzia%C5%82alno%C5%9B%C4%87i-RPD-za-rok-2019.pdf>> and in 2020 <[www.senat.gov.pl/prace/posiedzenia/przebieg,548,2.html](http://www.senat.gov.pl/prace/posiedzenia/przebieg,548,2.html)> accessed 2021.

<sup>21</sup> According to the translation of the Polish Constitution at the Polish Parliament's website there is 'the Commissioner for Citizens' Rights'.

<sup>22</sup> The Constitution of the Republic of Poland 1997, s 208.

wide range of powers, the Commissioner has the power to intervene also in matters of foreigners, refugees and migrants.<sup>23</sup> Unfortunately, being a body that was independent from PiS, the Commissioner faced obstruction by the government, which was reflected in the gradual reduction of funds for his office's activities.<sup>24</sup> Consequently, it resulted in the deterioration of the possibilities of intervention in all areas of his activity – in defence of the rights of both citizens and non-citizens, compared to what had been carried out before 2015.<sup>25</sup>

The same process affects the functioning of NGOs. Government agencies can influence the existence of NGOs (simply by granting money, or not) and can, in that way, shape the framework for their activities. This does not mean that some areas of NGOs' activities are expressly prohibited; they are simply not supported by the state's money,<sup>26</sup> which in practice means that they are not performed.

The decrease in the level of protection for migrants is, in these cases, a side effect of the struggle of the PiS government against those authorities and bodies that remain independent and outside of its influence. Again, migrants are not an exclusive target. They became victims of a general crackdown between PiS and the institutions defending human rights. The decline in the level of protection for individuals under the rule of Law and Justice and problems with the treatment of migrants cannot be separated. These are phenomena that function simultaneously, two sides of the same coin.

An anti-migrant state policy does not have to be active. It is sufficient for the state to remain passive in such matters, which means that migration issues disappear from the government agenda. State reforms that could potentially support migrants simply ignore them and their specific situation. This process can be observed through the example of Poland's judicial reform carried out

<sup>23</sup> Rzecznika Praw Obywatelskich, 'Cudzoziemcy, uchodźcy, migranci' <[www.rpo.gov.pl/pl/kategoria-tematyczna/cudzoziemcy-uchodzcy-migranci](http://www.rpo.gov.pl/pl/kategoria-tematyczna/cudzoziemcy-uchodzcy-migranci)> accessed 23 January 2021.

<sup>24</sup> Rzecznika Praw Obywatelskich, 'Sejm zdecydował, że budżet Biura Rzecznika Praw Obywatelskich na 2021 rok wynosić będzie 51,187 mln zł.' (22 January 2021) <[www.rpo.gov.pl/pl/content/sejm-obcial-wydatki-rpo-chodzi-o-biuro-rpo-ktore-sluzzy-obywatelom](http://www.rpo.gov.pl/pl/content/sejm-obcial-wydatki-rpo-chodzi-o-biuro-rpo-ktore-sluzzy-obywatelom)> accessed 23 January 2021.

<sup>25</sup> Rzecznika Praw Obywatelskich, 'Sejm obciął wydatki RPO. Tu nie chodzi o mnie, ale o Biuro RPO, które służy obywatelom. Adam Bodnar w senackiej komisji' (4 January 2021) <[www.rpo.gov.pl/pl/content/budzet-rpo-na-rok-2021-%C2%A0informacja](http://www.rpo.gov.pl/pl/content/budzet-rpo-na-rok-2021-%C2%A0informacja)> accessed 23 January 2021.

<sup>26</sup> Anton Ambroziak, "Dobra zmiana" dla NGO. PiS zamrozi pieniądze z Funduszu Inicjatyw Obywatelskich na rok. Zmieni też priorytety i zasady przyznawania dotacji' (OKO.press, 30 October 2017) <<https://oko.press/dobra-zmiana-dla-ngo-pis-zamrozi-pieniadze-funduszu-inicjatyw-obywatelskich-zmieni-tez-priorytety-zasady-przyznawania-dotacji/>> accessed 23 January 2021.

in 2017.<sup>27</sup> The changes did not cover any matters related to migrants or migration. When reforming, it could have been an opportunity to consider and improve the organisation of the courts in the area of migration. Today, decisions on the detention of a foreigner and court actions against administrative decisions on international protection and the right of residence are dealt with by two different types of courts – criminal and administrative. Unfortunately, the reform did not provide for a change in this division. No thought has been given to consolidating the judiciary in migration matters.

Sometimes the reforms even worsened the situation of migrants, despite not being the intention. Among the reforms introduced was the concept of drawing lots between judges. This solution has its advantages, but it does not necessarily work in migration cases, where a quick decision is needed from a judge who is familiar with the nuances of migration problems.

Taking into account what has been said above, we argue that the negative impact of Polish constitutional decay on the issues of migrants manifests itself not only in the liquidation of migration policies and diminishing the actions of the bodies supporting them, but also in ignoring their problems and specific nature, which in practice deepens their vulnerability.

### 9.2.3 *Primary Findings*

To sum up Poland's experience, this is a country where populism is not a potential threat, but a real fact. We advocate the concept of a 'strong' relationship between populism, the crisis of constitutional democracy and migration policies. In this sense, we perceive restrictive migration policies as an element of democratic decay. As we have tried to show, the crisis of democracy, which results in the incremental and systematic undermining of human rights, is also evident in matters of migration.<sup>28</sup>

The Polish state's approach to migrants and asylum seekers requires further exploration in more detail. To explain this policy properly, it must be emphasised that the migration policy constitutes an element of a wider phenomenon. We realise that this concept of a link may not be seen so clearly from the perspective of most Western European countries, where populist politicians are only aspiring to take over power, but in the case of Poland, a country where populists have already come to power, it is based on fact.

<sup>27</sup> <[www.iustitia.pl/79-informacje/1553-zalozenia-planowanej-reformy-sadownictwa-a-d-2017](http://www.iustitia.pl/79-informacje/1553-zalozenia-planowanej-reformy-sadownictwa-a-d-2017)> accessed 23 January 2021.

<sup>28</sup> Michaela Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

The Polish experience also shows that if populists take full power, no one can count on self-safeguards included in the internal law. The Polish case shows that the rule of law will not defend itself. This has already been explained in the literature, based on the Polish example, looking at how the ruling party was able to bend the interpretation of the Constitution and the laws to achieve important regime goals.<sup>29</sup> The sad truth is that, no matter how well-designed a system is, its operation always depends on the course of action taken by the elected rulers.<sup>30</sup>

After the takeover of power by Law and Justice, the Polish experience shows that the application of the law depends on the people wielding power. The guarantees contained in the legal system will not work unless someone is willing to use them. As law-making and law enforcement of the internal Polish law are under the control of Law and Justice, it is no longer possible to count on the *internal* law's ability to provide resilience against restrictive migration policies. If one seeks help in the law, it would rather have to be the international or European one. These issues will be discussed below.

### 9.3 THE PERSPECTIVE OF MIGRATION AND ASYLUM

#### 9.3.1 *Facts*

In contrast to Western and Southern Europe, the migration crisis of 2015–2016 largely bypassed Poland. This is a kind of paradox because, despite the low risk of waves of migrants from Syria and Africa arriving in Poland, Law and Justice managed to skilfully exploit the migration crisis in Europe, rather than in Poland, by sowing fear of an influx of migrants. That is why some facts should be established.

First, migration into Poland after 2014 was determined by the situation in Ukraine following the occupation of Crimea by Russia, and subsequently by the conflict in Donbas. However, only a few Ukrainians were granted refugee status or subsidiary protection. On the other hand, a very liberal visa policy was adopted for Ukrainian citizens. At present, Ukrainian citizens constitute the largest group of foreigners legally living and working in Poland (about 1.2 million people). It is believed that many more Ukrainians would have applied

<sup>29</sup> Wojciech Sadurski, 'Constitutional Design: Lessons from Poland's Democratic Backsliding' (2020) 6 *Constitutional Studies* 59, 64–65.

<sup>30</sup> Wojciech Sadurski 'Constitutional Democracy in the Time of Elected Authoritarians' (2020) 18(2) *International Journal of Constitutional Law* 324, 331.

for international protection if they had not had the possibility of legally entering and staying in Poland.<sup>31</sup>

Second, from 2007 to 2016, the total number of applicants for international protection (mainly from the Caucasus) did not exceed 12,300 (in 2015 and 2016). In 2017, the number of foreigners applying for international protection in Poland suddenly fell sharply to a little over 5,000, and has been decreasing since then. In 2019, only 4,110 foreigners applied for international protection and it was granted to just 144 of these foreigners.<sup>32</sup> It should also be added that it is characteristic for whole families, including children, to arrive in Poland.

Finally, a large number of proceedings for international protection are discontinued (there are usually more decisions on discontinuation than refusals), mainly due to foreigners absconding.

All these facts should be taken into account when describing Poland's migration policy, as they have appeared in the civil society reports, interventions of national human rights institutions, and on the international forum.

### 9.3.2 *Political Trends and Narration*

At present, the Act on Granting Protection to Foreigners in the Republic of Poland of 2003<sup>33</sup> and the Act on Foreigners of 2013<sup>34</sup> transpose EU law concerning third-country nationals into the Polish legal system. In general, these acts just about meet the requirements of the Common European Asylum System CEAS. In 2017 and 2019, substantial government proposals for amending the Act on Granting Protection to Foreigners were submitted. The drafts proposed, among other things, restrictive border procedures and stipulated that the inadmissibility or refusal of international protection or a permit to stay due to humanitarian reasons would oblige the foreigners to return, and would prohibit their re-entry into Poland or any other Schengen

<sup>31</sup> Iza Chmielewska et al, *Obywatele Ukrainy pracujący w Polsce – raport z badania*, Departament Statystyki NBP Warszawa, 2016 <[www.nbp.pl/aktualnosci/wiadomosci\\_2016/20161212\\_obywatele\\_ukrainy\\_pracujacy\\_w\\_polsce\\_-\\_raport\\_z\\_badiania.pdf](http://www.nbp.pl/aktualnosci/wiadomosci_2016/20161212_obywatele_ukrainy_pracujacy_w_polsce_-_raport_z_badiania.pdf)> accessed 5 November 2020.

<sup>32</sup> In 2020 there were over 2,800 applications, but 2020 should not be considered due to the COVID-19 pandemic. Official statistics of the Office for Foreigners available at [www.migracje.gov.pl](http://www.migracje.gov.pl).

<sup>33</sup> Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej Dziennik Ustaw 2003 nr 128 poz. 1176; 2018, poz. 51 and 107.

<sup>34</sup> Ustawa o cudzoziemcach Dziennik Ustaw 2013 nr 1650 and 2017 poz. 2206 and 2282; 2018 poz. 107 and 138.

State for a specified period of time.<sup>35</sup> In practice, this might lead foreigners with strong and good faith claims for asylum to refrain from exercising their fundamental human rights. The attempts to significantly change the law turned out to be unsuccessful, with the drafts receiving very negative reviews from UNHCR, NGOs, national institutions for human rights and the Supreme Court.<sup>36</sup> The legislative process was not completed before the parliamentary elections in October 2019, so it did not enter into force. Thus, at some point after 2015, the main changes concerning migration and asylum took place outside the legal sphere – through political strategy, debate and in the media.

After the Law and Justice party won the parliamentary elections in October 2015, the Council of Ministers cancelled the 2012 policy paper ‘Migration Policy of Poland – the Current State of Affairs and Proposed Actions’. It was not until June 2019 that the Council of Ministers presented a new proposed paper ‘Migration Policy of Poland’, being part of the Strategy for Responsible Development adopted in 2017.<sup>37</sup> Its authors emphasised, among other things, that the EU’s experience in the area of migration and integration, being based on a multicultural model, had become a failure, so it was necessary to adopt a new solution involving the concept of a leading culture. In this way, the system of integrating foreigners should become an obligation, not just an option to be chosen by foreigners. The aim of this new policy was primarily effective integration, but also the assimilation of any foreigners. The project focused on social cohesion and security issues, including counteracting illegal migration and the strengthening of border controls, thereby limiting attempts to abuse immigration or refugee procedures.

The project was subject to consultations and came under heavy criticism from civil society organisations;<sup>38</sup> it was not pursued further.<sup>39</sup> However, the

<sup>35</sup> The draft act – texts and legislative procedure available at <<https://legislacja.rcl.gov.pl/projekt/12294700/katalog/12410552#12410552>> accessed 5 November 2020.

<sup>36</sup> The opinions available at: <<https://legislacja.rcl.gov.pl/projekt/12294700/katalog/12410552#12410552>> accessed 5 November 2020.

<sup>37</sup> ‘Polityka Migracyjna Polski’ is a document clarifying the adopted policy in 2017 ‘Strategy for Responsible Development until 2020 (with an outlook up to 2030)’ <<https://interwencjaprawna.pl/wp-content/uploads/2019/06/Polityka-migracyjna-Polski-wersja-ostateczna.pdf>> accessed 17 November 2020.

<sup>38</sup> Opinion issued 1 July 2019 on ‘Polityka Migracyjna Polski’ <[www.hfhr.pl/politykamigracyjnajpolski](http://www.hfhr.pl/politykamigracyjnajpolski)> accessed 17 November 2020.

<sup>39</sup> December 2020, the Inter-ministerial Team for Migration accepted the diagnostic document, which will be the basis for the new Polish migration policy’s findings and recommendations. ‘Polityka migracyjna Polski – diagnoza stanu wyjściowego’ <[www.gov.pl/web/mswia/polityka-migracyjna-polski-diagnoza-stanu-wyjsciowego](http://www.gov.pl/web/mswia/polityka-migracyjna-polski-diagnoza-stanu-wyjsciowego)> accessed 15 January 2021.

government's current migration approach follows the main ideas of this project. There is a clear Janus-faced policy towards migrants. On the one hand, in view of growing job vacancies that threaten the development of particular sections of the economy and given the ageing Polish society, migrant workers who integrate here easily (mainly from Ukraine) are accepted as a necessary labour force. This aspect of migration is not a controversial issue, though there is, unfortunately, no deep debate on issues such as the working conditions of economic migrants.

On the other hand, asylum seekers have been presented as a threat to the security and social cohesion of the state. This has led to an increase in xenophobic sentiment, primarily in the context of the possible migration of Muslims. This aspect of migration (or potential migration) to Poland, the mass influx of voluntary and involuntary migrants to Europe, as well as the threat of terrorism, became a hot topic of political slogans during the electoral campaigns of 2015 and 2018–2019.<sup>40</sup> Special attention should be paid to the narrative of the political debate and the media message that accompanied the change of power in Poland. Politicians associated with the political right remain very reluctant to accept applicants for international protection. They treat the refugee issue instrumentally, exploiting it for political purposes, without considering the refugees' actual situation or their human rights. After winning the campaigns, the politicians seemed to abandon the subject as useless, moving on to find another group to divide society into 'us' and 'them', all the while accepting an unprecedented number of economic immigrants.

The public media, taken over by the ruling majority, has proved to be extremely helpful in creating a negative image of refugees. Public radio and TV broadcasts have been used extensively to build up a hostility towards migrants, who were presented as a threat to Polish and European values, national security, culture, traditions and even national health.<sup>41</sup> Referring to anti-migrant slogans and calling for the 'defence of common values' allowed Law and Justice to strengthen its popularity, which would not have been possible without ending the independence of the public media.

The 2018 pre-election scare campaign of the Law and Justice party may be a prime example of this tactic. The videos used during the campaign set out to frighten voters, offering a futuristic vision of Poland that accepted refugees

<sup>40</sup> See n 4.

<sup>41</sup> Kamil Feifer, "Wiadomości" TVP: mordują uchodźcy. Fakty nie mają znaczenia' (OKO.press, 22 December 2016) <<https://oko.press/wiadomosci-tvp-morduja-uchodzcy-fakty-maja-znaczenia/>> accessed 23 January 2021.

from Muslim countries. It presented immigrants, especially refugees from Muslim countries, as a potential source of riots, assaults, rape or murder, and undoubtedly aimed to arouse feelings of reluctance and hostility in the majority of the audience. In the opinion of the Commissioner for Human Rights (ombudsman), the videos were undoubtedly political and persuasive in nature, and therefore could not be considered as a mere expression of the opinion or opinions of its creators. According to the Commissioner, the videos call for hatred; it does not deserve the protection guaranteed under the Constitution of the Republic of Poland<sup>42</sup> or Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Commissioner tried to bring proceedings to classify the videos as 'hate speech', but the public prosecutor's office initially refused. The Commissioner twice filed complaints to the court against the refusals. In September 2020, after the court had issued decisions obliging the public prosecutor to start proceedings again, the public prosecutor discontinued the proceedings, stating that, after extensive analysis by three experts, it could not be accepted that the video amounted to incitement to hatred, as the goals of its authors were different. The Commissioner has again appealed against this decision,<sup>43</sup> but it is doubtful that his successor as commissioner, if one is elected by the Law and Justice party, will continue to be active on this matter.

This case also shows that politicians, the media and society in general have lacked a thorough, unbiased debate on the migration crisis and have failed to present the crisis in a broad context. The debate has mainly been limited to raising certain security issues and frightening the public.<sup>44</sup>

### 9.3.3 (*Lack of*) *Solidarity and International Cooperation*

The reluctant attitude of the Polish authorities towards migrants coming to Europe is also visible on the international arena. Particularly clear evidence of this approach can be found in Poland's rejection of the Global Compact on Migration at the seventy-third session of the UN General Assembly.<sup>45</sup> In a statement issued by the Polish delegation, it was postulated that the Global Compact was not the right instrument to manage migration and that it did not

<sup>42</sup> Dziennik Ustaw 1997 nr 78 poz. 483.

<sup>43</sup> Information available at the Commissioner's website <[www.rpo.gov.pl/pl/content/rpo-po-raz-kolejny-umorzenie-sprawy-antyuchodzczego-spotu-pis-z-2018](http://www.rpo.gov.pl/pl/content/rpo-po-raz-kolejny-umorzenie-sprawy-antyuchodzczego-spotu-pis-z-2018)> accessed 10 January 2021.

<sup>44</sup> Michał Kowalski, 'From a Different Angle – Poland and the Mediterranean Refugee Crisis' (2016) 17 *German Law Journal* 6, 974.

<sup>45</sup> United Nations General Assembly Resolution of 19 December 2018. 'Global Compact for Safe, Orderly and Regular Migration' A/RES/73/195.



serve the best interests of Poland and its nationals, so Poland maintained its sovereign right to restrict the admission of non-nationals. The other arguments of the Polish delegation were strange to say the least. The huge number of migrant workers already in Poland was indicated as a factor preventing Poland against the reception of more asylum seekers. The delegation also pointed out the difficulty in implementing detention standards.<sup>46</sup>

By not accepting the Global Compact,<sup>47</sup> a document of political dimension without legal power, Poland demonstrated a lack of goodwill towards promoting standards and norms concerning migration, as well as in cooperation between countries. In fact, it is difficult to find a rational justification for such an attitude, except to please its own voters.

Poland's reluctant approach to migration issues has also become a hot topic within the European Union. As mentioned above, the election campaigns in Poland also coincided with the process of relocating refugees, carried out from 2015 to 2017. It must be acknowledged that it was initially possible to expect consensus regarding migration, and that, after the elections in October 2015, the newly-elected government upheld its predecessor's undertaking to accept 7,082 asylum seekers from Italy and Greece as part of the Relocation and Resettlement Programme. However, the declared number of admitted asylum seekers was quickly reduced, and the relevant law to enable the relocations was never finally enacted. As a result, Poland failed to relocate asylum seekers from Italy or Greece. The politicians justified their position on security grounds, highlighting the terrorist attacks in Brussels in March 2016. The Ukrainian crisis and its potential consequences were also used as an excuse for rejecting any relocations.

Another argument against any relocations was the concept of on-site assistance; funding for this was significantly increased and a special Department for Humanitarian Aid was established in January 2018. Its task was the coordination and monitoring of assistance from Poland, mainly to those in need in North Africa and the Middle East. Since no complete report of the department's activity is currently available, it is difficult to assess the results of this initiative. Its future does not seem optimistic. The Ministry of Foreign Affairs failed to launch any calls for humanitarian aid projects in 2020 and has reduced development aid funding by one-third. The Syrians in Lebanon and Jordan, whose accommodation is financed by Poland, along with

<sup>46</sup> The video see at <[www.unmultimedia.org/avlibrary/asset/2338/2338741](http://www.unmultimedia.org/avlibrary/asset/2338/2338741)> accessed 10 October 2021.

<sup>47</sup> Worth mentioning is that Poland did not protest against the New York Declaration in 2016.

patients in clinics in Kurdistan and victims of the conflict in Donbas, will all suffer the most.<sup>48</sup>

It is worth adding that the ruling majority rejected not only the concept of relocation, but also the concept of humanitarian corridors. In this matter, the government's position turned out to be very tough, as even the Polish Catholic Church's initiative to organise humanitarian corridors for those in need of medical assistance did not meet with government approval.<sup>49</sup>

Poland's position on relocation and solidarity among the EU Member States in matters of migration has always been consistently negative. First, Poland intervened against the relocation programmes in the case *Slovak Republic and Hungary v. Council of the European Union*. The Court, however, confirmed the legality of these programmes, concluding that Article 78 (3) TFEU allows the EU institutions to take all temporary measures necessary to respond rapidly and effectively to an emergency situation such as a sudden influx of migrants.<sup>50</sup>

Then, Poland was one of three countries, together with the Czech Republic and Hungary, against which the European Commission launched infringement procedures in December 2017, reasoning that these Member States had failed to fulfil their obligations under the Relocation Decisions. The Court followed the opinion of Advocate General, Eleanor Sharpston<sup>51</sup> and, on 2 April 2020, upheld the actions for the failure. The Court concluded that there had been an infringement of the decision adopted by the Council with a view to the mandatory relocation of 120,000 applicants from Greece and Italy. It also found that Poland and the Czech Republic had also failed to fulfil their obligations under an earlier decision that the Council had adopted with a view to the relocation, on a voluntary basis, from Greece and Italy of 40,000 applicants for international protection.<sup>52</sup>

Finally, when negotiating the Dublin IV Regulation, the Polish Government expressed strongly opposition to any proposals for mandatory

<sup>48</sup> Marcin Żyła, 'Polska będzie mniej pomagać', *Tygodnik Powszechny* (Krakow 2 December 2019), 8.

<sup>49</sup> Magdalena Półtorak, The Polish Report (unpublished) contributed to 'Study on the feasibility and added value of sponsorship schemes as a possible pathway to safe channels for admission to the EU, including resettlement Final Report' (Directorate-General for Migration and Home Affairs October 2018).

<sup>50</sup> Joined Cases C-643/15 and 647/15 *Slovak Republic and Hungary v. Council of the European Union* [2017] EU:C:2017:631.

<sup>51</sup> Joined Cases C-715/17, 718/17 and 719/17 *Commission v. Poland, Hungary and the Czech Republic* [2019], Opinion of E. Sharpston, ECLI:EU:C:2019:917.

<sup>52</sup> Joined Cases C-715/17, 718/17 and 719/17 *Commission v. Poland, Hungary and the Czech Republic* [2020], ECLI:EU:C:2020:257.

and automatic redistribution mechanisms. Poland has indicated that any future compromise on the application of solidarity mechanisms should be based solely on solutions acceptable to all Member States.<sup>53</sup>

#### 9.3.4 *Human Rights Issues*

Poland's attitude towards various migrants, especially involuntary migrants, has been noticed on the international forum. When analysing observations, views and judgements of human rights treaty bodies and the European Court of Human Rights' judgements, three main points emerge. The first is the general issue of preventing xenophobia. The second point refers to the right to seek asylum. The last one relates to the unsolved problem of migrant detention.

##### 9.3.4.1 Problem of Xenophobia

The international community formulated several recommendations and comments during the Universal Periodic Review in 2017. Many of them encouraged Poland to take an active stance in combating and raising awareness of racism and intolerant political rhetoric, as well as strengthening legal and other measures to address bias-motivated crimes, ensuring the prompt and effective prosecution of racist, xenophobic hate crimes. Many other recommendations related to the rule-of-law principle and the protection of the judiciary's independence, as well as to the reduction of funds for civil society organisations and national human rights institutions, as all these factors lead to diminishing the standard of human rights protection.<sup>54</sup>

In the Concluding Observations of 2019 by the Committee on the Elimination of Racial Discrimination (CERD), Poland was advised to introduce educational campaigns on tolerance, aimed at eliminating prejudices and social stereotypes, and to ensure the proper registration, investigation, prosecution and conviction of perpetrators of hate speech and hate crimes.<sup>55</sup> All these remarks are fully justified, as the political narrative and the public

<sup>53</sup> A letter from the Ministry of Foreign Affairs to the President of the Senate of 9 July 2018, No. 905.

<sup>54</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review, September 2017 A/HRC/36/14, 11–29.

<sup>55</sup> Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Poland of 29 July 2019, CERD/C/POL/CO/22–24, 6–7.

media have contributed to the xenophobic sentiment over the last few years. The prosecution of hate speech does not seem to be a priority.

#### 9.3.4.2 Access to Territory

Bearing in mind these proposals to change migration policy and attempts to tighten up border procedures and, above all, the dramatic drop in asylum applications on Poland's eastern border, it is worth looking at this issue from the perspective of international bodies.

Already in 2016, the Human Rights Committee advised the Polish authorities to ensure that access to asylum would not be obstructed on the grounds of religious discrimination, or any other grounds prohibited by the Covenant on Civil and Political Rights, and to establish a proper screening system that will ensure asylum seekers are not returned to a country where there are substantial grounds to believe they may face a real risk of irreparable harm, such as that set out in Articles 6 (right to life) and 7 (ban on torture) of the Covenant.<sup>56</sup>

The committee's recommendations failed to prove effective, as the committee received a communication in 2017 referring to a violation by Poland of Articles 2 (non-discrimination clause), 7 and 13 (rights of aliens) of the Covenant, due to its failure to register and accept an asylum application.<sup>57</sup>

In 2019, two other committees issued their Concluding Observations in which they raised the problems of denied access to asylum procedures by border guards, refusal to register asylum applications and lack of access to legal assistance at the border.

These committees were the mentioned CERD and the Committee against Torture (CAT). The latter noted that individuals in need of international protection were not always given access to Poland, particularly at the Terespol border crossing from Belarus, and at the Medyka border crossing from Ukraine. In this context, CAT criticised a proposed amendment to the *Act on Granting Protection to Foreigners* concerning the introduction of accelerated border procedures as it claimed this would severely limit further access to Poland and result in the refusal of asylum claims and limits on the right to an effective remedy. The committee also stressed the asylum seekers' right to legal assistance. Finally, the committee said that Poland should refrain from

<sup>56</sup> Human Rights Committee, Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, 23 November 2016, 6–7.

<sup>57</sup> Communication no 3017/2017. The case is pending.

engaging in pushbacks and refolement, and should set up accessible and protection-sensitive entry systems at border-crossing points.<sup>58</sup>

However, the attitude to asylum seekers and the respect of their human rights are much better illustrated by a case brought before the ECtHR. The case *M.K. and others v. Poland* originated from the applications of three Chechen families with children who travelled to the Terespol border crossing. The applicants alleged that the Polish authorities had repeatedly denied them the possibility of submitting an application for international protection, despite their expressed wish to apply for asylum. They complained about a breach of *non-refoulement* under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights – ECHR), and invoked Article 4 of Protocol No 4 to the Convention, alleging that their situation had not been reviewed individually and that they were victims of a general policy that was followed by the Polish authorities with the aim of reducing the number of asylum applications registered in Poland. They also argued that lodging an appeal against a decision of denial of entry into Poland did not constitute an effective remedy, as it would not be examined quickly enough, would have no suspensive effect and would not be examined by an independent body. It is worth mentioning also the fact that their legal representative was denied the opportunity to meet them at the border checkpoint. Finally, the applicants complained that the Polish authorities had not complied with the interim measures granted to them by the Court, in breach of Article 34 of the Convention. In response to this last allegation, the Ministry of Foreign Affairs explained that the Convention did not apply, because the applicants were not present in Poland as a result of the refusal of entry.<sup>59</sup> This argument obviously remains in breach of Article 1 of the Convention, since ‘within their jurisdiction’ also means ‘being subject to border checks’. This arises from the ECHR jurisprudence and is a well-established concept in the area of human rights.<sup>60</sup> In its judgment, the Court<sup>61</sup> found that Poland had violated all the aforementioned provisions of the ECHR. Currently, there is another, almost identical, complaint pending before the ECtHR, this time from a Syrian family. In the case *D. v. Poland*, the applicants complain not only about being repeatedly denied the possibility to submit an application for international protection, but they

<sup>58</sup> Committee against Torture, Concluding Observations on the Seventh Periodic Report of Poland of 29 August 2019, CAT/C/POL/CO/7, 9–11.

<sup>59</sup> See Chapter 4 in this volume.

<sup>60</sup> Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *Human Rights Law Review* 287, 339.

<sup>61</sup> *M.K. and others v. Poland* App no 40503/17 and no 43634/17 (ECHR, 23 July 2020).

also allege that they are victims of a general policy adopted by the Polish authorities aimed at reducing asylum applications in Poland.<sup>62</sup>

### 9.3.4.3 Detention

The specific nature of involuntary migration to Poland, where there is a high risk of asylum seekers absconding and the frequent application of the Dublin mechanism, has led to the issue of detention in Polish guarded centres being discussed on the international forum. The detention of asylum seekers, including families with children, is obviously not a new problem that has only emerged in recent years. It has been around for many years and has been reported on by NGOs previously.<sup>63</sup> Although the Human Rights Committee's Concluding Observations of 2016 and the Committee on the Rights of the Child's Observations on Poland's periodic report in 2015 encouraged Poland to the extensive application of alternative measures to avoid the detention of asylum seekers under the age of eighteen and families with children, the situation has not changed.<sup>64</sup> The same remarks appeared again in the CERD Observations in 2019. The committee noted 'the continuing practice of detaining children with their parents, or having unaccompanied or separated children in guarded prison-like centres for foreigners, which subject children to a traumatic experience and prevent those children from having access to full-time education.'<sup>65</sup>

It should also be pointed out that the Fundamental Rights Agency saw the percentage of decisions imposing an alternative to detention increase from eleven per cent in 2014 to over twenty-three per cent in 2017,<sup>66</sup> which may either be recognised as progress or a failure.

Finally, the case of *Bistieva and others v. Poland*,<sup>67</sup> heard by the European Court of Human Rights (ECHR), clearly shows the specific nature of Polish

<sup>62</sup> *D.A. v. Poland* App no 51246/17 (ECHR, Communicated on 7 September 2017).

<sup>63</sup> Tomasz Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014–2015* (Instytut na Rzecz Państwa Prawa, Lublin 2016); Marta Górczyńska and Daniel Witko, *Research on the Applicability of 'the Best Interests of the Child' Principle as the Primary Consideration in Detention Decisions as Well as the Alternatives to Detention* (UNHCR, Helsińska Fundacja Praw Człowieka 2018).

<sup>64</sup> Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Poland, 30 October 2015, CRC/C/POL/CO/3–4, 12.

<sup>65</sup> The Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Poland of 29 July 2019, CERD/C/POL/CO/22–24, 6–7.

<sup>66</sup> European Union Agency for Fundamental Rights Report 2018.

<sup>67</sup> *Bistieva and others v. Poland* App 75157/14 (ECHR, 10 April 2018).

asylum cases, both in terms of the situation (the unwillingness of foreigners to stay in Poland) and the solutions adopted by the Polish authorities concerning the detention of migrants, including families with children.<sup>68</sup> Concerning Article 8, the ECHR found that there had been a breach of the Convention because the detention of the applicant and her children for six months interfered with the effective exercise of their family life. In the Court's opinion, the authorities had not fulfilled their obligation to consider the family's detention as a last-resort measure, and had not taken into account any alternative measures. Acting in the child's best interests could not be limited to simply keeping the family together. In the *Bistieva* judgement, the Court also ruled that further action would need to be taken by Poland's authorities in order to prevent similar violations.

In June 2019, the government submitted a statement on the enforcement of this judgement, saying that Poland had fulfilled its obligations, among other things, by implementing and developing the regulation – 'Rules of the conduct of the Border Guard with respect to foreigners requiring special treatment'.<sup>69</sup>

The Helsinki Foundation for Human Rights, monitoring the implementation of this judgement, took a different view in this case. In August 2019, it submitted to the Committee of Ministers of the Council of Europe a communication stating that the Polish authorities had failed to properly take into account the principle of assessing the best interests of the child in immigration proceedings, and that effective measures must be taken to prevent similar violations in the future. Therefore, the report concluded, judges and border guard officers should receive proper training on applying the principle of the best interests of the child and ECtHR case law in cases of immigration detention of minors, and the courts must incorporate a personalised assessment of the situation of the affected children when deciding to place a family in a guarded centre.<sup>70</sup>

Certainly, issues concerning the detention of asylum seekers and irregular migrants is not only a Polish problem; indeed Poland is not even the biggest offender in this area. There are also a number of judgements and

<sup>68</sup> See also: Magdalena Anna Kosińska, 'Bistieva and Others v. Poland' (2019) 8 *Polish Review of International and European Law* 2, 129–139.

<sup>69</sup> Information on measures taken to implement the judgment in the case of *Bistieva and Others v. Poland* DH-DD(2019)931 <<https://rm.coe.int/1355th-meeting-september-2019-dh-action-report-11-06-2019-communicatio/168094ef06>> accessed 15 December 2020.

<sup>70</sup> Communication from Poland concerning the case *Bistieva and Others v. Poland* App no 75157/14) DH-DD(2019)678 <<https://rm.coe.int/1355th-meeting-september-2019-dh-action-report-11-06-2019-communicatio/168094ef06>> accessed 15 December 2020.

recommendations addressed to other governments. However, this issue has been selected to show clearly that human rights mechanisms become ineffective when there is no political will to take a serious look at the problem. The lack of will means that even binding international rulings may be circumvented or not implemented properly. This results in weakening the standard of the protection of human rights provided by international institutions.

At the same time, the detention problem highlights the importance of civil society organisations, the independence of national human rights institutions (here the Commissioner for Children's Rights) and judges for maintaining legal resilience.

#### 9.4 CONCLUSION

The current political and social situation in Poland gives us a real-world look at the relationship in practice between the crisis of democracy and the rights of migrants, especially asylum seekers, in an era of democratic decay. In the Polish case, we would like to stress that it is difficult to consider 'legal resilience' as a mitigating factor. The seizure of the public media and almost all state institutions by the ruling majority, coupled with the reduction in support for civil society organisations undoubtedly affected the situation of migrants. In fact, in the area of migration policy and migrant rights, no special bending of the rules was required. It was enough to gather in one political hand the instruments of lawmaking, law enforcement and legal interpretation to pursue the migration policy in a direction welcomed by the ruling party. At the same time, the lack of independent watchdogs has severely limited the ability to supervise these processes, especially as a hostile approach to asylum seekers also appeared outside the legal sphere, on the political and practical levels.

Our findings confirm that in the event of a populist party taking over all the state institutions, migrants' rights cannot be considered in separation from the protection of human rights in general. Analysing the Polish experience, the breakdown of the constitutional rights system results in a decrease in migrants' rights protection just as it does for other social groups. However, lowering the general standards of human rights protection affects migrants in particular, as they should be treated as a group of human rights holders that is more vulnerable than most. Due to their situation, they are much less able to defend their 'general' human rights compared to citizens. Aside from this negative impact on the general standards of human rights protection, migrants suffer added detriments to their human right to asylum and principle of non-refoulement, as well as the right to an effective remedy in the case of being pushed back at the border.



The hostile attitude of politicians on the political right towards accepting refugees and the negative message expressed through public media has resulted in an aversion to asylum seekers and refugees that has increased xenophobic sentiment in society. At the same time, law enforcement agencies have not been sensitised to combating xenophobic crimes and hate speech. The progressive exchange of judges also lowers the standard of protection in this area.

Presently, upholding the rights of migrants, refugees, and asylum seekers (including detained children) is not in the interest of the bodies responsible for eliminating discrimination and ensuring equal treatment and policy. The only exception to this is the Commissioner for Human Rights, whose term of office is coming to an end. Finally, the increasingly difficult situation of civil society organisations hurts their ability to provide support for migrants, especially in terms of legal assistance and reception.

Moreover, the two phenomena – the breakdown of democracy and the issue of migrants' rights – appear to be complementary. They seem to interact with each other. Firstly, the migration crisis was exploited by PiS to take power. Jarosław Kaczyński's party used this crisis to mobilise voters during the 2015 and 2018 election campaigns (presenting migrants as a threat to Polish culture and economy, and PiS as the only force able to overcome this threat).

Second, after victory in the elections, PiS used and still uses the instruments of power that they gained in order to introduce restrictions in the flow of migrants, pursuing a strategy that directly or indirectly has a negative effect on migrants' rights. Thus, these two elements are actually combined. When the migrant crisis of 2015 diminished, the migration problem nearly disappeared from PiS's agenda and migrants were no longer presented as the main danger. Nevertheless, this style of policymaking remained, but the targets changed. Nowadays *other* social groups are in the firing line, shown as the main threat: the democratic opposition described as 'elites', LGBT and 'gender ideology'. This has resulted in various restrictions on judges, sexual minorities and women (the problem of reproductive rights). Nevertheless, it is easy to predict that, when the need again arises, migrants will return to the agenda, which will probably be combined with further restriction of their rights.

When it comes to the potential and limits of legal resilience in the migration context, the Polish experience shows that the way the law is used as an instrument of shaping social reality depends on the attitude of those who hold power. The Polish experience after Law and Justice took power over the parliament, the executive and the Constitutional Tribunal, and finally the Supreme Court shows unequivocally that there is no such thing as an inherent resistance of the law to being used improperly. The law cannot defend

itself but is a tool of the ruling politicians. This means that a change in the approach to migration law in Poland is inevitably combined with a change in the holders of power. They must be replaced by people with a different vision for policy in this respect. Therefore, what we are dealing with here is not primarily a legal, but rather a political problem, which may be overcome not by legal means (the law itself), but by the will of the people expressed at elections. However, in the current climate, even the opposition parties are not willing to put migrants' rights onto their agenda. Polish society's mindset about migrants has been ingrained so deeply that it is difficult to expect particular initiatives on their rights to appear in subsequent election campaigns. It would be too risky for either party.

Seeking support for legal resilience in international forums may also prove unsuccessful. Certainly, the international and European instruments are beyond the direct control of the Polish government, but everyday migration policy remains in the national domain.

The human rights treaty bodies have identified many discrepancies between Poland's law and practice in the area of human rights protection. The ECtHR has found a breach of the provisions of the ECHR, including the ban on torture in border cases. The CJEU has issued a ruling on the infringement of the solidarity principle due to the rejection of relocation decisions. In light of these findings by international bodies, it might be thought that they can offer a remedy forcing PiS to modify its attitude to migration. However, nothing could be further from the truth, as PiS does not care about external opinions, because the target group it wants to convince is its own voters. Contesting international consensus or the recommendations of human rights bodies is much easier, cheaper and more popular than reviewing the use of detention or raising the awareness of judges and state officials in relation to asylum seekers' rights.

What might make a difference to the 'good change'? Probably only the awakening of civil society and a red card shown at the next elections.

## Criminalising Migrants and Securitising Borders

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

STEFANO ZIRULIA AND GIUSEPPE MARTINICO

#### 10.1 ITALIAN POPULISM IN A COMPARATIVE PERSPECTIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 10.7 THE CRIMINALISATION OF SEARCH AND RESCUE ACTIVITIES

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 10.9 CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

# The Restriction of Refugee Rights during the ÖVP-FPÖ Coalition 2017–2019 in Austria

*Consequences, Legacy and Potential for Future Resilience  
against Populism*

MARGIT AMMER AND LANDO KIRCHMAIR

## 11.1 INTRODUCTION

This chapter analyses the lasting impact of the 2017/2019 government coalition on the state of refugee rights in Austria. We investigate to what extent the policies and legal initiatives of this government restricting refugee rights feature democratic decay, in particular elements of populism. The legacy of this coalition is of interest also for constitutional scholars as the Austrian Government was represented (again) by the Austrian People's Party (*Österreichische Volkspartei, ÖVP*) and the Freedom Party of Austria (*Freiheitliche Partei Österreichs, FPÖ*), a so-called radical right populist party.<sup>1</sup>

First, we provide an account of refugee rights restrictions during the ÖVP-FPÖ coalition 2017/2019 (Section 11.2). Afterwards follows a diagnosis of whether the quality of democracy and the rule of law is in decay, stagnates or rises in Austria in connection to these restrictions. We argue that these restrictions show elements of populism and are thus interlinked with the phenomenon of democratic decay. This decreases the functionality of Austrian democracy and the rule of law (Section 11.3). In light of this finding, we show what constitutional law has done, can and could do to keep in check, prevent but also remedy such restrictions. We will particularly look at how human rights (including fundamental rights) as guaranteed by the Austrian Constitution and applied and interpreted by the Austrian Constitutional Court can or could provide relief (Section 11.4).

<sup>1</sup> Cas Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007).



## 11.2 AN ACCOUNT OF (FURTHER) RESTRICTIONS OF REFUGEE RIGHTS BY THE 2017/2019 ÖVP-FPÖ COALITION

The FPÖ is one of the most successful ‘populist radical right parties’<sup>2</sup> in Western Europe.<sup>3</sup> While in the early 1990s still on the fringes of the political spectrum, it has gradually become an ‘agenda setter’ or ‘opinion leader’ in the Austrian political system, at least when it comes to migration issues. After a string of electoral victories, it has arrived in the Austrian political mainstream. It has already formed part of the Austrian Government three times since 2000, always in cooperation with the ÖVP. Lately, the FPÖ rose to new heights under its former leader Heinz-Christian Strache when scoring election results, at a size which was previously only achievable for the two traditionally leading Austrian parties, the ÖVP and the Social Democratic Party of Austria (*Sozialdemokratische Partei Österreichs*, SPÖ). The almost twenty-six per cent of all votes at the 2017 Parliamentary Elections leading to the fourth government participation of the FPÖ in Austrian history, lasted until the so-called ‘Ibiza affair’. This chapter focuses on the ‘lasting output’ in the area of asylum of the third ÖVP-FPÖ Government coalition which endured not even one and a half years.

Restrictive trends have been prevailing in the Austrian immigration and asylum policies for the last decades.<sup>4</sup> As also suggested in the literature, asylum policy has become – influenced by the FPÖ – increasingly deterring since the 1990s also under ‘Grand Coalitions’ between the ÖVP and the SPÖ; this was justified with the prevention of ‘asylum abuse’.<sup>5</sup> This accelerated with the sudden rise in the number of asylum seekers in 2015 and 2016 (some of them only transiting) leading to several amendments in the Asylum Act under the ÖVP-SPÖ Government.<sup>6</sup>

<sup>2</sup> *Ibid.*; Laurenz Ennser-Jedenastik, ‘Von der Fundamentalopposition auf die Regierungsbank: Die FPÖ unter Heinz-Christian Strache’ in Emmerich Tálos (ed), *Die Schwarz-Blaue Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 33.

<sup>3</sup> Ennser-Jedenastik (n 2) 30.

<sup>4</sup> Bernd-Christian Funk and Joachim Stern, ‘Die österreichische Einwanderungs- und Asylpolitik: völkerrechtliche, europarechtliche und verfassungsrechtliche Aspekte’ in Peter Hilpold and Christoph Perathoner (eds), *Immigration und Integration* (Peter Lang 2010) 237.

<sup>5</sup> See, e.g., Bernhard Perching and Gerd Valchars, ‘Einwanderungs- und Integrationspolitik’ in Emmerich Tálos (ed), *Die Schwarz-Blaue Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 429–30.

<sup>6</sup> E.g., granting of a three-year permit, instead of a permanent one, to refugees; restrictions with regard to family reunification of beneficiaries of international protection; ‘emergency decree’ restricting access to the asylum procedure in the case of a high influx of asylum seekers.

The FPÖ has a long history of engaging in anti-migrant rhetoric. Immigration has been the central topic of the FPÖ since Jörg Haider took over the lead of the party in 1986, and even more since Heinz-Christian Strache became head of the party in 2005. This focus was spurred by the high numbers of asylum seekers in 2015 leading to very successful results in the 2016 Presidential Elections and the 2017 Parliamentary Elections.<sup>7</sup> The topics of immigration and integration are for the FPÖ so dominant that they also feature in other policy fields, e.g., social policy or education policy. In this vein, the 2017 FPÖ election programme contained nativist scatters in almost all topics.<sup>8</sup>

The FPÖ has been influencing the positioning of other political parties including the two big parties of the centre, the ÖVP and the SPÖ, even without participating in governments. ÖVP and SPÖ have gradually taken over the rhetoric and politics of the FPÖ with its anti-immigration slogans since the early 1990s within the framework of the grand coalition.<sup>9</sup> In recent years, in particular the ‘new’ ÖVP under Sebastian Kurz has increasingly sought to assume the role occupied by the FPÖ. During the 2017 election campaign for the Parliamentary Elections, Kurz stressed several times that he ‘closed the Balkan Route’, criticised the migration policy of Angela Merkel and supported the positions of the Visegrád group in the EU. At one point, the FPÖ even accused Sebastian Kurz of ‘stealing’ their policies and portrayed their leader H C Strache as ‘thought leader’ (*Vordenker*) to which other parties would finally follow suit.<sup>10</sup> With this convergence of their agendas, Kurz’ ÖVP and Strache’s FPÖ formed a government coalition (2017–2019). In the Parliamentary Elections of October 2017, the ÖVP (*Liste Kurz*) succeeded with a very restrictive stance against refugees and asylum seekers outpacing the FPÖ.<sup>11</sup> By entering into a coalition with the FPÖ, issues of radical right parties

<sup>7</sup> Ennser-Jedenastik (n 2) 32.

<sup>8</sup> *Ibid.*, 35.

<sup>9</sup> Franz Fallend, ‘Von Schwarz-Blau zu Türkis-Blau: Ursachen und Folgen der Koalitionsstrategien der ÖVP 1999/2000 und 2017’ in Emmerich Tálos (ed), *Die Schwarz-Blau Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 9 referring to Michael Minkenberg, ‘The Radical Right in Public Office: Agenda-setting and Policy Effects’, *West European Politics* 24/4 (2001), 13–14; and to Heinz Fassmann, ‘Migrations- und Integrationspolitik’, in Robert Kriechbaumer and Franz Schausberger (eds), *Die Umstrittene Wende. Österreich 2000–2006* (Böhlau 2013) 698–701.

<sup>10</sup> See, e.g., die Presse, ‘Neue FPÖ-Plakate: “Vordenker” Strache gegen “Spätzünder” Kurz’, 25 September 2017 <[www.diepresse.com/5291629/neue-fpo-plakate-vordenker-strache-gegen-spatzuender-kurz](http://www.diepresse.com/5291629/neue-fpo-plakate-vordenker-strache-gegen-spatzuender-kurz)> [last visited 29 September 2020].

<sup>11</sup> Emmerich Tálos, ‘Wende in Schwarz-Blau. Eine Bilanz’ in Emmerich Tálos (ed), *Die Schwarz-Blau Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 446.

(e.g., national identity, abuse of the welfare state, immigration and security) were legitimised.<sup>12</sup>

In contrast to previous ÖVP-FPÖ coalitions, the content and wording of the 2017–2022 Government Programme showed a considerable incorporation of FPÖ positions,<sup>13</sup> and a new focus was placed on the ‘extremely restrictive exclusionary treatment’ of asylum seekers, beneficiaries of international protection and foreign nationals in general.<sup>14</sup> Moreover, for the very first time the FPÖ was responsible for its central topics including asylum by receiving departments such as the Ministry of the Interior.<sup>15</sup> Very importantly, there was a ‘better ideological compatibility’ with the coalition partner<sup>16</sup> since the ÖVP under Kurz embarked on a course overlapping strongly with the priorities of the FPÖ.<sup>17</sup>

Reactions to the FPÖ participation were in 2017 much ‘softer’ than in 2000, since in 2017 it seemed to be ‘normal’ that a populist radical right party participated in a European government. In the public opinion the ÖVP-FPÖ coalition did well. A Eurobarometer survey revealed that the confidence in the government after one year since its formation, was at the highest level since mid-2011.<sup>18</sup>

In the following, an overview of the main restrictions in the area of asylum introduced during the 2017/19 government is given.

### 11.2.1 *Asylum as an Issue of ‘Order and Security’*

In contrast to previous FPÖ government participations, this Government Programme<sup>19</sup> clearly showed the handwriting of the FPÖ,<sup>20</sup> but arguably also of the ‘new ÖVP’ led by Sebastian Kurz. Even though in 2018 the number of asylum applications filed in Austria was the lowest since 2010,<sup>21</sup> images of large

<sup>12</sup> Fallend (n 9) 9 referring to Roger Eatwell, ‘The Rebirth of Extreme Right in Western Europe?’ (2000) 53 *Parliamentary Affairs* 422 and to Piero Ignazi, *Extreme Right Parties in Western Europe* (Oxford University Press 2003) 203–204.

<sup>13</sup> Perchinig and Valchars (n 5) 436; Ennser-Jedenastik (n 2) 30, 38.

<sup>14</sup> Tálos (n 11) 458. Tálos argues that while the division between ‘own citizens’ (‘natives’) and ‘immigrants’ (‘others’) was widely discussed, also ‘natives’ were affected by restrictive policies.

<sup>15</sup> Ennser-Jedenastik (n 2) 38.

<sup>16</sup> *Ibid.*, 46.

<sup>17</sup> *Ibid.*, 30.

<sup>18</sup> *Ibid.*, 39.

<sup>19</sup> Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria].

<sup>20</sup> Ennser-Jedenastik (n 2) 46.

<sup>21</sup> Federal Ministry of the Interior, ‘Annual Asylum Statistics 2018’ <[https://bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik\\_2018.pdf](https://bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2018.pdf)> [last visited 29 September 2020].

movements of asylum seekers were used, strongly influenced by the experiences of the 2015 so-called refugee crisis. The programme also contained elements allowing nativist interpretations. For example, the preamble stressed that the governing parties would be working solely for Austria's citizens.<sup>22</sup> One of the leading principles of the Programme was '*Heimat*' (home land):

We want to preserve our homeland Austria as a country worth living in with all its cultural advantages. This also includes deciding for ourselves who is allowed to live with us as an immigrant and putting an end to illegal migration.<sup>23</sup>

The Programme claimed that the 'free and solidary society' would be 'increasingly challenged by the mistakes in migration policy of the past years' and linked the protection of the welfare state from abuse with the stop of 'illegal' migration to Austria.<sup>24</sup> What is more, it connected the will of the Austrian population to the end of 'illegal' migration:

Our migration policy should be designed in such a way that it can be supported by the population. We will therefore handle it in such a way that Austria remains a secure, stable state in which people can live in prosperity and social peace. To this end, illegal migration into our country must be stopped and qualified immigration geared to Austria's needs.<sup>25</sup>

The topic of asylum was primarily located in the chapter about 'order and security' and the objective of the asylum policy was defined as the 'consistent prevention of asylum abuse and creation of a framework for rapid asylum procedures'.<sup>26</sup> To achieve this objective,<sup>27</sup> asylum was briefly mentioned as a form of 'temporary protection' as opposed to a form of a durable solution in Austria, and as something to be granted only to those who 'really need it'.<sup>28</sup> It was stressed that 'illegal' migration would 'usually' take place by abusing the right to asylum.

### 11.2.2 *Towards Zero Asylum Seekers Arriving in Austria?*

The Government Programme stressed that Austria would work towards the development of an EU asylum policy 'that relieves the burden on Austria and strengthens the returns of economic migrants'.<sup>29</sup> The reduction of asylum

<sup>22</sup> Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria] 7.

<sup>23</sup> *Ibid.*, 9.

<sup>24</sup> *Ibid.*, 7.

<sup>25</sup> *Ibid.*, 29.

<sup>26</sup> *Ibid.*, 30.

<sup>27</sup> *Ibid.*, 33–35.

<sup>28</sup> *Ibid.*, 29.

<sup>29</sup> *Ibid.*, 33–34.

applications was also a goal pursued at the European Council in June 2018, where Chancellor Kurz was in favour of ‘Anlandeplattformen’ (docking platforms) outside Europe,<sup>30</sup> which implied that persons rescued at sea should be brought to third states instead of to the EU.<sup>31</sup> This concept was taken over by the EU Council as ‘regional disembarkation platforms’<sup>32</sup> and further developed in the documents of the European Commission.<sup>33</sup> In the same vein, during the Ministerial Conference on Security and Migration organised by the Austrian EU Council Presidency in September 2018, the Ministries of the Interior of Italy and Austria backed a proposal for asylum seekers to be processed on board ships rather than brought to shore in Europe.<sup>34</sup> Building on the European Council Conclusions from June 2018, the Austrian Ministry of the Interior and the Danish Ministry of Immigration and Integration proposed to shift the policy focus in favour of providing protection only to ‘the most vulnerable migrants’ in countries of first reception near conflict areas.<sup>35</sup> Thus, no asylum seekers should arrive in Europe anymore.

Only a few months later, the Minister of the Interior at that time, Mr. Kickl (FPÖ), announced the objective that ‘basically nobody, [. . .] should be able to file an asylum application in Austria anymore’, since Austria would be surrounded by secure third countries.<sup>36</sup> At the same time, initial reception centres of asylum seekers (*Erstaufnahmezentren*) were renamed to ‘departure centres’ (*Ausreisezentren*), even though the notion ‘*Erstaufnahmezentrum*’ is a legal notion (e.g., Sec. 1 GVG-Bund 2005). This was meant to signal that asylum seekers were not welcome in Austria and not in need of international protection.<sup>37</sup>

<sup>30</sup> Federal Chancellery Austria, ‘Bundeskanzler Kurz: Trendwende in der Flüchtlingspolitik möglich’ (28 June 2018) <[www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2017-2018/bundeskanzler-kurz-trendwende-in-der-fluechtlingspolitik-moeglich.html](http://www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2017-2018/bundeskanzler-kurz-trendwende-in-der-fluechtlingspolitik-moeglich.html)> [last visited 29 September 2020].

<sup>31</sup> *Ibid.*

<sup>32</sup> European Council Conclusions 28 June 2018.

<sup>33</sup> See, e.g., Non-paper by the European Commission <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724\\_non-paper-regional-disembarkation-arrangements\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf)> [last visited 29 September 2020].

<sup>34</sup> ECRE, ‘Italy and Austria look to “solve” disembarkation crisis by processing migrants at sea’, 21 September 2018 <[www.ecre.org/italy-and-austria-look-to-solve-disembarkation-crisis-by-processing-migrants-at-sea/](http://www.ecre.org/italy-and-austria-look-to-solve-disembarkation-crisis-by-processing-migrants-at-sea/)> [last visited 29 September 2020].

<sup>35</sup> Austrian Federal Ministry of the Interior, Danish Ministry for Immigration and Integration ‘Vision for a Better Protection System in a Globalized World Mending a Broken System’, 2018, <https://uim.dk/filer/nyheder-2018/vision-for-a-better-protection-system-in-a-globalized-world.pdf> [last visited 29 September 2020].

<sup>36</sup> ORF Zeit im Bild 2, 25 February 2019.

<sup>37</sup> The then new interim Minister of the Interior – after the ‘Ibiza affair’ – changed the name of ‘departure centres’ back to the previous name: initial reception centres (*Erstaufnahmezentren*).

While the ÖVP-FPÖ Government brought forward ideas to externalise protection, there were no initiatives promoting legal avenues for accessing protection in Austria – even though resettlement was mentioned in the Government Programme.<sup>38</sup> To the contrary, since 2018 Austria does not have any resettlement programme anymore.<sup>39</sup>

The government finally decided to abstain from voting regarding the Global Compact on Migration (2018) even though Austria had previously contributed to its drafting. This raised considerable criticism as regards the role of Austria during the EU presidency as well as during the consultations leading to the adoption of the Compact. While Kurz in 2017 (at that time Minister for Foreign Affairs) was in favour of the Compact, he eventually changed his position, in particular after the Austrian right-wing *Identitäre Bewegung* had started to mobilise against the Compact and also the FPÖ opposed joining the Compact. It is noteworthy in this context, that the recent ÖVP-Green Party Government will abide by the decision not to join the Compact.<sup>40</sup> Given its less ambitious content, the Global Compact on Refugees did not meet any comparable resistance.

### 11.2.3 *Further Restrictions in the Name of the Prevention of Asylum Abuse*

In accordance with the Government Programme, the ÖVP-FPÖ Government proposed several legislative measures in the field of asylum aiming at the prevention of asylum abuse and achieving more effectiveness. These legislative acts, in particular the 2018 Aliens Law Amendment Act (FrÄG), the 2019 Federal Law on the Establishment of the Federal Agency for Care and Support Services, and the 2019 Social Assistance Act led to the restriction of the rights of asylum seekers and beneficiaries of international protection.

Apart from new legislative initiatives, policy implementation focused – as also visible in the Government Programme – on the withdrawal of protection status and returns. The number of first instance proceedings to revoke protection status quadrupled between 2017 and 2018,<sup>41</sup> even though in much fewer

<sup>38</sup> Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria] 35.

<sup>39</sup> Between 2014 and 2017, Austria resettled in total 1,900 refugees from Syria.

<sup>40</sup> ORF.at, 'UNO-Migrationspakt: Beitrittsfrage für Van der Bellen abgehakt', 18 January 2020 <<https://orf.at/stories/3151449/>> [last visited 29 September 2020].

<sup>41</sup> Answer to Parliamentary Enquiry 4105/AB of 31 October 2019 to 4117/J (XXVI. GP) <[www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB\\_04105/imfname\\_770753.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_04105/imfname_770753.pdf)> [last visited 29 September 2020].

cases protection status was actually revoked. Forced removals increased in 2018 by forty-seven per cent compared to 2017.<sup>42</sup>

With the 2018 Aliens Law Amendment Act (FrÄG 2018)<sup>43</sup> the trend to ‘prevent abuse of asylum’ and ‘increase the efficiency of asylum and aliens law procedures’ continued. Measures interfering with the human rights of asylum seekers were undertaken. These included the authorisation of public security bodies to search asylum seekers and seize cash of up to EUR 840.00 per person to contribute to the basic care costs; the authorization to seize data carriers such as mobile phones and to evaluate the data stored on them in case of doubt in relation to identity or flight route;<sup>44</sup> and further restrictions with regard to freedom of movement of asylum seekers.<sup>45</sup> The actual necessity and proportionality of these measures in relation to the (controversial) objective of countering asylum abuse was not clarified.<sup>46</sup> For this reason, the UNHCR criticized the 2018 FrÄG by noting that the law conveyed ‘the broad impression that the vast majority of asylum seekers submit an asylum application that has no connection with the granting of protection’ and that a general danger would come from asylum seekers. The UNHCR also added that the measures – imposing a number of additional tasks on the competent authorities – did not appear to be suitable for achieving the objective of increased efficiency.<sup>47</sup>

The government 2017/19 also made the already difficult access to the labour market for asylum seekers<sup>48</sup> even more cumbersome by abolishing access to apprenticeship schemes.<sup>49</sup>

<sup>42</sup> EU Fundamental Rights Agency, ‘Migration: Key Fundamental Rights Concerns, Quarterly Bulletin’, 1.7.–30.9.2019 <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-migration-bulletin-4\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-migration-bulletin-4_en.pdf)> [last visited 29 September 2020]. See also Answer to Parliamentary Enquiry 4105/AB.

<sup>43</sup> *Fremdenrechtsänderungsgesetz 2018 – FrÄG 2018* [Aliens Law Amendment Act 2018] BGBl I 56/2018.

<sup>44</sup> Sec. 39a BFA-VG.

<sup>45</sup> Sec. 15b Asylum Act.

<sup>46</sup> Adel-Naim Reyhani, ‘Stellungnahme des Ludwig Boltzmann Instituts für Menschenrechte zum FrÄG 2018, 12/SN-38/ME XXVI. GP’ (14 May 2018) <[www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME\\_00905/imfname\\_693777.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_00905/imfname_693777.pdf)> 3–4; For details see also: UNHCR, ‘Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018, 4/SN-38/ME XXVI. GP,’ (9 May 2018) 16–18 <[www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME\\_00872/imfname\\_693196.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_00872/imfname_693196.pdf)> [last visited 29 September 2020].

<sup>47</sup> UNHCR, ‘Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018’ (n 46) 1.

<sup>48</sup> While the Aliens Employment Act (AuslBG) does not prohibit access to wage-earning employment as such, a decree restricts asylum seekers to seasonal and harvest work. This seems not to fulfil the requirements of the Recast Reception Conditions Directive.

<sup>49</sup> Access was abolished per decree of the Minister of Social Affairs. Asylum seekers enrolled in apprenticeship schemes had to stop their apprenticeship if a negative decision in the asylum procedure was delivered or if subsidiary protection status was revoked.

Finally, while not mentioned in the Government Programme, in 2019 the former FPÖ Minister of the Interior Kickl planned detention for potentially dangerous asylum seekers (a so-called preventive or security detention) without criminal offence; it was to be decided by the authority under the Ministry of the Interior after a risk analysis with judicial review only *ex post*.<sup>50</sup> Chancellor Kurz supported this plan and the government even agreed on the cornerstones of such ‘security detention’.<sup>51</sup> However, a necessary amendment of the Federal Constitutional Act on the Protection of Personal Liberty<sup>52</sup> would have required a two-thirds majority in the Parliament. Soon after the agreement on the cornerstones, the ‘Ibizagate’ – which finally led to the dissolution of the government – became public.

#### 11.2.4 *Abolishment of Independent Legal Assistance for Asylum Seekers*

Despite sharp criticism by UNHCR,<sup>53</sup> NGOs,<sup>54</sup> academics,<sup>55</sup> and OHCHR,<sup>56</sup> the ‘Law on the establishment of a Federal Agency for Care and Support

<sup>50</sup> This idea was triggered by the stabbing of a public official in a social welfare service in Vorarlberg, allegedly by an asylum seeker who had been banned from the Schengen area.

<sup>51</sup> See Federal Chancellery of Austria, ‘Bundeskanzler Sebastian Kurz: Sicherungshaft mit richterlicher Genehmigung soll Österreich wieder sicherer machen’, 6 March 2019 <[www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2019/bundeskanzler-sebastian-kurz-sicherungshaft-mit-richterlicher-genehmigung-soll-oesterreich-wieder-sicherer-machen.html](http://www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2019/bundeskanzler-sebastian-kurz-sicherungshaft-mit-richterlicher-genehmigung-soll-oesterreich-wieder-sicherer-machen.html)> [last visited 29 September 2020].

<sup>52</sup> *Bundesverfassungsgesetz vom 29 November 1988 über den Schutz der persönlichen Freiheit* [Federal Constitutional Act on the Protection of Personal Liberty], BGBl Nr. 684/1988, last amended by BGBl I Nr 2/2008.

<sup>53</sup> UNHCR, ‘Analyse des Entwurfs für ein BBU-Errichtungsgesetz, 15/SN-127/ME XXVI. GP’ (11 April 2019) <[www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME\\_04072/imfname\\_747916.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_04072/imfname_747916.pdf)> [last visited 29 September 2020].

<sup>54</sup> See also ECRE, ‘Reforming Legal Assistance in Austria: An End to Independent Provision? ECRE’s Call for Withdrawal of Measures that severely restrict Access to Independent Legal Assistance’, 2019, <[www.ecre.org/wp-content/uploads/2019/07/Legal-Note-5.pdf](http://www.ecre.org/wp-content/uploads/2019/07/Legal-Note-5.pdf)> [last visited 29 September 2020].

<sup>55</sup> Margit Ammer and Adel-Naim Reyhani, ‘Stellungnahme des Ludwig Boltzmann Instituts für Menschenrechte zum Entwurf betreffend das BBU-Errichtungsgesetz [Legal opinion on the draft law on the establishment of a “Bundesagentur für Betreuungs- und Unterstützungsleistungen (BBU)” (Federal Agency for Care and Support Services)]’ (36/SN-127/ME XXVI. GP, 12 April 2019) <[www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME\\_04118/imfname\\_748026.pdf](http://www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_04118/imfname_748026.pdf)> [last visited 29 September 2020].

<sup>56</sup> OHCHR, ‘Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return’ (October 2018) <[www.ohchr.org/Documents/Issues/Migration/AustriaMigrationMissionReport.pdf](http://www.ohchr.org/Documents/Issues/Migration/AustriaMigrationMissionReport.pdf)> [last visited 29 September 2020], 41: ‘OHCHR regards it essential for the Government to ensure sufficient space for a plurality of civil society actors to meaningfully promote and protect the human rights of migrants within migration processes



Services (BBU-G)<sup>57</sup> was adopted in May 2019, gaining majority solely through the votes of ÖVP and FPÖ members of the National Assembly. The law abolished independent legal advice by NGOs. This idea stemmed from the FPÖ that had already accused NGOs earlier of ‘greed for profit’ and to be part of the ‘asylum industry’.<sup>58</sup>

The new agency, owned by the Federal Government, which *inter alia* provides legal assistance in asylum and return procedures since the beginning of 2021, is subordinated to the Ministry of Interior, which is also responsible for the first instance asylum authority. The establishment of the agency was considered necessary for countering the strong dependence of legal assistance on external service providers. The Agency was also viewed as necessary for optimisation of costs and quality assurance.<sup>59</sup> While the exclusion of civil society from legal assistance in asylum and return procedures in itself already constitutes a considerable cut, it is questionable whether the legal advice provided by the Agency can be independent and impartial.

Although, according to the BBU-G, legal advisors must be independent and not bound by instructions, a closer look reveals that these requirements are compromised by the primary goals of the BBU-G and the organisational design of the Agency. The Federal Minister of the Interior, which is to exercise shareholder rights on behalf of the Federation as a hundred-per-cent owner of the Agency, will have considerable influence on the work of the Agency. The Minister also has an internal right to issue instructions, affecting all management decisions, and is – in support of his management and auditing rights – entitled to a comprehensive right to information. This influence raises serious concerns with regard to the right to an effective remedy and seems to conflict with the provisions of the EU Procedures Directive.<sup>60</sup> It is

and policies. This includes providing independent legal counselling and assistance, and facilitating administrative procedures and legal remedies.’

<sup>57</sup> *Bundesgesetz über die Errichtung der Bundesagentur für Betreuungs- und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung (BBU-Erichtungsgesetz – BBU-G)*, [Federal law on the establishment of the Federal Agency for Care and Support Services Limited liability company], BGBl I 53/2019; entry into force in June 2019.

<sup>58</sup> Perchinig and Valchars (n 5) 430–431.

<sup>59</sup> Government bill, 594 der Beilagen XXVI. GP, Erläuterungen, 1.

<sup>60</sup> According to Article 21(1) of the Procedures Directive (2013/32/EU) ‘specialised services of the State’ could be used to provide legal and procedural information in first instance proceedings (Article 19). However, this possibility is not allowed for legal assistance and representation (under Article 20) in appeal proceedings – here the Directive clearly refers to ‘persons’ and not to ‘specialised services of the State’. This separation also requires an interpretation of Article 21 (1) in conformity with human rights. Legal assistance and representation requires mutual trust, which in turn demands a clear separation from state institutions. This suggests that persons

questionable whether legal assistance by the Agency can be independent and impartial since the Ministry of the Interior is the authority that is also responsible for the first instance of the asylum procedure. Even assuming that the substantive activities of legal advisors could take place without direct influence from the Minister, the proposed constellation is prone to indirectly influence the motives of legal advisors and to create an appearance of bias and inequality of arms.<sup>61</sup>

The Minister of Justice of the subsequent ÖVP-Green Party Government, Green Party member Alma Zadić that took office in 2020, has tried to implement the law in such a way that civil society can still provide input to the work of the Agency, for example, by appointing a former NGO person as head of a newly introduced department for legal advice, installing a quality advisory board, or staffing the supervisory board of the BBU GmbH also by external experts in addition to representatives of the ministries.<sup>62</sup> Still, these efforts have not remedied the weaknesses mentioned above.

#### 11.2.5 *Restrictions for Beneficiaries of International Protection*

Legislative amendments initiated by the ÖVP-FPÖ Government hampered the integration of recognised refugees by impeding access to citizenship and cutting social assistance for those with insufficient command of German or English. In particular, the 2018 Aliens Law Amendment Act (FrÄG 2018) increased the minimum duration of lawful and uninterrupted residence for the granting of citizenship to recognised refugees (from six to ten years).<sup>63</sup> Therefore, recognised refugees are no longer granted more favourable treatment than other foreign nationals.<sup>64</sup> Surprisingly, the explanatory notes to the draft bill<sup>65</sup> considered this change to be in compliance with Article 34 of the

working for 'specialised services of the State' cannot be 'persons as admitted or permitted under national law' (according to Article 21(1), second sentence).

<sup>61</sup> For details see Ammer and Reyhani (n 55).

<sup>62</sup> See Austrian Ministry of Justice, 'Zadić: Unabhängigkeit der Rechtsberatung für Asylsuchende garantiert', APA OTS, 3 July 2020, [www.ots.at/presseaussendung/OTS\\_20200703\\_OTS0110/zadic-unabhaengigkeit-der-rechtsberatung-fuer-asylsuchende-garantiert](http://www.ots.at/presseaussendung/OTS_20200703_OTS0110/zadic-unabhaengigkeit-der-rechtsberatung-fuer-asylsuchende-garantiert) [last visited 29 September 2020].

<sup>63</sup> This corresponds to the standard minimum duration. See Sec. 11a (7) *Staatsbürgerschaftsgesetz* [Citizenship Act], BGBl 311/1985, last amended by BGBl I 56/2018.

<sup>64</sup> At the same time, the FPÖ wanted to introduce double citizenship for South Tyrolians with German and Ladin mother tongue even without residence in Austria, which constitutes a long-standing demand of the FPÖ but also right-wing South Tyrolian parties. See Perchinig and Valchars (n 5) 426–427.

<sup>65</sup> ErläutRV 189 BlgNR 26. GP, 40.

Refugee Convention that, actually, demands facilitation of naturalisation of refugees as far as possible. Many stakeholders including UNHCR, however, saw the tension.<sup>66</sup>

The ÖVP-FPÖ Government introduced a new Basic Law on Social Assistance,<sup>67</sup> entering into force in June 2019, that made the full amount of social assistance for recognised refugees dependent on a certain level of German or English skills. More specifically, at least thirty-five per cent of the benefit was made dependent on employability at the labour market; such employability could be only assumed if the person has German level B1 or English level C1.<sup>68</sup> However, in December 2019, the Austrian Constitutional Court ruled that this provision was contrary to the constitutional principle of equality.<sup>69</sup>

In this context, it must be also noted that the ÖVP-FPÖ Government restricted access to German language courses. The 2018 FrÄG abolished the entitlement of certain asylum seekers (those admitted to the asylum procedure and for whom there is a very high probability of being granted international protection) to German language courses. The legal provision containing the entitlement of asylum seekers to German language courses had entered into force only in 2018.<sup>70</sup> In addition, language courses beyond A2 level offered by the Labour Market Service (AMS) to beneficiaries of international protection, were reduced considerably.<sup>71</sup>

Under the new Basic Law on Social Assistance, beneficiaries of subsidiary protection can only be granted ‘core social assistance benefits which do not exceed the level of basic care’.<sup>72</sup> The Austrian Constitutional Court did not regard this limitation as unconstitutional.<sup>73</sup>

<sup>66</sup> UNHCR-Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018, 4/SN-38/ME XXVI. GP (n 53) 18–20. See also Reyhani (n 46) 4.

<sup>67</sup> Federal Act concerning Federal Law on Principles of Social Assistance (Basic Law on Social Assistance), BGBl I 41/2019.

<sup>68</sup> Sec. 5(6) and (7) Basic Law on Social Assistance.

<sup>69</sup> Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.3.3.3. The *Gleichheitssatz* [principle of equality] is applicable also to third-country nationals via Article I (1) Federal Constitutional Law implementing the International Convention on the Elimination of all forms of Racial Discrimination (see Constitutional Court, VfSlg. 13.836; 14.191.).

<sup>70</sup> Sec. 68 (1) Asylum Act.

<sup>71</sup> See, e.g., Die Presse, ‘Arbeitsmarktservice streicht Großteil der Deutschkurse’, 30 November 2018 <[www.diepresse.com/5538879/arbeitsmarktservice-streicht-grossteil-der-deutschkurse](https://www.diepresse.com/5538879/arbeitsmarktservice-streicht-grossteil-der-deutschkurse)> [last visited 29 September 2020].

<sup>72</sup> Sec. 4(1) Basic Law on Social Assistance.

<sup>73</sup> See Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.2.1.5, with reference to Constitutional Court (28.06.2017) VfSlg. 20.177/2017.

### 11.3 THE CONFLUENCE AND INTERRELATION OF POPULISM AND THE RESTRICTION OF REFUGEE RIGHTS IN AUSTRIA: IS DEMOCRACY IN DECAY IN AUSTRIA?

#### 11.3.1 *Are We Witnessing Populism in Austrian Politics?*

While the rule of law and democracy crisis is among the most important issues of (European) constitutionalism and democracy studies in the early twenty-first century, the numerous studies analysing this crisis have led to a rapidly growing body of literature usually focusing on populism. By now libraries can be filled with studies on populism and an overview of the literature becomes difficult to oversee.<sup>74</sup> Jan-Werner Müller, for instance, prominently conceives of populism as ‘a moralized form of anti-pluralism’.<sup>75</sup> According to his definition, the decisive claim of populists is to be the true representatives of the people, which even goes so far as populists themselves, in an anti-institutional manner, claiming that it is them and only them who represent the people. Thereby populists appeal to a ‘unity’ and ‘community’, which constructs the ‘other’ as an enemy. This ‘othering’ aims to exclude, among others, asylum seekers. Wojciech Sadurski goes beyond such a discourse-related understanding of populist politics and identifies populism with actions. Thereby he also includes ‘hostility to *institutional* pluralism’ in his understanding of populism.<sup>76</sup>

We will refer to populism here broadly speaking as a phenomenon constituting an important challenge to discursive and institutional pluralism. In so doing, this contribution identifies, among several other important criteria for the current misery, also the danger represented by political lies and voter manipulation as a key issue and problem.<sup>77</sup> Thereby it becomes clear that ‘populists’ do not actually care for the interest of the people. Rather, they use techniques in order to gain their support other than through sheer force. Elsewhere, one of us has referred to this by labelling such politicians ‘cuckoo politicians’.<sup>78</sup>

<sup>74</sup> For an overview, see Cristóbal Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017).

<sup>75</sup> Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 20. See also Chantal Mouffe, *The Democratic Paradox* (Verso 2000) 44–45.

<sup>76</sup> Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019) 22–24.

<sup>77</sup> Lando Kirchmair, ‘What Gustav Radbruch Teaches Us about (Authoritarian) Populism: Lies by Officials Should Not Be Referred to as Populism Because They Are a Genuine Threat to the Democratic Legal Culture’ in Stephan Kirste and Norbert Paulo (eds.), *Populism – Perspectives from Legal Philosophy* (2021) Beiheft Archiv für Rechts- und Sozialphilosophie 81–112.

<sup>78</sup> Lando Kirchmair, ‘Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zu einer transnationalen Gewaltengliederung’ (2019) 6 (2) *Zeitschrift für praktische Philosophie* 171.

Even though a large-scale diagnosis cannot be provided within the frame of this contribution, Austrian politics are marked – at least to some extent – by populism. Especially the restriction of human rights as described in Section II is an important instance of populism. Generally speaking, the ÖVP-FPÖ Government coalition made integration of beneficiaries of international protection very difficult if not impossible. At the same time, social benefits were made dependent upon integration (language skills at a certain level). Portraying refugees generally as abusers of the system and unwilling to integrate and linking them broadly speaking to irregular migration and criminal behaviour while at the same time making access to the labour market and language courses difficult, is the work of populists. Refugees were portrayed as ‘the others’, constituting a security problem. Blurring the legal concepts of asylum and migration and ignoring international and EU legal obligations in particular in areas of asylum and human rights, disrespects legal guarantees. The ÖVP-FPÖ Government justified interferences in the human rights of asylum seekers with new measures and legislative acts as a ‘prevention of asylum abuse’. This is populist propaganda, especially because such claims were lacking any empirical evidence. Finally, civil society, the media, as well as human rights activists and to some extent even the prestigious Austrian Constitutional Court, were verbally attacked in particular by the FPÖ, which shows a clear disrespect for important pillars of institutional pluralism. The coalition partner ÖVP has not firmly opposed this conduct, which entails ‘complicity’ in populism.

The given examples also indicate a common link between the restriction of refugee rights and democracy which is also related to discursive and institutional pluralism. Human rights and democracy are mutually dependent. It is not possible to have rule of law guaranteed without democracy. Nor can we have democracy without the rule of law.<sup>79</sup> Precisely therein lies the conceptual relationship between the restriction of refugee rights and democracy. Conceiving of democracy without human rights makes little sense. The right to vote, bluntly speaking, is of little value, if basic human rights such as freedom of information and freedom of press are absent. This holds also true the other way round. The rule of law and basic human rights are not sustainable without democracy, as political restrictions of such rights might not face protest at the ballot box. Also, historically, democracy and human rights have co-evolved.

<sup>79</sup> See only, e.g., András Jakab, ‘Was kann Verfassungsrecht gegen die Erosion von Demokratie und Rechtsstaatlichkeit tun? Zur Verbundenheit des Schutzes von Demokratie und Rechtsstaatlichkeit’ (2019) 74 *Zeitschrift für öffentliches Recht* 390 describing the relationship between the rule of law and democracy like a working marriage. Even though there are structural conflicts, one cannot do without another.

Their coinciding is not a mere historical coincidence. If the democratic legal culture erodes, human rights thus will suffer too. Many dictatorships have and do still show that they disfavour individual rights. Also, the other way round it is hard to secure human rights if democratic control is missing.

This is particularly troublesome for refugee rights, because refugees usually lack democratic rights such as the right to vote (in the country of refuge). Hence, if governments limit the rights of refugees, refugees themselves cannot express their protest at the ballot box. They have to rely on ‘altruistic support’ from voters which are not directly concerned by the rights restriction. Precisely a lack of concern among voters for the restriction of refugee rights can be exploited by populist parties like the FPÖ. Additionally, this is unlikely to be counteracted by mainstream parties like the ÖVP since they have nothing to gain and much to lose if they would be seen as ‘altruistically’ refugee-friendly. This is what causes the (informal) elements of democracy to crumble and lead to – or fail to prevent – further restrictions of refugee rights. Limiting refugee rights, however, is still a restriction of human rights, and thus also a contribution to the deterioration of the balance between democracy and human rights. In such a climate, radical ideas by populist right-wing parties like those of the FPÖ are more likely to be picked up by other parties such as the ÖVP. In a climate where limitations of human rights are part of the political game, more moderate parties like the ÖVP also become more radical. This might even work if ‘mainstream’ political parties ‘only’ co-opt restrictive asylum policies to ‘cut off’ support for more radical populist right-wing parties like the FPÖ. This displays an indirect link between populism and restrictive asylum policies which is also connected to the question as to whether such populist elements also imply democratic decay.<sup>80</sup>

### 11.3.2 *Democratic Decay in Austria?*

Democratic decay is ‘the incremental degradation of the structures and substance of liberal constitutional democracy’.<sup>81</sup> Importantly such decay must

<sup>80</sup> For an early analysis of ‘right-wing populism’ in Austria, see Reinhard Heinisch, ‘Success in Opposition – Failure in Government: Explaining the Performance of Right-wing Populist Parties in Public Office’ (2003) 26 *West European Politics* 91. See also Konrad Lachmayer, ‘Questioning Basic Values: Austria and Jörg Haider’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017) 436.

<sup>81</sup> See for this definition Tom Gerald Daly, ‘Diagnosing Democratic Decay’, paper presented at Comparative Constitutional Roundtable, UNSW Sydney 7 August 2017, as quoted in Wojciech Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’, *Sydney Law School Legal Studies Research Paper* 1 (2018) 8.

not be understood in an isolated fashion, for if this would be the case, this might create the impression of a ‘connotation of a degradation which is slow and almost impersonal, occurring without a plan – a connotation certainly not giving justice to energy, enthusiasm and design.’<sup>82</sup> Another caveat is that decay implies a temporal component. Similarly, as it is impossible to engage in conclusions on climate change by simply looking at the weather yesterday and today, or by saying that last year it was colder than this year, and thus, climate change is not happening, it is also misleading to say that democracy in Austria is rising as the current government constituted by the refurbished ÖVP and the Green Party is ‘more democratic’ than the ÖVP-FPÖ coalition. Starting from a specific point in time and a given quality of democracy, decay points at a negative evolution of democracy in relation to the starting point.

However, to what extent do the above-described restrictions of refugee rights represent a form of democratic decay in populist times? Instead of identifying a specific point in time as the heyday of Austrian democracy, the prior identification of elements of populism points to some, isolated, but nevertheless important cuts into the blueprint of liberal democracy which is generally present in Austria.<sup>83</sup>

Hence, after having made transparent how populism is understood in this contribution and the analysis whether elements in Austria are present, it would be nevertheless implausible to conclude that democracy is on the rise in Austria. Whether we witness democratic decay in Austria also depends on the conceptual understanding of democracy.<sup>84</sup> This contribution cautiously floats the hypothesis that indeed some incidents surely are worrisome from the perspective of liberal democracy. The restriction of human rights of refugees is a cut into what is at the very core of liberal democracy because human rights and the rule of law as well as democracy are interconnected. Moreover, these examples constitute linkages between populism and democratic decay.

Against the measure of a well-functioning democracy, we can thus say that the restrictions of refugee rights are cuts into Austrian liberal democracy. This is not a negligible by-product or a passive development without agents. Rather,

<sup>82</sup> Sadurski (n 81) 8 speaking about PiS in Poland.

<sup>83</sup> See for a comparative analysis, e.g., Ludger Helms and David M. Wineroither (eds), *Die Österreichische Demokratie im Vergleich* (2nd ed. Nomos and facultas 2017). C.f. also Tarunabh Khaitan, ‘Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India’ (2020) 14 (1) *Law & Ethics of Human Rights* 49 speaking also of ‘cuts’ especially pointing to the problem of dismantling liberal democratic institutions in a *systemic* manner.

<sup>84</sup> See generally, Günter Bischof and David M. Wineroither (eds.), *Democracy in Austria* (Innsbruck University Press 2019) providing an overview.

there is a connection between populism that causes democratic decay also by significantly restricting refugee rights. The responsible agents for these developments are populist politicians. However, those responsible are not only populist politicians, but also the people. Surveys show that twenty-two per cent in Austria held in 2019 that 'Austria would be in need of a strong leader which must not rely on parliament or elections'<sup>85</sup> and in 2018 forty-three per cent generally wished for a 'strong leader'.<sup>86</sup>

#### 11.4 LEGAL RESILIENCE: THE POSSIBILITIES AND LIMITS OF CONSTITUTIONAL LAW TO KEEP IN CHECK, PREVENT BUT ALSO REMEDY THE RESTRICTION OF REFUGEE RIGHTS, POPULISTS AND DEMOCRATIC DECAY

Finally, this contribution asks what Austrian (constitutional) law can do to prevent democratic decay and populism in general, as well as the restriction of refugee rights more specifically.<sup>87</sup> At first sight, Austrian (constitutional) law deeply influenced by Kelsenian positivism, seems to be rather toothless due to its strong neutrality regarding politics. Whatever content a specific law has, if the two-thirds-majority in parliament is ensured, even constitutional law can be amended or created.<sup>88</sup> This is potentially problematic as exemplified by the former Minister of the Interior, Mr. Kickl, who argued that it is the law which must bow to politics, and not the other way round.<sup>89</sup> However, at a second glance there are some tools provided by constitutional law which might offer some relief, and thereby strengthen the democratic compass.<sup>90</sup> An effective tool of the Austrian Constitution is that even constitutional law must be in line

<sup>85</sup> Hans Rauscher, 'Autoritäres Potential', *DerStandard*, 11 December 2019, available at [www.derstandard.at/story/2000112168429/autoritaeres-potenzial](http://www.derstandard.at/story/2000112168429/autoritaeres-potenzial) [last visited 29 September 2020].

<sup>86</sup> APA, '43 Prozent der Österreicher wünschen sich starken Mann an der Spitze', *Die Presse*, 20 April 2017, available at [www.diepresse.com/5203856/43-prozent-der-osterreicher-wunschen-sich-starken-mann-an-der-staatsspitze](http://www.diepresse.com/5203856/43-prozent-der-osterreicher-wunschen-sich-starken-mann-an-der-staatsspitze) [last visited 29 September 2020].

<sup>87</sup> For an overview, see Jakab (n 79).

<sup>88</sup> See generally on this, Theo Öhlinger, 'Die Verfassung der demokratischen Republik: ein europäischer Sonderfall?' in Ludger Helms and David M. Wineroither (eds), *Die Österreichische Demokratie im Vergleich* (2nd ed. Nomos and facultas 2017), 105–127 (especially 109 with further references). Only once in history, the Austrian Constitutional Court declared a constitutional law unconstitutional (as it violated the fundamental principles of the Austrian Constitution), see VfSlg. 16.327/2001.

<sup>89</sup> See *Die Presse*, 'Recht muss Politik folgen, nicht Politik dem Recht', 23 January 2019, available at [www.diepresse.com/5566984/asyl-recht-muss-politik-folgen-nicht-politik-dem-recht](http://www.diepresse.com/5566984/asyl-recht-muss-politik-folgen-nicht-politik-dem-recht) [last visited 29 September 2020].

<sup>90</sup> See generally Ulrich Wagrاندl, 'Militant Democracy in Austria' (2018) 2 *Vienna Law Review* 95 arguing that Austria is more of a militant democracy than is usually perceived.



with the most important constitutional principles that are of the highest rank in the Austrian Constitution. The Austrian Constitutional Court guards these principles which include – among other principles – also a democratic principle, human rights and the rule of law and can declare constitutional laws unconstitutional if they violate these principles.<sup>91</sup>

Human rights are themselves another important element of legal resilience, which are also anchored in the Austrian Constitution. Apart from the State Basic Law on the protection of the rights of citizens that contains traditional civil liberties,<sup>92</sup> it is in particular the European Convention on Human Rights (ECHR) that constitutes ‘the main, constitutionalised source of fundamental rights protection’.<sup>93</sup> Other rights in the Austrian Constitution are, for example, the right to equality in Article 7 Federal Constitutional Law (B-VG);<sup>94</sup> the rights in other international treaties adopted by Austria on a constitutional level (e.g., the International Convention on the Elimination of All Forms of Racial Discrimination)<sup>95</sup> or implemented through special constitutional acts (e.g., the Convention on the Rights of the Child),<sup>96</sup> and the constitutional rights in peace treaties.<sup>97</sup> During the past decade, the EU Charter of Fundamental Rights (CFR) has increasingly become important in the Austrian human rights system. In 2012, the Constitutional Court ruled that the rights in the CFR can be asserted before the Court as constitutionally guaranteed rights.<sup>98</sup> In particular, in the area of asylum the Charter plays an important role.<sup>99</sup> Given that asylum procedures do not fall within the scope of application of the Article 6 ECHR, provisions of the CFR such as Article 47, have been increasingly invoked and applied in the asylum procedure.

<sup>91</sup> For such a decision of the Constitutional Court, see VfSlg. 16.327/2001. Naturally, this safeguard rests on a functioning constitutional court that has not been captured.

<sup>92</sup> *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (StGG)*, RGBl 142/1867, incorporated in the Austrian Constitution in 1920.

<sup>93</sup> ECHR rights ‘are understood as constitutional rights, as they are formally part of Austrian constitutional law (rather than the ECHR being applied as an international treaty).’ See Konrad Lachmayer, ‘The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 1283.

<sup>94</sup> *Bundes-Verfassungsgesetz (B-VG)*, BGBl 1/1930, last amended by BGBl 1013/1994.

<sup>95</sup> Transformation to Austrian constitutional law by BGBl 1973/390.

<sup>96</sup> Austrian Constitutional Act on the Rights of the Child, BGBl I 2011/4.

<sup>97</sup> E.g., Treaty of St. Germain 1919, Treaty of Vienna 1955, containing, e.g., rights for minorities.

<sup>98</sup> Constitutional Court, VfSlg 19.632/2012.

<sup>99</sup> Constitutional Court, VfSlg 19.632/2012: Asylum procedures are within the scope of application of the CFR.

The Constitutional Court ‘reads the relevant provisions from the different instruments together, to provide a comprehensive protection’.<sup>100</sup> In addition, human rights and the rule of law also pertain to the above-mentioned core principles of the Austrian Constitution. The Constitutional Court might, thus, declare even a constitutional act that aims at diminishing or even abolishing specific human rights, unconstitutional. Only by a popular referendum and a so-called total revision of the Austrian Constitution, could human rights be abolished.<sup>101</sup> This protection against considerably amending or abolishing human rights also by potential acts of parliament is an important instrument of legal resilience against further, admittedly large-scale, restrictions of refugee rights.

Arguably, also an Austrian withdrawal from the ECHR would only be possible after such a popular referendum (in addition to a two-thirds majority in parliament) due to the constitutional rank and the high importance of the ECHR in Austria. This is an important contributing factor of legal resilience of the Austrian Constitution. It protects against attacks by members of the former ÖVP-FPÖ Government like the former Minister of the Interior (FPÖ) who questioned the ECHR indirectly in line with the FPÖ election programme 2017 that contained possible withdrawal from the ECHR and its replacement by an Austrian Human Rights Convention (which should protect also the ‘home land rights of Austrians’).<sup>102</sup> The same minister devalued human rights guarantees at national, EU and international level as ‘strange legal constructs’ which would be obstacles to do ‘what is necessary’.<sup>103</sup>

The Constitutional Court exercises important functions that may serve to keep populist behaviour and democratic decay in check. Such functions include judicial review of laws and regulations, review of rulings by administrative tribunals and the verification of elections.<sup>104</sup> With regard to the cutting of social assistance for recognised refugees, for instance, the Constitutional Court declared these norms initiated by the ÖVP-FPÖ Government as

<sup>100</sup> Lachmayer (93) 1271.

<sup>101</sup> Article 44 (3) B-VG.

<sup>102</sup> FPÖ Election Programme 2017, ‘Unsere Souveränität und Selbstbestimmung schützen’: one of four demands of the FPÖ in order to eliminate crisis of fairness in the area of freedom and responsibility: ‘Evaluation of ECHR and possibly replacement by Austrian Human Rights Convention which protects also the homeland right of Austrians.’ C.f. Ennser-Jedenastik (n 2) 41.

<sup>103</sup> Tálos (n 11) 462–463.

<sup>104</sup> Additional elements of legal resilience, such as strengthening electoral laws like strict rules on party financing and a proper role for the Court of Audit, can be further important tools.

unconstitutional.<sup>105</sup> Still, it seems to be only the tip of an iceberg which the Court can address according to its mandate.

In line with the above-mentioned importance of informal democratic legal culture and human rights support, civil society also plays an important role to keep elements of populism in check. This is visible in petitions such as the petition relating to access to the labour market of asylum seekers or in relation to the Global Compact on Migration. The role of the civil society is also visible in the statements submitted in the context of the parliamentary procedure or in protests against the renaming of first reception centres into return centres.<sup>106</sup> Still, there is no legal obligation to take civil society's petitions, protests, etc. into account. The ÖVP-FPÖ Government also tried to reduce the influence of civil society in the asylum procedure by introducing the BBU-G. Hence, there is not one single strategy or tool of resilience. Rather, the network of formal and informal rules of the democratic legal culture and safeguards of human rights are needed in order to prevent democratic decay and populist propaganda.

## 11.5 CONCLUSION

The open attacks against human rights, the rule of law and also attacks on parts of civil society by members of the government, were the innovations brought with the 2017/2019 ÖVP-FPÖ Government.<sup>107</sup> The legacy of the ÖVP-FPÖ Government has a dark and long shadow eclipsing also the coalition government by the ÖVP and the Green Party which has been in office since January 2020.<sup>108</sup> During the first year of the ÖVP Green Party Government, in particular the refusal of the ÖVP to accept even a single child from the refugee camps on the Greek islands, not even after the catastrophe in Moria, underlines this legacy. 'Security detention' now features in the Government Programme, albeit the programme stresses that it must be in conformity with the Constitution, the ECHR and EU law.<sup>109</sup> The decision not to join the Global Compact on Migration and the abolition of the

<sup>105</sup> Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.3.3.3.

<sup>106</sup> Der Standard, "'Ausreisezentrum'-Taferl in Traiskirchen von Aktivisten entfernt', 23 May 2020, [www.derstandard.at/story/2000103706372/kickl-weg-ausreisezentrum-taferl-in-traiskirchen-von-aktivisten-entfernt](https://www.derstandard.at/story/2000103706372/kickl-weg-ausreisezentrum-taferl-in-traiskirchen-von-aktivisten-entfernt) [last visited 29 September 2020].

<sup>107</sup> Tólos (n 11) 463.

<sup>108</sup> Parliamentary elections in September 2019 resulted in a major victory of the ÖVP and the Green Party but a loss for the FPÖ of almost 10% but also for the SPÖ. In January 2020, the ÖVP under Sebastian Kurz and the Green Party formed a new government.

<sup>109</sup> Government Programme 2020–2024: Aus Verantwortung für Österreich, 199.

independent legal assistance of asylum seekers are maintained. Looking more broadly at the Government Programme, externalisation tendencies in the asylum policy and the protection of external borders prevail too.

While the FPÖ was a trendsetter in othering refugees and restricting their rights, it is hard to say whether elements of populism represented by the FPÖ have actually led to more restrictive refugee laws and policies, or whether the othering of refugees has contributed to the success of the FPÖ in the first place. Restrictions were in place even before the FPÖ rose to power. Yet, it is undisputed that the politics of the FPÖ, which were largely also adopted and continued by the ÖVP, brought further restrictions. At least in the Austrian case a clearcut, black or white answer to the question as to whether the restriction of refugee rights accelerates democratic decay or whether it is the other way round, cannot be provided. Both phenomena are more likely part of a symbiotic and constantly amplifying process. The more populists dominate politics, the more they will restrict refugee rights. Further restricting refugee rights might easily lead to more support for populists. The more populists have to say, the worse this is for democracy. A bad state of democracy, in turn, is a more fruitful ground for populism. Hence, populism, the restriction of refugee rights and democratic decay is a downward spiral that is not easily hindered. Yet, a strong legal culture and support for the constitution are vital. In Austria this support is ensured by the most fundamental principles of constitutional law that can only be derogated by a public referendum according to Article 44 (3) of the Austrian Constitution. This provides a strong arsenal for resilience. Further specific regulations, such as a strong commitment to human rights and a robust safeguarding of the democratic process are supportive too. This, however, is not given. The Austrian Constitutional Court, constitutional scholars and politicians as well as civil society must work to support liberal democracy and its values.

## Right-Wing Populism, Crumbling Migrants' Rights and Strategies of Resistance in Belgium

ELLEN DESMET AND STIJN SMET

### 12.1 INTRODUCTION

In constitutional terms, the current moment in world history is marked by democratic decay and constitutional erosion.<sup>1</sup> Within Europe, Poland and Hungary are the blueprints of 'illiberal democracy'<sup>2</sup> and 'constitutional backsliding' in the hands of authoritarian populists.<sup>3</sup> But given the transnational nature of the challenges that confront liberal democracy, no state can be presumed risk-free from the populist threat.<sup>4</sup>

In Belgium, as in other European countries,<sup>5</sup> the (constructed) 'migration crisis' of 2015 has further boosted support for right-wing populist policies. As Cas Mudde has argued,

framing of a spike in asylum-seekers as a 'refugee crisis,' together with rhetoric linking this 'crisis' to terrorism, created a 'perfect storm' for the populist radical right. It brought their key issues – immigration, security, and Euroskepticism – to the top of the agenda, and it made voters more receptive to nativist, authoritarian, and populist appeals.<sup>6</sup>

The image of a perfect storm points towards complex entanglement of processes of democratic decay, (right-wing) populism and migration. In a range of

Stijn Smet thanks Merel Vrancken for valuable research assistance.

<sup>1</sup> Zachary Elkins, 'Is the Sky Falling? Constitutional Crises in Historical Perspective', in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 55–56.

<sup>2</sup> *Ibid.*, 243–256, Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary'.

<sup>3</sup> *Ibid.*, 257–275, Wojciech Sadurski, 'Constitutional Crisis in Poland'.

<sup>4</sup> See the Introduction to this volume.

<sup>5</sup> See the other country studies presented in this volume.

<sup>6</sup> Cas Mudde, as cited in Cathryn Costello, 'Overcoming Refugee Containment and Crisis' (2020) 21 *German Law Journal* 20.

countries, would-be authoritarian populists have seized upon a series of crises – in Europe, these include the economic crisis of 2008, the ‘migration crisis’ of 2015, the ‘terrorism crisis’ of 2015–2016 and most recently the COVID-19 crisis of 2020–2022 – to centralize state power in their own hands. They have done so by incrementally undermining core elements of constitutional democracy, in particular the separation of powers and the rule of law.<sup>7</sup>

Although there are clear linkages between migration, right-wing populism and democratic decay, a conceptual distinction should nevertheless be maintained between the undermining of migrants’ rights, on the one hand, and genuine democratic decay, on the other.<sup>8</sup> The former occurs in virtually all European states, whereas the latter is – for now – limited to a few specific states (Poland and Hungary, in particular).<sup>9</sup> Even when restrictions of migrants’ rights are widespread and far-reaching, this phenomenon does not amount, in and of itself, to a dismantling of the constitutional-democratic order. The need to retain a conceptual distinction between both processes – the undermining of migrants’ rights and democratic decay – is confirmed by the Belgian case.

In Section 12.2, we argue that the risk of genuine democratic decay in Belgium is minute, given that a series of constitutional safeguards prevents hostile take-over of government by authoritarian populists. These constitutional safeguards ensure, in particular, that the separation of powers, and the checks and balances it entails, continues to function adequately. In other words, a robust constitutional framework provides for constitutional resilience against the threat of authoritarian populism in Belgium.

At the same time, we posit that an *indirect* relationship does exist between the (hypothetical) threat of would-be authoritarian populists to constitutional democracy and the undermining of migrants’ rights. A genuine risk exists – and has materialized in Belgium – that ‘mainstream’ political parties co-opt nativist and populist policy proposals on migration in an effort to cut off support for radical-right populist parties. To put it crudely, migrants are being thrown under the bus in exchange for electoral support. Particularly during

<sup>7</sup> See Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press 2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Broadway Books 2018). See also Stephen Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (2020) *Columbia Journal of Transnational Law* 1.

<sup>8</sup> For further discussion, see the Introduction to this volume. See also Chapters 10, 11 and 13 on Italy, Austria and Sweden.

<sup>9</sup> See Chapter 1 by Vladislava Stoyanova in this volume (suggesting that restrictive migration laws and policies are a common feature of liberal democracies).

the 2014–2019 legislative term, severe disregard for and active targeting of migrants by the Belgian federal government has resulted in systematic weakening of their rights, a process we refer to as the crumbling of migrants' rights.

In Section 12.3, we show that a series of legislative initiatives and policy decisions on migrants in the 2014–2019 period has contributed to the crumbling of migrants' rights. We also, and particularly, set out to identify elements of legal resilience against this process. In doing so, we build on the conclusion of Section 12.2 that the separation of powers remains intact in Belgium. As a result, and unlike in countries like Poland and Hungary, civil society actors have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants' rights in the face of restrictive laws and regulations. Our main finding is that at a time when lobbying and policy suggestions no longer sufficed, judicial action became a prominent tool to cut back rights-restricting migration measures, but with mixed results. This leads us to the overall conclusion that, in Belgium, the combination of a vocal civil society and an independent judiciary provides a relevant site of resistance against the dismantling of migrants' rights. From a migrants' rights perspective, however, the judicial outcomes lead to a nuanced assessment.

## 12.2 CONSTITUTIONAL RESILIENCE AGAINST (WOULD-BE) AUTHORITARIAN POPULISTS

We begin by explaining why, in our estimation, the risk of genuine democratic decay in Belgium is minute, in light of a series of safeguards embedded in the constitutional framework, as it operates in practice.

Any hostile take-over of government, followed by incremental undermining of the rule of law and the separation of powers, as has occurred in Hungary and Poland, could arguably only come from the radical-right and nativist *Vlaams Belang* (Flemish Interest) party. *Vlaams Belang* combines the thin ideology (or political style)<sup>10</sup> of populism with a nationalist (i.e. pro-Flemish), nativist (i.e. anti-migration) and radical-right (especially anti-Muslim) ideology.<sup>11</sup> In 2004, the party's predecessor *Vlaams Blok* (Flemish Bloc) was found to have incited hatred and discrimination against migrants by blaming them for the 'misery of the native population' under the slogan 'Our own people

<sup>10</sup> Rogers Brubaker, 'Why Populism?' (2017) 46 *Theory and Society* 357.

<sup>11</sup> Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 6 and 34.

[volk] first'.<sup>12</sup> In the wake of the criminal trial, the party changed its name to *Vlaams Belang* and reached its electoral zenith, claiming twenty-four per cent of the vote in the 2004 regional elections.<sup>13</sup>

Although the party's official discourse and programme have since 'softened',<sup>14</sup> discourse analysis shows that it continues to 'mobilize populism and (sub-state) nationalism'.<sup>15</sup> Aside from advocating for increased use of direct democracy, as populist parties tend to do, *Vlaams Belang* continues to construe migrants and Muslims as dangerous 'outsiders' from which the 'pure' Flemish people must be protected; something the 'politically correct elite' is unwilling or unable to do.<sup>16</sup> It is, in other words, evident that *Vlaams Belang* draws heavily on the right-wing populist playbook that has served Fidesz (in Hungary) and Law and Justice (in Poland) so well.

Until recently, this was not much cause for concern as *Vlaams Belang* was thought to have been (again) reduced to a marginal party after its 2004 electoral success (24%), with a large segment of its former electorate now supporting the right-wing nationalist *Nieuw-Vlaamse Alliantie* (N-VA – New Flemish Alliance). In the 2014 federal elections, for instance, *Nieuw-Vlaamse Alliantie* secured 32.5% of the vote whereas *Vlaams Belang* managed to convince just 6% of the electorate, barely above the electoral threshold of 5%. In the wake of the 2015 'migration crisis', however, recent election cycles have been a powerful reminder that the *Vlaams Belang*'s populist discourse and radical-right policies continue to appeal to the electorate. During the 2019 national elections, *Vlaams Belang* rebounded from its dismal 2014 result to claim 18.5% of the vote (results in Flanders). This corroborates findings by Dennison and Geddes that anti-immigration parties have benefitted from an increase in salience of migration issues among voters in the wake of the 'migration

<sup>12</sup> See Court of Appeals (Ghent), 21 April 2004.

<sup>13</sup> For discussion, see Eva Brems, 'Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism' (2006) 4 *International Journal of Constitutional Law* 702.

<sup>14</sup> But note that the 2019 electoral programme still contains thirty-three policy proposals that are in manifest violation of human rights, primarily those of migrants, Muslims, and criminal suspects and prisoners. See Eva Brems et al, *Schendingen van mensenrechten in het verkiezingsprogramma 2019 van Vlaams Belang* (October 2019), available at [www.uhasselt.be/Documents/faculteiten/rechten/RapportMensenrechtenVBprogramma.pdf](http://www.uhasselt.be/Documents/faculteiten/rechten/RapportMensenrechtenVBprogramma.pdf) (the authors of this chapter are co-authors of this research report).

<sup>15</sup> Emilie van Haute, Teun Pauwels and Dave Sinardet, 'Sub-state Nationalism and Populism: the Cases of Vlaams Belang, New Flemish Alliance and DéFI in Belgium' (2018) 16 *Comparative European Politics* 965.

<sup>16</sup> See Brubaker (n 10), 363 (for a general description of right-wing populism).



crisis'.<sup>17</sup> Pre-COVID-19 polls even put *Vlaams Belang* at an all-time high of twenty-eight per cent of voting intentions, well ahead of all other parties, including the Flemish-nationalist *Nieuw-Vlaamse Alliantie* (21%).<sup>18</sup> In light of these data, renewed attention for the (hypothetical) threat of *Vlaams Belang* to the Belgian constitutional order is warranted.

### 12.2.1 Robust Constitutional Framework

Given the electoral resurgence of *Vlaams Belang*, considered against the backdrop of global democratic decay, it is important (or at least prudent) to assess how resilient the Belgian constitutional framework is against capture by would-be authoritarian populists. If we take Hungary and Poland as the blueprints of rule of law backsliding, authoritarian populists would need to achieve two objectives to mount a credible threat to the Belgian constitutional order. First, they must be in government. Second, once in government they must be able to implement an 'illiberal-democratic' agenda.

For a combination of reasons, it is extremely unlikely – if not impossible – for would-be authoritarian populists to achieve both objectives. A series of 'primary' constitutional safeguards prevent hostile takeover of the Belgian constitutional order by a single political party. A further series of 'secondary' constitutional safeguards would prevent constitutional capture even if would-be authoritarian populists manage to enter a coalition government. In combining these primary and secondary safeguards, the Belgian constitutional framework mirrors Stephen Gardbaum's 'counter-playbook' of constitutional resilience. Composed of constitutional design features that ensure adherence to an 'anti-concentration principle', the counter-playbook ensures that the separation of powers continues to operate in a robust manner.<sup>19</sup>

First, a series of constitutional safeguards shield the Belgian constitutional order from hostile takeover by a single political party. We call these safeguards 'primary', since they foreclose a precondition for the incremental dismantling of the constitutional order: authoritarian populists claiming a (super)majority of seats in Parliament.<sup>20</sup> The most important primary safeguards are

<sup>17</sup> James Dennison and Andrew Geddes, 'A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe' (2019) 90 *The Political Quarterly* 107.

<sup>18</sup> X, 'Peiling: extremen op winst, N-VA verliest het zwaarst', *De Morgen* (14 March 2020).

<sup>19</sup> Gardbaum (n 7).

<sup>20</sup> It is, admittedly, conceivable that multiple populist parties with an authoritarian slant co-exist in the same country. The threat of a *coalition* of authoritarian populists should therefore not be

entrenchment of an electoral system based on proportional representation (PR) and the federal structure of the Belgian State.

Since 1920, the Belgian Constitution provides that elections take place according to the PR system.<sup>21</sup> Quasi-constitutional legislation provides the same for regional elections.<sup>22</sup> Since 1993, Belgium is also formally ‘a federal State composed of Communities and Regions’.<sup>23</sup> For the purposes of this chapter, one of the most important consequences of the federalization process was the split (completed by the end of the 1970s) of the formerly unitary ‘traditional’ parties in separate Flemish and Francophone parties.<sup>24</sup> The Constitution moreover *requires* that the federal government is composed of at least two political parties: one Flemish, one Francophone (this is the bare constitutional minimum; in practice there are always more).<sup>25</sup> Furthermore, while the radical right has enjoyed electoral successes in recent years in Flanders, the same cannot be said of the counterpart of *Vlaams Belang* in Wallonia. The *Front National*, forced to rebrand itself as *Démocratie Nationale* in 2012 following a complaint by Marine LePen, has thus far not garnered the same level of support as its radical-right counterpart in Flanders.

The combined effect of these elements – several of which are constitutionally entrenched – is a fragmented multiparty system and the inevitability of coalition governments.<sup>26</sup> This fragmentation has produced democratic challenges,<sup>27</sup> but it also guarantees that any federal government is necessarily a *coalition* government. It is, in other words, impossible for a single political

neglected, as Chapter 10 on Italy in this volume confirms. Some of the points that follow apply to such (hypothetical) coalitions.

<sup>21</sup> See current article 62 Constitution. For most elections (municipal elections being the exception), the D'Hondt system is used to assign seats. See Electoral Code 1894, article 167.

<sup>22</sup> Article 29 Special Act on Institutional Reform (1980).

<sup>23</sup> Article 1 Constitution.

<sup>24</sup> Lieven De Winter and Patrick Dumont, ‘Belgium: Delegation and Accountability under Partitocratic Rule’ in Kaare Strøm et al (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press 2003) 256.

<sup>25</sup> See article 99 Constitution (requiring that the federal government ‘is composed of an equal number of Dutch-speaking and French-speaking Ministers’).

<sup>26</sup> De Winter and Dumont (n 24), 256.

<sup>27</sup> See Audrey Vandeleene and Lieven De Winter, ‘Introduction: Candidates between Parties and Voters – A Triadic Relationship in the Belgian Partitocracy’ in Audrey Vandeleene, Lieven De Winter and Pierre Baudewyns (eds), *Candidates, Parties and Voters in the Belgian Partitocracy* (Palgrave Macmillan 2018) 27 (‘Large multiparty coalitions force government parties to conclude gigantic compromises [...] which in the end rarely satisfy the parties’ distinctive electorates’).

party to successfully take over government at the federal level.<sup>28</sup> One of the preconditions of constitutional capture in Poland and Hungary is thus precluded in Belgium. Although the relevant constitutional provisions were not designed with a potential risk of democratic erosion in mind, they effectively ensure a robust level of constitutional resistance against authoritarian populism.<sup>29</sup> At the regional level, some of these safeguards are not in effect, while the influence of the others is muted. As a result, it is possible – although it remains unlikely – for the radical-right to take over government in the Flemish region. The (ultimately failed) coalition talks between the right-wing nationalists of *Nieuw-Vlaamse Alliantie* and the radical-right populists of *Vlaams Belang* in the wake of the 2019 regional elections were a disturbing signal of potential threat of democratic erosion at the regional level.

Second, even if – hypothetically speaking – would-be authoritarian populists would circumnavigate the primary safeguards and manage to enter a coalition government,<sup>30</sup> a series of ‘secondary’ constitutional safeguards would still prevent them from implementing an ‘illiberal-democratic’ agenda. These secondary safeguards ensure robust protection of the separation of powers, thereby shielding the constitutional order from capture by (any) coalition government.

Most of these secondary safeguards originate in the deep distrust of the executive that informed the drafting of the Belgian Constitution in 1831. To protect the newly founded constitutional democracy, a series of checks on the executive branch of government and a Bill of Rights were included in the liberal Constitution to shield citizens against ‘overly autocratic interferences’ by government.<sup>31</sup> The constitutional framework has by and large remained the same,<sup>32</sup> at least in terms of rights provisions and checks and balances.<sup>33</sup> Yet,

<sup>28</sup> Since the 1970s, federal cabinets have been composed of four to six political parties on average. See Dewinter and Dumont (n 24), 256; Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 2012) 34.

<sup>29</sup> See Gardbaum (n 7), 28 (arguing that federalism ‘dispers[es] power by increasing the number of independent political entities’ and noting that ‘three of the four paradigms of structural populism [Hungary, Turkey and Poland] involve unitary states’) and 36 (‘a PR electoral system is to be preferred [since in] pure PR systems, a single party rarely obtains the legislative majority necessary to govern alone’).

<sup>30</sup> This is extremely unlikely to occur, especially at the federal level, given the *cordon sanitaire* that surrounds *Vlaams Belang*.

<sup>31</sup> Jan Velaers, *De Grondwet: Een artikelsgewijze commentaar – Deel I* (die Keure 2019) 14.

<sup>32</sup> It has, of course, been seriously overhauled to enable the evolution from a decentralized unitary state to a federation.

<sup>33</sup> Although a number of new rights provisions have been inserted over time, among others to protect the rights of the child, and several socio-economic rights and the rights of persons with a disability.

the contemporary political reality of ‘particracy’<sup>34</sup> – that is, a form of government in which political parties are the *de facto* seat of power – effectively enables the executive to dominate the legislature, contrary to what the constitutional framework envisages.<sup>35</sup>

This makes it all the more important to assess secondary constitutional safeguards that can keep ‘muscular’ coalition governments in check.<sup>36</sup> Given what we know about the blueprint of constitutional capture, the independence of the judiciary is particularly important. Here, the experience in Poland and Hungary shows that *constitutional* courts are among the first targets of would-be authoritarian populists.<sup>37</sup> Once the principal guardian of the Constitution has been captured, constitutional review effectively ceases to exist. As the Polish experience shows, authoritarian populists can subsequently push blatantly unconstitutional legislation through Parliament without fear of repercussions. It is, therefore, pivotal to assess how resistant constitutional courts are against capture.

In Belgium, quasi-constitutional legislation that can only be amended by supermajority ensures that the judges of the Constitutional Court are appointed for life,<sup>38</sup> that their nomination by Parliament requires a supermajority (two-thirds of the vote),<sup>39</sup> and that the President of the Court is elected by the judges themselves.<sup>40</sup> Equally significantly, the composition of the Constitutional Court is intentionally politicized, in the double sense that half of the Court’s twelve judges are former politicians *and* – perhaps more curiously – that the ideological balance among the twelve judges is intended to reflect the electoral power relations between all ‘mainstream’ political parties. Whereas the former requirement is entrenched in quasi-constitutional legislation,<sup>41</sup> the latter was deliberately left out of the legal framework.<sup>42</sup> In political practice, however, it is generally adhered to in the nomination process (that is, nominees are selected from a pool of candidates with the

<sup>34</sup> Vandeleene and De Winter (n 27), 27 (describing Belgium as a particracy and defining the latter as an ‘excessive case of party dominance’).

<sup>35</sup> De Winter and Dumont (n 24), 266; Dave Sinardet, ‘From consociational consciousness to majoritarian myth: Consociational democracy, multi-level politics and the Belgian case of Brussels-Halle-Vilvoorde’ (2010) *Acta Politica* 355.

<sup>36</sup> Samuel Issacharoff, ‘Democracy’s Deficits’ (2018) 85 *University of Chicago Law Review* 499.

<sup>37</sup> Given space restrictions, only constitutional courts are discussed here.

<sup>38</sup> Article 32 Special Act on the Constitutional Court.

<sup>39</sup> *Ibid.* (judges are nominated by the House of Representatives or the Senate on a rotating basis).

<sup>40</sup> *Ibid.*, article 33.

<sup>41</sup> *Ibid.*, article 34.

<sup>42</sup> Toon Moonen, *De keuzes van het Grondwettelijk Hof: Argumenten bij de interpretatie van de Grondwet* (die Keure 2015) 181.

‘correct political colour’ for the vacant seat).<sup>43</sup> Moreover, radical-right parties such as *Vlaams Belang* are currently excluded from this informal power sharing mechanism by political agreement, as a result of which they are not able to nominate judges to the Constitutional Court. Pursuing, by design, an ideological balance on the Constitutional Court may raise fundamental questions in other respects, but it does ensure that no single political party (or political family) can dominate the Court. In this sense, the politicized nature of the Court’s composition is an additional element in the shield that protects it from capture by a (hypothetical) malignant government.

Although the Belgian judiciary is robustly independent in most respects, the Hungarian and Polish experiences also reveal that the entire Belgian judiciary, from the Constitutional Court to the lowest courts, is in one crucial respect vulnerable to capture. The retirement age of judges is *not* constitutionally entrenched in Belgium. Instead, just as in Hungary and Poland, it is determined by statute *and* higher than the general retirement age of 65 (70 for judges on the Constitutional Court, Council of State and Supreme Court of Cassation and 67 for judges on all other courts).<sup>44</sup> The strategy of Fidesz and PiS to capture the judiciary by lowering the statutory pension age for judges could, hypothetically speaking, therefore be transplanted to Belgium. At the same time, however, replacing the forcibly retired judges with government-friendly ‘cronies’ would still be a less-than-straightforward exercise, given that judicial appointments are made by the constitutionally entrenched High Council of the Judiciary.

Aside from the rules on retirement age for judges, some other potential vulnerabilities emerge when the Belgian constitutional framework is assessed against Gardbaum’s counter-playbook. The three most significant potential vulnerabilities can only be touched upon here.

First, political parties are not regulated in the Constitution. Although political parties are the most powerful actors in the Belgian ‘particracy’,

<sup>43</sup> But see the recent controversy over the Senate’s vote *against* the nomination of Zabia Khattabi, a member of the Green party *Ecolo*, to an open seat on the Court. A number of political parties, including *Vlaams Belang* and the Flemish-nationalist N-VA, voted against Khattabi. N-VA voted against since it opposed this particular nomination, arguing (inaccurately) that the candidate should be excluded as she had allegedly intervened to prevent the deportation of a migrant who was travelling on the same plane as her. Ann De Boeck, ‘Zakia Khattabi (Ecolo) verliest stemming, Vivaldi-coalitie hangt in de touwen’, *De Morgen* (17 January 2020), [www.demorgen.be/politiek/zakia-khattabi-ecolo-verliest-stemming-vivaldi-coalitie-hangt-in-de-touwen~b63cff7d/](http://www.demorgen.be/politiek/zakia-khattabi-ecolo-verliest-stemming-vivaldi-coalitie-hangt-in-de-touwen~b63cff7d/).

<sup>44</sup> See in that order, article 4 Act of 6 January 1989; article 104 Coordinated Acts on the Council of State; article 383 Judicial Code.

effectively enabling the executive to dominate the legislature, they are not even mentioned in the Constitution. As Kim Lane Scheppele explains, '[w]ithout constitutionalized processes in which parties can be assessed, the building blocks of a democratic state can become subject to internal corruption and eventually to a potentially anti-democratic turn'.<sup>45</sup>

Second, although the Senate persists as an institution, it has been stripped of most of its law-making powers.<sup>46</sup> Given the broader context of the primary and secondary constitutional safeguards discussed above, the lack of bicameralism is unlikely to generate a *direct* threat to the constitutional order. But from the perspective of constitutional resilience (and of federalism theory),<sup>47</sup> it remains a potential vulnerability, given the experience in Hungary and Poland.<sup>48</sup>

Third, Belgium lacks a number of fourth and fifth branch institutions that, especially when constitutionally entrenched, could provide some resistance against democratic erosion.<sup>49</sup> Until 2019, Belgium did not have an overarching human rights institution, an omission for which it was repeatedly criticized by UN and Council of Europe monitoring bodies. An independent federal human rights institution has since been installed, which, however, only has advisory and reporting powers.<sup>50</sup> Even more significant, from the perspective of preventing democratic decay, is the absence of an independent electoral commission. Instead, a combination of constitutional, quasi-constitutional and statutory provisions give the respective parliaments the *exclusive* authority to review the validity of their own elections.<sup>51</sup> This generates obvious problems for the independent monitoring of elections, which has led the Grand Chamber of the European Court of Human Rights to rule that the Belgian framework violates article 3 of Protocol 1 to the European Convention on Human Rights (the right to free elections).<sup>52</sup>

<sup>45</sup> *Ibid.*, 512–513.

<sup>46</sup> With very few exceptions (article 77 Constitution), the Senate can no longer initiate the law-making process (article 75 Constitution).

<sup>47</sup> See Lijphart (n 28), 38 (arguing that '[t]he principal justification for instituting a bicameral instead of a unicameral legislature is to give special representation to minorities, including the smaller states in federal systems'; and noting that the Upper House 'must have real power').

<sup>48</sup> Gardbaum (n 7), 30.

<sup>49</sup> *Ibid.*, 47.

<sup>50</sup> Article 5 Act of 12 May 2019 tot oprichting van een Federaal Instituut voor de bescherming en de bevordering van de rechten van de mens.

<sup>51</sup> See article 48 Constitution; article 231 Electoral Code 1894; article 31(1) Special Act on Institutional Reform.

<sup>52</sup> *Mugemangano v Belgium* App no 310/15 (ECHR, 10 July 2020).

12.2.2 *Interim Conclusion*

In the first part of this chapter, we have in essence taken a particular form of democratic decay, namely ‘rule of law backsliding’,<sup>53</sup> as our frame of analysis. Evaluated through that lens, a series of primary and secondary constitutional safeguards make the Belgian constitutional order more resilient to capture than the constitutional order of Hungary and Poland. A Hungary-type scenario in which (would-be) authoritarian populists incrementally dismantle the liberal-constitutional order by changing the ‘rules of the game’ appears impossible in Belgium.<sup>54</sup> Similarly, a Poland-type scenario in which (would-be) authoritarian populists use statutory means to achieve the same illiberal ends is unlikely to unfold in Belgium.<sup>55</sup> Yet, to conclude that all is well with Belgian constitutional democracy would be (much) too swift. The Polish and Hungarian experiences have taught us to look *beyond* the obvious scenarios to carefully scrutinize other warning signs of democratic decay.

Throughout the first section of our chapter, we have focused on the threat posed by would-be authoritarian populists. In one respect, this initial focus is justified, given the resurgence of the nativist and radical-right *Vlaams Belang* in the polls. In another respect, however, an exclusive focus on this single political party would dramatically underestimate the potential impact of right-wing populism in Belgium. Experience from around the world indicates that (former) ‘mainstream’ parties may pose a much bigger threat to liberal democracy than radical-right parties do. It is, in that respect, crucial to evaluate the impact of co-optation, or ‘poaching’,<sup>56</sup> of populist policies and discourse by mainstream political parties.

In an important contribution to the debate on constitutional resilience, Rosalind Dixon and Anika Gauja have approached such co-optation in a cautiously optimistic manner.<sup>57</sup> After considering the drawbacks of what they call ‘policy responsiveness’ by mainstream parties, Dixon and Gauja conclude

<sup>53</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 10 (defining rule of law backsliding as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’).

<sup>54</sup> See Chapter 8 on Hungary in this volume.

<sup>55</sup> See Chapter 9 on Poland in this volume.

<sup>56</sup> Brubaker (n 10), 379.

<sup>57</sup> Rosalind Dixon and Anika Gauja, ‘Australia’s Non-populist Democracy? The Role of Structure and Policy’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 397.

that ‘a quasi-populist turn in mainstream democratic politics is a price worth paying for preserving the minimum core of a democratic system, in the face of a credible threat of illiberal populist takeover’.<sup>58</sup>

It strikes us that the operative word, here, is ‘credible’. Above, we have argued that a series of constitutional safeguards make a hostile takeover of the Belgian constitutional order by would-be authoritarian populists unlikely. To the extent that this renders the threat *not* credible, the ‘quasi-populist turn’ in mainstream politics becomes highly suspect (and in our view indefensible). Rather than turning a blind eye to the impact of ‘policy responsiveness’, we should take it seriously. We do so in the remainder of this chapter by analyzing the impact on migrants’ rights, in particular.

### 12.3 CRUMBLING MIGRANTS’ RIGHTS AND STRATEGIES OF RESISTANCE

In Belgium, mainstream political parties are not attempting to capture the courts, control the media or shut down universities. There is, in short, no genuine risk of rule of law backsliding. Nevertheless, throughout this section we reveal a pattern of restrictive migration laws and policies that has caused migrants’ rights to crumble in Belgium. We simultaneously show that, in terms of resistance to this development, civil society organizations and courts emerge as crucial actors to secure a minimum level of human rights compliance and uphold the rule of law. However, even though the Constitutional Court and the Council of State have put a brake on some of the more restrictive migration measures, they did not adopt a maximalist approach to the protection of migrants’ rights.

Migration has been a sensitive political issue in Belgium in recent years. This is evident – to pick just one prominent example – from how the previous federal government fell over public endorsement of the UN Global Compact for Safe, Orderly and Regular Migration at the Intergovernmental Conference in Marrakesh at the end of 2018. A few months earlier, then Prime Minister Charles Michel had expressed Belgium’s support for the Compact at the UN General Assembly. This endorsement went by almost entirely unnoticed. In the lead-up to the more public Intergovernmental Conference in Marrakesh, however, the Global Compact suddenly became a subject of heated debate. The right-wing nationalist *Nieuw-Vlaamse Alliantie*, a key member of the coalition government that had previously not objected to endorsement of

<sup>58</sup> *Ibid.*, 420.



the Compact, began to raise critical concerns against it.<sup>59</sup> The ethno-nationalist and populist nature of the debate is illustrated by the fact that – while a parliamentary hearing with expert witnesses on the Global Compact was ongoing – the *Nieuw-Vlaamse Alliantie* launched a malicious social media campaign against the Compact. Using style, images and language eerily similar to that of the radical right *Vlaams Belang*, the party firmly rejected what it now called the ‘Marrakesh Pact’.<sup>60</sup> The radical shift in discourse was arguably due to the *Nieuw-Vlaamse Alliantie* belatedly realising that a policy decision on migration it had endorsed as coalition partner (i.e. endorsing the Global Compact) could well lead to a substantial loss of votes to *Vlaams Belang*. Ultimately, the *Nieuw-Vlaamse Alliantie* left the federal government over a non-binding international instrument – a unique event in Belgian constitutional history (where coalition partners rarely leave coalition governments prematurely, and definitely not over a non-binding text).

We focus our analysis in this section on the 2014–2019 period because this legislative term has come to an end and thus allows for an overall analysis. From 2014 until 2018, Theo Francken of the Flemish-nationalist *Nieuw-Vlaamse Alliantie* was Secretary of State for Asylum and Migration. When his party left the government at the end of 2018 over the Global Compact, the liberal minister Maggie De Block became responsible again for asylum and migration – as had been the case in the 2009–2014 legislative term.

In this five-year period, a landslide of legislative and regulatory changes have aimed to ‘optimize’ the asylum procedure, fight against sham relations, increase (child) immigration detention, facilitate removal for reasons of public order and national security, and emphasize migrants’ individual responsibility to integrate.<sup>61</sup> As a result of all these measures, migrants’ substantive and procedural rights have been put under pressure. This is not to say that migrants’ rights had not already been weakened prior to 2014, for instance in relation to family reunification.

<sup>59</sup> Nieuw-Vlaamse Alliantie, ‘Waarom de N-VA zich verzet tegen het migratiepact van Marrakesh’, 4 December 2018, [www.n-va.be/migratiepact](http://www.n-va.be/migratiepact).

<sup>60</sup> The claims regarding the Global Compact were not empirically substantiated or lacked nuance at best. See Ellen Desmet, ‘Het Migratiepact: aanleidingen voor de crisis en beleidsuitdagingen voor België’ in Toon Moonen, Ellen Desmet and Tom Ruys (eds), *Het Migratiepact: kroniek van een crisis. Actuele vragen uit internationaal recht, grondwettelijk recht en migratierecht* (die Keure 2021), 7–35.

<sup>61</sup> The legislative changes to the federal Aliens Act almost doubled from 179 in the 2009–2014 legislative term to 367 in the 2014–2018 period under State of Secretary Francken. See Lorraine Kihl, ‘La suédoise, hyperactive sur le dossier migratoire’, *Le Soir* (21 August 2019).

The rights-restrictive measures adopted between 2014 and 2019 have met resistance. Civil society organizations have been vocal in denouncing the lack of nuance, accuracy and inclusivity in the public debate. But their proposals, geared towards human rights compliant policy changes, were usually not taken into account, as the space for dialogue with civil society virtually disappeared (12.3.1). In response, civil society organizations have begun to challenge the legality of (some of) these measures by filing complaints at the Constitutional Court (12.3.2) and the Council of State (12.3.3).<sup>62</sup> In some instances, but certainly not all, these courts have taken up their role of watchdog of human rights by annulling, suspending or nuancing the most far-reaching provisions. Finally, some cracks in the separations of powers could be observed, exemplified by the disregard for (quasi)judicial decisions – a worrying tendency from a rule of law perspective (12.3.4). In the conclusion we emphasize the critical role of civil society and courts in challenging rights-restrictive migration policies as the main takeaway from the Belgian case.

### 12.3.1 *Deteriorating Quality of the Law-Making Process*

The 2014–2019 legislative period was characterized by a deteriorating quality of the law-making process, through the undermining of the advisory function of the Council of State and the virtual disappearance of dialogue with civil society.

An emblematic case was the huge ‘asylum bill’ submitted by the federal government in June 2017, amending many provisions of the Aliens Act.<sup>63</sup> Even though the bill contained some measures to protect persons with special procedural needs, its chief objectives were to reform the asylum procedure in order to create ‘clear, efficient, quick and high-quality procedures with a focus on the fight against abuse’, on the one hand, and to strengthen the effectiveness of return policy, on the other.<sup>64</sup> Then Secretary of State Francken used the ‘urgency procedure’ to obtain the advisory opinion of the Legislation Section of the Council of State on the preliminary draft. This reduces the period within which the Council has to provide advice to thirty days.<sup>65</sup> With regard to the impact of the bill on the right to an effective

<sup>62</sup> The applications were mostly submitted by NGOs, yet often together with the Bar Council of French- and German-Speaking Lawyers and sometimes with the Federal Migration Centre Myria.

<sup>63</sup> *Parl. St. Chamber*, Doc. 54 2548/001, 22 June 2017.

<sup>64</sup> *Ibid.*, 7.

<sup>65</sup> *Ibid.* The period was extended by roughly a week by email.

remedy, as guaranteed by article 13 of the European Convention on Human Rights, the Council of State strikingly noted:

[C]onsidering the period within which the Legislation Section must provide advice and considering the fact that it is a particularly complex matter, it is not possible to check at this stage whether the combination of the different modifications brought by the preliminary draft will not have the effect that, in certain cases, the right to an effective remedy is disproportionately affected.<sup>66</sup>

Given that the Council of State was not granted the time to assess the cumulative impact of the proposed changes, it put the ball back into the Secretary of State's court by advising him

to supplement the explanatory memorandum in order to identify more clearly the new elements that could negatively impact the right to an effective remedy and to explain why this impact is not so disproportionate that the effectiveness of the remedy is endangered.<sup>67</sup>

Both civil society organizations and UNHCR refused to accept a last-minute invitation to discuss the bill in the Committee on the Interior of the Chamber of Representatives, due to a lack of sufficient preparation time.<sup>68</sup> Notwithstanding critical opinions by independent human rights actors such as UNHCR, the Federal Migration Centre Myria and the Data Protection Authority, the 'Asylum Act' was adopted by the plenary assembly in November 2017 without substantive modifications.

### 12.3.2 *Challenging Laws before the Constitutional Court*

The Constitutional Court is competent to review legislative acts, that is acts adopted by the federal parliament or by the parliaments of the communities and regions. The Court assesses their compliance with the fundamental rights enshrined in the Constitution and with the division of competences between the federal state, the communities and the regions.<sup>69</sup> Actions for annulment must generally be brought within six months of the publication of the challenged act.<sup>70</sup> This section analyzes the most relevant actions for annulment of

<sup>66</sup> *Ibid.*, 222.

<sup>67</sup> *Ibid.*

<sup>68</sup> Tine Danckaers and Louise Hantson, 'Belgische asielwet lijkt op Vlaamse koterij', *MO Magazine*, 26 October 2017, [www.mo.be/nieuws/belgische-asielwet-lijkt-op-vlaamse-koterij](http://www.mo.be/nieuws/belgische-asielwet-lijkt-op-vlaamse-koterij).

<sup>69</sup> Article 142 Constitution; article 1 Special Act on the Constitutional Court.

<sup>70</sup> Article 3 Special Act on the Constitutional Court. In addition, tribunals may refer preliminary questions to the Court at any time. Article 26 Special Act on the Constitutional Court.

migration legislation provisions adopted in the 2014–2019 period, upon which the Constitutional Court has delivered judgment. While the Court has (partially) annulled some provisions, we conclude that a real protection of migrants' rights would have implied a more stringent review.

Some actions for annulment were pending at the moment of writing, such as an action brought against the new Belgian Maritime Code of 2019 concerning the fundamental rights of stowaways.<sup>71</sup> Most recently, the Constitutional Court annulled the detention period of up to eight months for Union citizens and their family members who are ordered to leave the territory for reasons of public order or national security (see generally 12.3.2.2).<sup>72</sup>

### 12.3.2.1 International Protection

The Asylum Act, discussed above as to its deficient drafting process, included various measures which, in the view of civil society and human rights actors, undermined fundamental rights. Even though the Constitutional Court declared some provisions void and provided interpretative clarifications for others, it upheld the legality of the most controversial ones.<sup>73</sup>

On the one hand, the Court held that the preservation of original documents establishing the identity or nationality of the applicant during the whole course of the procedure (including on appeal) constituted a violation of the applicant's right to respect for private life.<sup>74</sup> Moreover, the possibility for the Commissioner General for Refugees and Stateless Persons to keep certain elements related to sources of information confidential beyond what is allowed by the EU Asylum Procedures Directive, did not respect the rights of defence of the applicant.<sup>75</sup> In addition, the Court (partially) annulled provisions regarding the possibility to communicate in certain procedures the notes of the asylum interview together with the decision rather than before,<sup>76</sup> the application of the accelerated procedure,<sup>77</sup> and the starting point to calculate the period of four weeks during which asylum seekers can be

<sup>71</sup> Case no. 7354 on the docket of the Court. See generally Petra Baeyens, Mathieu Beys, Deborah Weinberg and Julie Lejeune, 'Les droits fondamentaux restent à quai? Le statut juridique des passagers clandestins dans les ports belges' (2020) *Revue du droit des étrangers* 5.

<sup>72</sup> Constitutional Court 23 December 2021, no. 187/2021, following *Ordre des barreaux francophones and germanophone and Others* C-718/19 (CJEU, 22 June 2021).

<sup>73</sup> Constitutional Court 25 February 2021, no. 23/2021.

<sup>74</sup> *Ibid.*, B.22.

<sup>75</sup> *Ibid.*, B.72.3.

<sup>76</sup> *Ibid.*, B.67.6.

<sup>77</sup> *Ibid.*, B.95.3; see also B.99.4.

detained at the border.<sup>78</sup> The annulment of these provisions was also justified because they failed to respect the minimum standards established in the EU Asylum Procedures Directive.

On the other hand, many provisions that had been heavily criticized by independent human rights actors and NGOs prior to the adoption of the Asylum Act, were left untouched. For instance, the Constitutional Court did not agree with the applicants that the definition of the ‘risk of absconding’ was too vague and could lead to arbitrary detention.<sup>79</sup> Moreover, the Court found that the rules for detention of asylum seekers at the border are a ‘*lex specialis*’ compared to the general rules on detention in the EU Reception Conditions Directive. As a consequence, they do not need to provide the same guarantees when this is not considered feasible in light of the objective of ‘effective border control’.<sup>80</sup> In this way, the Court sanctions the current practice of systematic detention of asylum seekers at the border.<sup>81</sup>

Another illustration concerns the right to respect for private life. When the Commissioner General for Refugees and Stateless Persons has good reasons to assume that an applicant is holding back information, he can request access to their digital devices (e.g., cell phone, laptop). A refusal of the applicant is interpreted as a refusal to cooperate, which may negatively impact the decision regarding international protection. During the drafting process, the Secretary of State had responded to the critical opinions of the Data Protection Authority and UNHCR by announcing a royal decree with additional guarantees – which is still not in place.<sup>82</sup> The Constitutional Court considered that the interference with the right to respect for private life did not cause any disproportional consequences, in light of the legitimate aim of assessing the application for international protection.<sup>83</sup>

Finally, with the aims of ‘simplification and harmonization’, the time period to contest a decision denying international protection – normally thirty days – was reduced. In some cases, the already shorter appeal period of fifteen days was further reduced to ten days, for instance for an asylum seeker in detention. In other cases, the appeal period was shortened from ten to only

<sup>78</sup> *Ibid.*, B 125.5.

<sup>79</sup> *Ibid.*, B.117.4.

<sup>80</sup> *Ibid.*, B.122.7-122.8.

<sup>81</sup> NANSEN Note 2018/01, April 2018, <https://nansen-refugee.be/wp-content/uploads/2020/08/NANSEN-NOTE-2018-01-Asielzoekers-aan-de-grens-grensprocedure-en-detentie.pdf>.

<sup>82</sup> Data Protection Authority (then Privacy Commission), Advice CO-A-2017-047, 11 October 2017; UNHCR, Advice 4 October 2017, *Parl. St.* Chamber, 2016–17, Doc. 54-2548/004. Currently, the Commissioner General does not make use of this possibility, awaiting the royal decree.

<sup>83</sup> Constitutional Court 25 February 2021, no. 23/2021, B.33.4.

five days, for instance for an asylum seeker in detention who wants to appeal an inadmissibility decision of a subsequent application. The Court found that these periods of ten and five days are sufficient for the appeal to be considered an effective remedy.<sup>84</sup>

In this respect, it is to be noted that the Constitutional Court did not assess the *combined* effect of the modifications of the asylum legislation on the right to an effective remedy, as the Legislation Section of the Council of State had suggested to the Secretary of State (see 12.3.1). The Court only evaluated the legality of each amendment in itself.

### 12.3.2.2 Removal for Reasons of Public Order or National Security

In 2017, various provisions of the Aliens Act were revised ‘in order to strengthen public order and national security’, in the wake of the Paris and Brussels terrorist attacks.<sup>85</sup> Legally residing third-country nationals<sup>86</sup> can now receive an order to leave the territory ‘for reasons of public order or national security’, whereas before it was required that they had ‘damaged public order or national security’.<sup>87</sup> This vague language, together with the abolishment of the prior advice of the Commission of Advice for Foreigners, gives the Immigration Office a wide power in decisions to end residence of third-country nationals for reasons of public order or national security.

Moreover, the exception that persons born in Belgium or who had moved to Belgium before the age of twelve could not be deported for reasons of public order or national security, was removed.<sup>88</sup> This implies that persons can now be sent back to a country of which they have the nationality but where they never or only during their childhood lived. The exception was removed ‘because of the fight against terrorism and radicalisation’.<sup>89</sup> Finally, the automatic suspensive effect of appeals against decisions taken for reasons of public order or national security was also removed.<sup>90</sup>

<sup>84</sup> *Ibid.*, B. 143.1.2 (ten days) and B. 143.2.2 (five days).

<sup>85</sup> See Joyce De Coninck and Yasmina El Kaddouri, ‘Openbare orde en nationale veiligheid in de Belgische Vreemdelingenwet: individuele rechten theoretisch en illusoir?’ (2018) *Tijdschrift voor Vreemdelingenrecht* 302; Julien Hardy, ‘Ordre public: modifications législatives et jurisprudence récentes’ in Sylvie Sarolea (ed.), *Immigrations et droits. Questions d’actualité* (Larcier 2018) 97.

<sup>86</sup> Refugees are excluded from these provisions (article 20, 2nd para Aliens Act).

<sup>87</sup> Article 21 Aliens Act, as modified by Act of 24 February 2017.

<sup>88</sup> This exception had been introduced in the Aliens Act in 2005.

<sup>89</sup> *Parl. St.*, Chamber 2016–17, Doc 2215/3, 5.

<sup>90</sup> *Parl. St.*, Chamber, 2016–17, Doc. 54 2216/001, 3. See article 39/79, § 3 Aliens Act, as modified by Act of 15 March 2017.

These measures were unsuccessfully contested before the Constitutional Court.<sup>91</sup> The Court did provide some interpretative clarifications, which ‘took off the sharp edge’.<sup>92</sup> For instance, referring to the case law of the European Court of Human Rights requiring a ‘very weighty reason’ to deport a settled migrant,<sup>93</sup> the Court held that the parliamentary works indicate that the provision allowing to deport persons born in Belgium or who arrived here before the age of twelve, ‘mainly had the situation in mind of young foreigners who have committed very serious crimes that are linked with activities of terrorist groups or who pose an immediate danger for national security’.<sup>94</sup> In this way, the potentially broad application of the provision was limited. Nevertheless, the Court could have taken a more rights-protective stance, for instance regarding the impossibility to contest an entry ban when still on the Belgian territory.<sup>95</sup> Instead, the Court endorsed the broad interpretation and application powers granted to the administrative authorities related to removals for reasons of public order or national security.<sup>96</sup>

### 12.3.2.3 Integration as a Residence Condition

In 2016, integration was inserted as a residence condition, in that the Immigration Office can put an end to certain residence rights when the person concerned has not made ‘a reasonable effort to integrate’.<sup>97</sup> The Aliens Act mentions the following criteria to assess a person’s efforts to integrate: integration courses, work, studies, vocational training, language knowledge, active participation in social life, and criminal history. The last criterion of criminal history has been annulled by the Constitutional Court as being too broad and not proportionate to the goal of integration and

<sup>91</sup> Constitutional Court 18 July 2019, no. 112/2019 (on the act of 24 February 2017); Constitutional Court 18 July 2019, no. 111/2019 (on the act of 15 March 2017).

<sup>92</sup> See Luc Denys, ‘Noot bij GwH 18 juli 2019, nr. 112/2019 en GwH 18 juli 2019, nr. 111/2019: De nieuwe openbareordewetten gewikt en gewogen door het Grondwettelijk Hof (2020) Tijdschrift voor Vreemdelingenrecht 44.

<sup>93</sup> *Maslov v. Austria* App no 1638/03 (ECHR, 23 June 2008), para 75; *Ndidi v. the United Kingdom* App no 41215/14 (ECHR, 14 September 2017), para 81.

<sup>94</sup> Constitutional Court 18 July 2019, no. 112/2019, B.24.6. Note that ‘mainly’ leaves some room for interpretation.

<sup>95</sup> Denys (n 92) 52.

<sup>96</sup> Christelle Macq, ‘Retrait du droit au séjour et éloignement pour motifs d’ordre public: les lois du 24 février 2017 et du 15 mars 2017 validées, sous réserve d’interprétations, par la Cour Constitutionnelle’, *Cahiers de l’EDEM*, September 2019, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/cour-constitutionnelle-arrets-n-111-et-112-2019-du-18-juillet-2019.html>.

<sup>97</sup> Art. 1/2 Aliens Act, inserted by Act of 18 December 2016.

participation.<sup>98</sup> The Court also held that a lack of (sufficient) proof of efforts to integrate cannot suffice to not prolong or revoke a residence right, but that there must be other reasons as well (e.g. not living together anymore in cases of family reunification).<sup>99</sup>

#### 12.3.2.4 The Fight against ‘Manifestly Unlawful Appeals’

In 2017, the procedure which aims to fight manifestly unlawful appeals before the Council for Alien Law Litigation was simplified, in that the Council can now immediately impose a fine in the hearing in which it handles the appeal, instead of in a subsequent hearing.<sup>100</sup> An action for annulment was dismissed by the Constitutional Court.<sup>101</sup> The Court did provide two interpretative clarifications. First, the Council for Alien Law Litigation must specify in its notification the particular reasons inducing it to consider to rule on the manifestly unlawful character of the appeal – instead of the current general statement included in the notification.<sup>102</sup> Second, the impact of the appeal on the defendant cannot be taken into account when determining the amount of the fine, as the fine only aims to fight the improper use of judicial proceedings – and in this sense differs from a compensation for damages caused by reckless litigation.<sup>103</sup>

#### 12.3.2.5 Sham Acknowledgements

Family law has been instrumentalized in order to achieve migration policy objectives. Belgian public authorities have increasingly invested in the fight against ‘sham’ relations: first sham marriages, then sham legal cohabitations, and now also sham paternity acknowledgements. In 2017, the latter were legally defined as acknowledging a child with the apparent and sole intention of obtaining an advantage related to residence rights (for oneself, the child or the person who needs to consent to the acknowledgement).<sup>104</sup> The

<sup>98</sup> Constitutional Court 4 October 2018, no. 126/2018, B.40.8 – B.41.

<sup>99</sup> *Ibid.*, B.19.2.

<sup>100</sup> Article 39/73-1 Aliens Act, as modified by Act of 19 September 2017.

<sup>101</sup> Constitutional Court 24 October 2019, no. 150/2019.

<sup>102</sup> *Ibid.*, B.7.

<sup>103</sup> *Ibid.*, B.10.2.

<sup>104</sup> Article 330/1 Civil Code, inserted by Act of 19 December 2017.



acknowledgement will thus not be registered when fraudulent intention is presumed, even when there is a biological link between the father and the child.<sup>105</sup>

Before the 2017 legislative change, the public prosecutor could only demand the cancellation of an acknowledgement afterwards. Now, the civil status registrar may proactively suspend the procedure to request advice from the public prosecutor or even refuse to draw up a paternity acknowledgement because of (suspicions of) fraud.<sup>106</sup> Such a refusal has far-reaching consequences, in that the child will not have a legal father. According to Verhellen, this provision was inserted without the existence of ‘transparent figures and scientific studies that adequately map the phenomenon of sham acknowledgement’.<sup>107</sup>

In its advisory opinion, the Legislation Section of the Council of State had been very critical of the bill. In its view, the lack of an obligation for the civil status registrar to consider the best interests of the child when refusing an acknowledgement constituted a violation of the Constitution and of the Convention on the Rights of the Child.<sup>108</sup> Moreover, the possibility to refuse an acknowledgment in case of a biological link, would violate the best interests of the child and their right to respect for private and family life.<sup>109</sup> The legislator did not take this criticism into account. Neither did the Constitutional Court.

In a judgment of 2020, the Constitutional Court overall upheld the new legislation on fraudulent paternity acknowledgement; it only found the lack of appeal possibilities against the civil status registrar’s refusal to draw up an acknowledgement unconstitutional.<sup>110</sup> This issue has meanwhile been remedied by the legislator.<sup>111</sup> Disturbingly, the Court thus did not find it problematic that, in cases of fraud, the civil status registrar is not required to consider the best interests of the child.<sup>112</sup> Finally, the Court did not find

<sup>105</sup> Isabelle de Viron, ‘La loi sur la reconnaissance frauduleuse en droit belge’ in Sylvie Sarolea (ed.), *Statut familial de l’enfant et migrations* (Université catholique de Louvain 2018) 49.

<sup>106</sup> Article 330/2 Civil Code, as modified by Act of 19 December 2017.

<sup>107</sup> Jinske Verhellen, ‘Schijnkerkeningen: Internationale families opnieuw in de schijnwerpers’ (2016) *Tijdschrift voor Internationaal Privaatrecht* 103.

<sup>108</sup> Article 22bis Constitution and article 3 Convention on the Rights of the Child. Council of State, Legislation Section, Advice 60.382/2, 9 January 2017, 28.

<sup>109</sup> *Ibid.*, 30.

<sup>110</sup> Constitutional Court 7 May 2020, no. 58/2020, B.28.

<sup>111</sup> Article 330/2 Civil Code, as modified by Act of 31 July 2020.

<sup>112</sup> Constitutional Court 7 May 2020, no. 58/2020, B.19. Somewhat confusingly, the Constitutional Court does recognize that any decision impacting the child, should consider their best interests, see B.18 and B.13.

any discrimination between Belgian citizen children and children from parents regularly residing in Belgium, on the one hand, and children with at least one irregular parent, on the other. Both categories are not comparable, as no risk of circumventing migration legislation exists in the former case.<sup>113</sup>

### 12.3.3 *Challenging Regulations before the Council of State*

The Belgian Council of State is composed of two sections with diverging powers. One section sits as the highest administrative court with the power to review and annul administrative decisions made and decrees issued by the executive branch of government (it also acts as a court of cassation within the administrative courts system).<sup>114</sup> A different section, the Legislation Section, issues non-binding advisory opinions to the legislative branch of government on (most) bills.<sup>115</sup> The first section and its powers of judicial review are most pertinent for the purposes of this chapter. We will thus focus on its case law.

#### 12.3.3.1 Administrative Fees

As from 2 March 2015, the admissibility of certain applications for residence permits was made conditional upon the payment of a contribution for compensating the administrative costs related to the processing of the application.<sup>116</sup> On 1 March 2017, the amounts were increased to 60, 200 or 350 euro, depending on the type of application. The Council of State annulled the royal decrees putting in place these fees, because the Belgian State had not demonstrated that their amount was reasonably proportional to the cost of the service.<sup>117</sup> This annulment did not have the expected effect though (see 12.3.4).

<sup>113</sup> *Ibid.*, B.31.2.

<sup>114</sup> Article 160 Constitution; article 14 Organic Laws on the Council of State.

<sup>115</sup> Article 160 Constitution; article 2 Organic Laws on the Council of State.

<sup>116</sup> At the time, the amounts were 60, 160 or 215 euros. Article 1/1 Aliens Act.

<sup>117</sup> Council of State, Administrative Litigation Section, 11 September 2019, no. 245.403 (annulling the royal decree of 16 February 2015); Council of State, Administrative Litigation Section, 11 September 2019, no. 245.404 (annulling the royal decree of 14 February 2017). The Constitutional Court had already exempted recognized stateless persons (who in Belgium do not automatically obtain a residence right – another gap in legal protection) from this fee. See Constitutional Court 22 February 2018, no. 18/2018, B.19.6.

## 12.3.3.2 Access to International Protection and Reception Conditions

In order to cope with the (constructed) reception ‘crisis’, a quota had been introduced. As from 22 November 2018, the number of applications for international protection that could be made at the Immigration Office was limited to 50 per day. This decision was not taken via a law, a royal or ministerial decree, or a circular letter. It was first announced in a press article, and confirmed the day after on Secretary of State Francken’s Facebook and Twitter accounts.<sup>118</sup> A coalition of NGOs obtained the suspension of the measure as a matter of extreme urgency: the Council of State held that the measure *prima facie* made effective access to the international protection procedure ‘excessively difficult’.<sup>119</sup> By that time, the then new liberal Minister of Asylum and Migration, Maggie De Block, had already ‘decided not to apply any quota’.<sup>120</sup>

Nevertheless, in early 2020, Minister De Block also took a contested decision to deal with the increased pressure on the reception system. Two groups of asylum seekers, who were depicted as ‘abusing’ the system, were excluded from material reception conditions: persons in relation to whom the period for a Dublin transfer had passed and persons with an international protection status in another EU Member State. This exclusion is contrary to both the Belgian Reception Act and the EU Reception Conditions Directive.<sup>121</sup> Again, no regulatory measure underpinned the exclusion; rather only instructions from the Federal Agency for the Reception of Asylum Seekers (Fedasil). A coalition of NGOs requested the Council of State to suspend and annul the instructions. After the auditor of the Council of State recommended their annulment, the Federal Agency for the Reception of Asylum Seekers repealed the instructions, and the case was closed before the Council of State.<sup>122</sup> Nonetheless, later instructions of the Agency regarding the accompaniment

<sup>118</sup> Council of State, Administrative Litigation Section, 20 December 2018, no. 243.306, para 3.

<sup>119</sup> *Ibid.*, para 19.

<sup>120</sup> *Ibid.*, paras 8–9. Given that no formal measure supported this policy change after the Minister’s nomination on 9 December 2018, the Council of State held that the applicants had an interest to challenge the measure.

<sup>121</sup> Article 4 Reception Act of 12 January 2007; article 20 Reception Conditions Directive (recast).

<sup>122</sup> Council of State, Administrative Litigation Section, 24 September 2020, no. 248.352. The Federal Agency for the Reception of Asylum Seekers has been condemned in individual cases for not providing reception, see, e.g., Labour Court Brussels, 22 January 2020, no. 20/4/C.

of applicants in the Dublin procedure have been criticized for partially reinstating the revoked instructions.<sup>123</sup>

### 12.3.3.3 Child Immigration Detention

The Belgian Aliens Act allows for the possibility of child immigration detention. In 2013, the Constitutional Court confirmed the legality of this provision, under the condition that detention conditions are adapted for children – an assessment which accrues to the Council of State.<sup>124</sup> Even though the Constitutional Court's position is in line with that of the European Court of Human Rights,<sup>125</sup> most other human rights actors, including the UN Committee on the Rights of the Child, hold that the detention of children for immigration reasons always constitutes a violation of their rights.<sup>126</sup>

Notwithstanding this legal possibility, Belgium had stopped detaining children in closed centres since 2009, in light of various condemnations by the European Court of Human Rights regarding the unacceptable conditions in which children had been detained.<sup>127</sup> Instead, 'return houses' for families with children were established, which received international praise.<sup>128</sup>

Yet, in August 2018, the government started to detain again families with children, dissatisfied with the rate of absconding from these return houses but without having carried out an in-depth evaluation. To that end, it constructed 'family units' in a closed centre near Brussels Airport – which were allegedly more adapted to the needs of children and would thus respond to the criticism of the European Court of Human Rights. The detention regime in these family units was laid out in a new royal decree, which was challenged before the Council of State.<sup>129</sup>

<sup>123</sup> Agency for Integration and Civic Integration, 'Nieuwe instructie van Fedasil over begeleiding van bewoners in Dublinprocedure', 9 October 2020, [www.agii.be/nieuws/nieuwe-instructie-van-fedasil-over-begeleiding-van-bewoners-in-dublinprocedure](http://www.agii.be/nieuws/nieuwe-instructie-van-fedasil-over-begeleiding-van-bewoners-in-dublinprocedure).

<sup>124</sup> Constitutional Court 19 December 2013, no. 166/2013.

<sup>125</sup> *Mubilanzila Mayeka and Kaninki Mitunga v. Belgium* App no 13178/03 (ECHR, 12 October 2006) para 100.

<sup>126</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, *Joint general comment No. 4 (2017) / No. 23 (2017)*, 16 November 2017, UN Doc. CMW/C/GC/4-CRC/C/GC/23, para 10.

<sup>127</sup> *Mubilanzila Mayeka and Kaninki Mitunga* (n 125); *Muskhadzhiyeva and others v. Belgium* App no 41442/07 (ECHR, 19 January 2010); *Kanagaratnam and others v. Belgium* App no 15297/09 (ECHR, 13 December 2011).

<sup>128</sup> These open return houses are not an alternative for detention, but an alternative form of detention, since the persons do receive a detention title.

<sup>129</sup> Royal decree of 22 July 2018.

In April 2019, the Council of State suspended a number of provisions of this royal decree, because children could be detained up to one month without excluding family units in places where children would be exposed to ‘particularly significant noise pollution’.<sup>130</sup> Given that the only existing family units were located next to Brussels Airport, this judgement had as a consequence that families with children were no longer detained.

However, the hopes created among civil society actors by this judgment of suspension were reduced in October 2020. In its first judgment on the merits, the Council found some complaints inadmissible, annulled some provisions of the royal decree, and reopened the debates as to the remainder of the complaints.

The complaints regarding the absence of provisions excluding the most vulnerable children (e.g. with disabilities or of very young age) from detention, the lack of specific obligatory training for the personnel, and the lack of prohibition to wear a uniform within the family units, were declared inadmissible. The Council of State found the royal decree illegal insofar as families may be restricted to two hours per day of access to outdoor space to guarantee order and security, personnel has unconditional access to the family unit between 6 a.m. and 10 p.m., and adolescents of minimum sixteen years old may be put in isolation for twenty-four hours when they present a danger to security.<sup>131</sup>

Even though these annulments limit some prerogatives of the personnel, the Council of State has not ensured an adequate protection of the human rights of families with children who would be detained.<sup>132</sup> In particular, the judgement has been criticized for its formalistic approach: the Council of State held that it could only check the positive measures included in the royal decree to ensure that the detention conditions were adapted to children, but that it could not assess measures that were lacking in the decree. The Council held that it was up to the other courts to assess the implementation of the royal decree. This implies that persons first have to be detained – and their rights potentially violated – before they can challenge this in court. In conclusion, the judgment displays a ‘diminished and fragmentary’ protection of children’s rights.<sup>133</sup>

<sup>130</sup> Council of State, Administrative Litigation Section, 4 April 2019, no. 244.190.

<sup>131</sup> Council of State, Administrative Litigation Section, 1 October 2020, no. 248.424.

<sup>132</sup> Germain Haumont and Emmanuelle Bribosia, ‘Quand se renvoyer la balle transforme les voies de recours en matière de détention des enfants migrants en un dédale kafkaïe’, *Cahiers de l’EDEM*, November 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/conseil-d-etat-arret-n-248-424-du-1er-octobre-2020.html>.

<sup>133</sup> *Ibid.*

The policy note of the current Secretary of State Sammy Mahdi of the party *Christian Democratic and Flemish* (CD&V) states: ‘minors cannot be held in closed centers’.<sup>134</sup> Nevertheless, the case before the Council of State, in which the Belgian government defends the position that the detention regime in the family units is appropriate to detain children, was continued. In its final judgment, the Council of State declared the remainder of the complaints inadmissible. These related, among others, to the lack of a prohibition in the royal decree to establish family units in places where children would be exposed to air and noise pollution (diverging from its earlier suspension on this ground), and to the vagueness of the provisions, which could lead to an arbitrary implementation.<sup>135</sup>

#### 12.3.4 *Disregard of (Quasi-)Judicial Authority: Small Cracks in the Separation of Powers?*

A basic characteristic of a solid rule of law is that the executive power respects the decisions of the judiciary power. When the executive power does not agree with certain judgments, it should amend the laws and regulations that the judges applied. In the 2014–2019 legislative period, some instances occurred where judicial authority in relation to migrants’ rights was questioned and/or ignored by the executive power. Two examples relate to topics discussed above, namely administrative fees and child immigration detention. A third illustration concerns humanitarian visas.

First, even though the Council of State held that the Belgian government had not demonstrated the proportionality of the amount of the administrative fees to the cost of the service, the Immigration Office, strikingly, continues to charge administrative fees for certain residence applications. It does so based upon a technical-legal argumentation that certain other royal decrees regulating these fees had not been annulled by the Council of State. However, these decrees are based on the same argumentation which has been declared invalid by the highest administrative court of the country. Even the Flemish Agency for Integration and Civic Integration – a government agency – argues that the continued charging of these fees is illegal.<sup>136</sup>

<sup>134</sup> *Parl. St.* Chamber, Doc. 55 1580/014, 4 November 2020, 34.

<sup>135</sup> Council of State, Administrative Litigation Section, 24 June 2021, no. 251.051.

<sup>136</sup> Agency for Integration and Civic Integration, ‘Raad van State vernietigt retributie verblijfsaanvragen’, 1 October 2019, [www.agii.be/nieuws/raad-van-state-vernietigt-retributie-verblijfsaanvragen](http://www.agii.be/nieuws/raad-van-state-vernietigt-retributie-verblijfsaanvragen).

Second, in September 2018, the UN Committee on the Rights of the Child ordered, as a provisional measure, the release of a Serbian family from the closed centre. The Immigration Office refused to comply with the measure, stating that ‘the UN Committee does not have competence on this matter in Belgium.’<sup>137</sup> Even though the Committee on the Rights of the Child is a ‘quasi-judicial’ authority, this is problematic because Belgium has ratified the third Optional Protocol to the Convention on the Rights of the Child on a communications procedure. Consequently, as the Committee noted in one of its views, ‘by becoming a party to the Optional Protocol, [Belgium] has recognized the competence of the Committee to determine whether there has been a violation of the Convention.’<sup>138</sup>

A final illustration of the disregard of judicial authority concerns a humanitarian visa case. In 2016, a Syrian family applied for a short-stay humanitarian visa at the Belgian consulate in Lebanon on the basis of the EU Visa Code.<sup>139</sup> In their application, they explicitly mentioned their intention to apply for international protection upon arrival in Belgium. The Immigration Office rejected the application. In appeal, the Council for Alien Law Litigation suspended the decision in an emergency procedure. The Council held that the Immigration Office had breached its duty to state reasons and ordered the Immigration Office to take a new decision within forty-eight hours, as a provisional measure.<sup>140</sup> The second decision was, however, basically identical to the first one, so the scenario repeated itself.<sup>141</sup> When also the third decision of the Immigration Office remained the same, the Council itself ordered the issuance of a humanitarian visa.<sup>142</sup>

Even though this judgement was immediately enforceable, the Immigration Office refused to deliver the visa. The applicants therefore aimed to enforce the judgment via the ordinary judiciary. The Court of Appeal confirmed the first instance decision of imposing a penalty payment of 4000 euro per day of delay in issuing a visa for the four family members.<sup>143</sup> Yet, the then Secretary of State Francken persevered in resisting to comply

<sup>137</sup> Lieslot Terryn, ‘VN-Kinderrechtencomité beveelt vrijlating Servisch gezin uit 127bis , DVZ gaat hier niet op in’, VRT NWS, 26 September 2018, [www.vrt.be/vrtnws/nl/2018/09/26/vn-kinderrechten-comite-beveelt-vrijlating-servisch-gezin-uit-st/](http://www.vrt.be/vrtnws/nl/2018/09/26/vn-kinderrechten-comite-beveelt-vrijlating-servisch-gezin-uit-st/).

<sup>138</sup> UN Committee on the Rights of the Child, *Y.B. and N.S. v. Belgium*, 5 November 2018, UN Doc. CRC/C/79/D/12/2017, para 10.

<sup>139</sup> See Astrid Declercq, ‘Het humanitair visum: balanceren tussen soevereine migratiecontrole en respect voor de mensenrechten’ (2017) *Tijdschrift voor Vreemdelingenrecht* 118.

<sup>140</sup> Council for Alien Law Litigation 7 October 2016, no. 175.973.

<sup>141</sup> Council for Alien Law Litigation 14 October 2016, no. 176.363.

<sup>142</sup> Council for Alien Law Litigation 20 October 2016, no. 176.577.

<sup>143</sup> Brussels Court of Appeal 7 December 2016, no. 2016/KR/119.

with the Council's judgement – hereby challenging the fundamentals of the rule of law. On the contrary, his party, the *Nieuw-Vlaamse Alliantie*, launched a social media campaign against the judges of the Council, who were depicted as 'detached from reality'. The fact that the Council's judgement was a reaction to the failure of the Immigration Office to properly state reasons, disappeared from the public debate. Both the attitude of the Secretary of State and the social media campaign were criticized by other political parties.<sup>144</sup> From a rule of law perspective, it is highly problematic that a Secretary of State refused to comply with an immediately enforceable judgment. As the Court of Justice of the European Union recently confirmed, 'the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.'<sup>145</sup>

#### 12.4 CONCLUSION

Our analysis in this chapter shows that the Belgian constitutional framework provides relatively robust protection against democratic decay. A series of primary and secondary constitutional safeguards renders hostile take-over of government by would-be authoritarian populists extremely unlikely (if not impossible). Rule of law backsliding of the variety witnessed in Poland and Hungary thus appears inconceivable in Belgium. Crucially, however, most of the constitutional safeguards that prevent a *hypothetical* slide towards authoritarianism only provide weak constraints, at best, against the *very real* and systematic undermining of migrants' rights. A PR electoral system, for instance, provides no bulwark against governing parties that *agree* to undermine migrants' rights. This situation is aggravated by the fact that persons without Belgian citizenship have no voting rights in federal and regional elections, which gives politicians less of an incentive to duly consider their fundamental rights.

In another sense, therefore, Belgium is just as vulnerable as other European states to co-optation of restrictive migration proposals by mainstream parties. As we have shown throughout this chapter, the dangers of co-optation in Belgium are real. Belgian migration policy in the period 2014–2019, formulated and implemented under a centre-right coalition, has been characterized

<sup>144</sup> For the substantive outcome of this case, see *M.N. and Others v. Belgium* App no 3599/18 (ECHR, 5 March 2020).

<sup>145</sup> *Alekszj Torubarov v. Bevándorlási és Menekültügyi Hivatal* C-556/17 (CJEU, 29 July 2019) para 57.



by multiple efforts to weaken the legal and actual position of migrants in general, and asylum seekers, family migrants and irregular migrants in particular. Fundamental rights, such as the right to respect for family life and the right to liberty, are under pressure. The accumulation of various 'small' legislative and policy changes has caused migrants' rights to crumble.

Our analysis indicates that the *combination* of a strong civil society and an independent judiciary is key to offer resistance against this development. Civil society actors initiating judicial proceedings has been the most effective means of challenging rights-restricting migration measures in Belgium. If no cases for annulment of such measures are brought before the courts, they cannot annul them. Spurred on by civil society initiatives, the judiciary has at least halted some of the most egregious measures infringing upon migrants' rights, such as the asylum quotas. Yet, more subtle or systemic measures aimed at undermining migrants' rights have often not been questioned by these same courts in their – at times legalistic and formalistic – analysis. The Constitutional Court seems to focus, for instance when assessing the legality of the Asylum Act, on its compatibility with clear, delineated provisions included in EU law (in particular the Common European Asylum System). By contrast, the Court seems to be more reluctant to engage in broader assessments as to how certain changes, especially cumulatively, impact on human rights. In this sense, our conclusion is that the highest courts of Belgium have safeguarded *minimal* respect for migrants' rights, whereas a *maximalist* interpretation of migrants' rights could have led to a more stringent and critical review of the contested migration laws and regulations.

## A Stable Yet Fragile System?

### *Legal Resilience against Rights Erosion in Current Swedish Migration Policy*

REBECCA THORBURN STERN AND ANNA-SARA LIND

#### 13.1 INTRODUCTION

Migration and the rights of migrants pose a challenge to state sovereignty. While it is widely accepted that states have exclusive control over the rules governing their own nationality and are only required<sup>1</sup> to admit their own citizens into their territory, there are limits to this control when it comes to migrants; asylum seekers, in particular.<sup>2</sup> The right to seek and enjoy asylum and the principle of *non-refoulement* put constraints on a state's power to decide who has a right to entry, as they provide the individual with a right, if not to remain in the territory, at least to have one's claims for protection properly assessed, and to not be deported during the process. In an increasingly globalised world, this challenge to state sovereignty has become an issue of growing controversy. Controlling migration and the right to entry has become, as Dauvergne puts it, a core element, even 'the last bastion', of sovereignty.<sup>3</sup> From this perspective, the arrival of migrants in a territory, in particular migrants who may be able to challenge the measures of control imposed on them, is easily perceived as a threat. In the context of globalisation, controlling borders may also be linked to protecting national identity, which includes some and excludes others. Among the excluded are migrants, but also in some cases those who do not conform to the image of the 'ideal' citizen (for example minorities of different kinds).

<sup>1</sup> This can be described as both a legal and a moral right, see, e.g., Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

<sup>2</sup> Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 79–80.

<sup>3</sup> *Ibid.*

While the issue of migration has long been debated, in recent years it has climbed up the political agenda at the global, regional and national level. Although few states in practice have ever had a particularly generous migration and/or refugee policy,<sup>4</sup> it could be argued that there has been a change in attitudes and in the tone of the debate over the last decade or so. Possible reasons for these changes include the securitisation of migration following the 9/11 attacks, the 2007/2008 economic crisis<sup>5</sup> and the rise of right-wing populism and nationalism. In Europe, the ‘refugee crisis’ of 2015/2016 had the effect not only of opening the door for measures aimed at controlling migration that would have previously been considered extreme, but also of pushing limits in other fields, such as negative rhetoric about migrants and migration, eroding migrants’ rights, and a deteriorating respect for key elements of the democratic system, including the legislative process. The resilience of legal systems established to safeguard individual rights and the democratic system was challenged during the ‘refugee crisis’ and, it could be argued, has continued to be so in its aftermath. The desire not to end up in the same situation (i.e., the ‘crisis’) again, combined with the rise of right-wing populism targeting migration as a threat to Western societies, in many countries in Europe and elsewhere has meant that the delicate balance between the interests of migration control, rights protection, and stability in the democratic process has been tilted in favour of the first of these interests.

It has been argued that extensive restrictions of migrants’ rights in a time of populism is a sign of constitutional crisis, in the sense that incremental and systematic undermining of human rights is the result of democratic decay.<sup>6</sup> On the other hand, it has also been proposed that while democratic decay and constitutional crisis may often coincide with restrictions of migrants’ rights through law and policy, the latter is not by default an indication of the former.<sup>7</sup> As Aleinikoff suggests, restrictive migration policies and intolerance against migrants in a society ‘may also be the result of everyday politics, as democracies define and redefine understandings of membership and the

<sup>4</sup> See, e.g., Michael J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004).

<sup>5</sup> Joakim Vogt Isaksen, ‘The Impact of the Financial Crisis on European Attitudes toward Immigration’ (2019) 7 *Comparative Migration Studies* 1.

<sup>6</sup> Michaela Hailbronner, ‘Beyond Legitimacy: Europe’s Crisis of Constitutional Democracy’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

<sup>7</sup> See, e.g., T. Alexander Aleinikoff, ‘Inherent Instability: Immigration and Constitutional Democracies’, in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

benefits that attach thereto',<sup>8</sup> initiated by, for example, economic considerations or perceived threats to national security. In both cases, a central issue is the possibilities and limits of legal resilience against the dismantling of migrants' rights.

There are several reasons why Sweden offers an interesting case for a discussion on legal resilience in this context. One is the reorientation of Swedish migration law and political discourse on migration in the wake of the 'refugee crisis'.<sup>9</sup> This reorientation, it could be argued, is due both to the actual strain put on the Swedish reception and welfare systems by the large influx of refugees in 2015, and to the framing of the events of late 2015 and early 2016 as a crisis not so much for the refugees as for Swedish society. Much effort has since gone into preventing Sweden from ending up in the same situation again. Legislation limiting migrants' rights in various ways has been introduced, and the rhetoric has changed from 'Refugees Welcome' to casting suspicion on asylum seekers and their motives, labelling those arguing in favour of a return to the previous policy as 'irresponsible', 'irrational', and 'goodness junkies'. A second reason concerns 'crisis' as such. The narrative of crisis – having been and still being in a state of crisis, avoiding a future crisis – we argue, has played an important role in underscoring the view of migration and migrants as a threat to the welfare state, law and order and to national security. This view in turn has been used to legitimise a migration policy based on the aim to control and deter rather than to manage migration in a way that is respectful of both state sovereignty and the rights of the individual. This narrative has also been used to facilitate and legitimise a revision of Sweden's self-image that claims generosity and solidarity with those in need as two of its defining features.<sup>10</sup>

A third reason concerns the rise of right-wing populism in the country and the effects this has had on, at least indirectly, national migration policy. For many years, Sweden was an exception in Europe where populist parties increasingly gained influence and power. While in the neighbouring countries of Norway and Denmark, right-wing populist parties secured access to formal political power decades ago, their counterpart<sup>11</sup> in Sweden – the anti-

<sup>8</sup> Aleinikoff (n 7) 1, cf. also Gibney (n 4).

<sup>9</sup> Anniken Hagelund, 'After the Refugee Crisis: Public Discourse and Policy Change in Denmark, Norway and Sweden' (2020) 8 *Comparative Migration Studies* 13. On the use of the crisis narrative to justify anti-immigration policies, see, e.g., Aleinikoff (n 7).

<sup>10</sup> Rebecca Stern, "'Our Refugee Policy is Generous": Reflections on the Importance of a State's Self-Image' (2014) 33 *Refugee Survey Quarterly* 25.

<sup>11</sup> It can, however, be contested whether the Sweden Democrats, the Danish Dansk Folkeparti and the Norwegian Fremskrittspartiet really are part of the same political family given their different political roots.

immigration, nationalist party the Sweden Democrats (SD) – for a long time were on the political margins. Any interaction with SD on the part of the mainstream parties prompted considerable stigmatisation and even though SD gained seats in the Riksdag in the 2010 general election, the party remained fairly isolated in Swedish politics. This changed, however, in the aftermath of the 2015/2016 ‘refugee crisis’. The ‘crisis’ not only led to a U-turn in Swedish migration policy towards a substantially more restrictive approach to migrants and migrants’ rights than what had previously been the norm; it also became less important for mainstream politicians on the right to avoid associating with SD and their stance on migration and migrants’ rights.

Against this background, the aim of this chapter is to discuss, from a Swedish perspective, the possibilities and limits of legal resilience against the deconstruction and erosion of migrants’ rights amid the rise of populism. We also discuss whether limitations on migrants’ rights in the Swedish context should be taken as signs of democratic decay and constitutional crisis. In the context of these two issues, we explore the potential implications of the ‘crisis’ rhetoric in terms of how laws are drafted and implemented. We start by presenting our points of departure regarding the concept of ‘populism’ and populism in Sweden.

## 13.2 ‘POPULISM’ AND ‘POPULISTS’

### 13.2.1 *On the Concept of Populism*

Defining ‘populism’ is not an easy task.<sup>12</sup> There are many different views and interpretations of the concept that Gagnon et al have described as ‘less of a fixed entity [...] and more of a shapeshifting phenomenon’.<sup>13</sup> Mudde in 2004 defined populism as ‘an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an

<sup>12</sup> If there is one thing on which there is agreement in today’s vast literature on populism, it is that, as Mueller puts it, ‘populism has proven a notoriously difficult concept to define’. Jan-Werner Müller, ‘Populism and Constitutionalism’ in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017), 590–606.

<sup>13</sup> Jean-Paul Gagnon, Emily Beausoleil, Kyong-Min Son, Cleve Arguelles, Pierrick Chalaye, Callum N Johnston, ‘What Is Populism? Who Is the Populist?’ (editorial) (2018) 5 *Democratic Theory* 2. Gagnon et al, in their analysis, draw upon the literature on populism and populists from 2008 to 2018.

expression of the *volonté générale* (general will) of the people'.<sup>14</sup> Mueller suggests that populism is 'a particular *moralistic imagination of politics*, a way of perceiving the political world which opposes a morally pure and fully unified – but [...] ultimately fictional – people to small minorities, elites in particular, who are put outside the authentic people'.<sup>15</sup> Mueller adds that in addition to this criticism of elites, populists also necessarily claim that only they 'properly represent the authentic, proper, and morally pure people'.<sup>16</sup> Moffitt speaks of populism in terms of a certain political style rather than a specific set of views.<sup>17</sup> Nevertheless, in the contemporary literature<sup>18</sup> and discourse, populism is often classified as being either 'right' or 'left'. Right populism, in the words of Gagnon et al, is 'characterized by emotionally-charged political appeals to addressing crises through neonationalism, masculinism, Othering, bordering, xenophobia, sexism, racism, phantasmatic ethnic golden-ageism, a disregard for liberal democratic norms, and so forth'.<sup>19</sup> Left populism, on the other hand, is 'said to hold the potential to address crises in a manner which secures the democratic project [...] by deepening the legitimacy of real-existing democracies and upholding civic, political, and economic rights alongside material egalitarianism'.<sup>20</sup>

Regardless of the political ideology to which a certain brand of populism leans, there are some common denominators. These are *criticism of elites* (even if one is part of the political establishment) and *anti-pluralism* (to claim that they, and they alone, represent the people and their true interest, and that anyone not supporting the populists might not be a proper part of the people).<sup>21</sup> Mueller holds that the anti-pluralism of populists can be described as a form of exclusionary identity politics, and that this can be a danger for democracy as pluralism is at the core of any real democracy.<sup>22</sup> Another factor

<sup>14</sup> Cas Mudde, 'The Populist Zeitgeist' (2004) 39 *Government and Opposition* 541, 543.

<sup>15</sup> Mueller (n 12).

<sup>16</sup> Mueller (n 12).

<sup>17</sup> Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* (Stanford University Press 2016).

<sup>18</sup> Cf. the overview provided by Gagnon et al (n 13).

<sup>19</sup> Gagnon et al (n 13) vii.

<sup>20</sup> Gagnon et al, however, conclude that this neat divide of populism is contradicted by the fact that populism is 'ideologically ambiguous' and that when it comes to populism, 'left' and 'right' are rather a combination of multiple interacting cleavages, including authoritarian/democratic, market fundamentalist/redistributive, exclusionary/inclusionary, xenophobic/cosmopolitan, electoral/participatory and nostalgic/aspirational. Gagnon et al (n 13) vii.

<sup>21</sup> See, e.g., Jan-Werner Müller, *What Is Populism?* (Penguin 2017) 2–3.

<sup>22</sup> Müller (n 21) 3. See also Schmitt on 'oneness' between the sovereign and the people. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 1926).

central for populism is *crisis*, real or perceived, which acts both as a hotbed for populism, creating a space for its emergence (the external perspective), and as a tool for populists to create a situation in which ‘the people’ can be united against a threatening Other, and be more susceptible to arguments in favour of strong leadership and fast political action in order to prevent the crisis from getting worse (the internal perspective).<sup>23</sup> On the internal perspective, Moffitt argues that it is important to ‘acknowledge the performance of crisis as an internal feature of populism’<sup>24</sup> to understand how populists trigger crises in order to create a situation in which they can gain and exercise power.

A few words should be said here about populism and constitutionalism. Modern constitutionalism, Loughlin and Walker argue, is ‘underpinned by two fundamental yet antagonistic imperatives: that governmental power ultimately is generated from “the consent of the people” and that, to be sustained and effective, such power must be divided, constrained and exercised through distinctive institutional forms’.<sup>25</sup> This common understanding of constitutionalism as a demand for limited government is challenged by Barber who argues that constitutionalism also has a positive dimension in the sense that it ‘requires the creation of an effective and competent set of state institutions’.<sup>26</sup> Populism, on the other hand, Mueller holds, is often described as ‘inherently hostile to mechanisms and, ultimately, values, commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protection for minorities, or, for that matter, fundamental rights as such’,<sup>27</sup> and as preferring direct interaction with the people over communicating through institutions and organisations.<sup>28</sup> As Gustavsson has explained, populists disapprove of the rule of law, freedom of speech, freedom of association and legitimate opposition; they love majority rule but dislike political liberalism.<sup>29</sup> Populists, Mueller holds, will always claim that they (alone) represent the

<sup>23</sup> See, e.g., Gagnon et al (n 13) viii–ix, Benjamin Moffitt, ‘How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism’ (2015) 50 *Government and Opposition* 189, 190.

<sup>24</sup> Moffitt (n 23) 190.

<sup>25</sup> Martin Loughlin and Neil Walker, ‘Introduction’ in *The Paradox of Constitutionalism* (Oxford University Press 2007) 1.

<sup>26</sup> Nicholas Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 1.

<sup>27</sup> Müller (n 12) 590, see also Martin Loughlin, ‘The Constitutional Crisis of Contemporary Democracy’ (2019) 39 *Oxford Journal of Legal Studies* 435, 444.

<sup>28</sup> Cf. Moffitt (n 17).

<sup>29</sup> Sverker Gustavsson, ‘Skuggteorin tydliggör problemet’, in Sverker Gustavsson, Claes-Mikael Jonsson and Ingemar Lindberg (eds), *Vad krävs för att rädda demokratin?* (Premiss förlag 2018) 161–202, 166.

people and their true interests.<sup>30</sup> The populist leader is determined that it is only he or she who can legitimately represent the people. Showing that one is not part of the corrupt elite by, for example, not being ‘politically correct’ is a crucial element in this regard. The fact that there may be other ideas and interests that exist in society is irrelevant for a leader of this kind. Moreover, Mueller points out that while populist parties by conventional wisdom may be seen primarily as protest parties in opposition to government, populism in government is not self-contradictory since all failures can continue to ‘be blamed on elites acting behind the scenes’.<sup>31</sup> Mueller identifies three distinct characteristics of populist government: colonisation of the state; mass clientelism as well as discriminatory legalism; and finally, repression of civil society.

### 13.2.2 *Populism in Sweden*

While populism, as discussed above, can be either right- or left-oriented (or both), what we mean when we talk about populism is usually right-wing populism, or radical right populism.<sup>32</sup> The Swedish case is no different. While for many years Sweden did not have any successful populist or extreme right party (with the exception of the New Democracy Party, which only lasted a few years in the early 1990s), the Sweden Democrats, as mentioned in the introduction to this chapter, in the past decade or so have steadily gained ground.<sup>33</sup> The party has moved a long way towards becoming a part of mainstream politics: they have, as Hellström and Nilsson put it, evolved from being perceived as a loud organisation of angry young men with clear Neo-Nazi tinges around 1990 to now instead trying to become a party for the common man, attracting voters from all other parties including those who abstain from voting.<sup>34</sup> Since Hellström and Nilsson made these reflections in 2010, SD have moved steadily in the same direction, now being the one of the largest parties and a powerful player in Swedish politics. The fact that SD over the years have gone through a number of scandals concerning violent, racist,

<sup>30</sup> Müller (n 21) 23.

<sup>31</sup> Müller (n 12) 596.

<sup>32</sup> Cas Mudde, ‘How Populism Became the Concept that Defines Our Age’ *The Guardian* (22 November 2018), [www.theguardian.com/commentisfree/2018/nov/22/populism-concept-defines-our-age](https://www.theguardian.com/commentisfree/2018/nov/22/populism-concept-defines-our-age) (last visited 23 October 2020).

<sup>33</sup> Carl-Ulrik Schierup, Aleksandra Ålund and Anders Neergaard, ‘“Race” and the Upsurge of Antagonistic Popular Movements in Sweden’ (2017) 41 *Ethnic and Racial Studies* 1837, 1841–42.

<sup>34</sup> Anders Hellström and Tom Nilsson, ‘We Are the Good Guys’: Ideological Positioning of the Nationalist Party Sverigedemokraterna in Contemporary Swedish Politics’ (2010) 10 *Ethnicities* 55.



anti-Muslim and anti-Semitic statements made more or less clandestinely by its representatives on different levels, seems not to have halted this move into the mainstream, or indeed not to have done much damage to the party's support base.

So, what kind of political party is the Sweden Democrats? Commentators and scholars have, drawing on understandings of populism such as those outlined in the previous section, presented several different definitions: that it is a populist party, a radical right nationalist party, a predominantly nationalist party, or an authoritarian populist party. According to their 2019 political manifesto, SD is a 'social conservative party with a nationalist basic outlook'<sup>35</sup> that aims to combine the best elements from traditional ideologies on the right as well as the left of the political spectrum.<sup>36</sup> SD also defines itself as a party emphasising the importance of (national) identity and of identification with common values.<sup>37</sup> They strongly oppose multiculturalism and instead favour the assimilation of migrants into Swedish society with the aim for them to adopt Swedish majority culture instead of their own. On migration, the SD party manifesto states that SD does not oppose migration completely, but that migration to Sweden must be maintained at an acceptable level and not be of a kind that threatens national identity, welfare or security. The right to asylum, it is stated, should be limited (and appears to mainly apply to individuals seeking protection from armed conflict or disasters) and asylum policy should primarily focus on assisting refugees in their own countries.<sup>38</sup> It can be noted that the terminology used in the previous party manifesto, adopted in 2011, was more expressive with regard to ideas such as that of 'inherited essence'<sup>39</sup> and the benefits of a strong national identity and a minimum of linguistic, cultural and religious differences to support social solidarity, stability and safety.<sup>40</sup> The position on migration and asylum in 2011 was basically the same as it is at present.

The wording of the 2019 party manifesto should be understood in relation to statements such as those made by the Sweden Democrats' party leader, Jimmie Åkesson, in a speech held at the party's 2019 national conference.

<sup>35</sup> The Sweden Democrats' Political Platform (Principprogram) 2019, Introduction, available at <https://ratatosk.sd.se/sd/wp-content/uploads/2020/11/16092141/Sverigedemokraternas-principprogram-2019.pdf> (last visited 19 February 2021).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 8.

<sup>38</sup> *Ibid.*, 14.

<sup>39</sup> The Sweden Democrats' Political Platform (Principprogram) 2011, 6. Available at <http://partiprogram.se/sverigedemokraterna> (last visited 21 February 2021).

<sup>40</sup> *Ibid.*

The speech was permeated by nativist ideology.<sup>41</sup> Åkesson spoke of how immigration has destroyed Swedish society, that there has to be a negative balance in migration (i.e. more returns than arrivals) and that the current situation in Sweden ('Sweden is torn apart') is all due to the catastrophic migration policy.<sup>42</sup> He made it clear that SD is the only party that knows how to turn the tide and 'make Sweden great again', and that left-wing liberals are all to blame. With his statements, Åkesson ticks all the boxes for a right-wing populist with a xenophobic nationalist ideology: he is critical of the elite; he specifically speaks in terms of an 'us' opposed to 'them/the Other'; he describes Sweden as being in a state of crisis from which his party is the only saviour; he speaks of a single national identity and sees migration as the main threat to the nation and society.<sup>43</sup> These and other similar statements firmly place SD in the right-wing populism category. In light of the declared aim of SD to become the dominant political party in Sweden, and the fact that in the 2018 general elections they became the third largest party, SD's ambitions and position on migration should not be taken lightly.

### 13.3 SWEDISH MIGRATION LAW IN LIGHT OF THE 2015 'REFUGEE CRISIS'<sup>44</sup>

#### 13.3.1 *On Swedish Asylum Law and Policy before 2015*

The right to asylum is not included in the Swedish Constitution. The right to international protection, however, has been regulated in Swedish law for decades. For a long time, Sweden was known for its generous and fair asylum policy and in the 1970s and 1980s, approval rates were relatively high. In the 1990s, however, Swedish asylum policy gradually became more restrictive,

<sup>41</sup> Jimmie Åkesson, speech at Landsdagarna 2019, available at <https://ratatosk.sd.se/sd/wp-content/uploads/2019/11/23082006/tal-landsdagarna-2019.pdf?fbclid=IwAR3hqXMwXQzu6CNTTPICYCMjFhCmGrvOM5fDPVY8yLTNKOAO1n95IbBeNMI> (last visited 24 October 2020).

<sup>42</sup> *Ibid.*

<sup>43</sup> These views have been repeated many times since, for example in a tweet by Åkesson published 18 February 2021 which attracted much attention. <https://twitter.com/jimmieakesson/status/136240950557012490> (last visited 21 February 2021).

<sup>44</sup> Some of this section draws on Rebecca Thorburn Stern, 'When the Ends Justify the Means? Quality of Law-making in Times of Urgency' (2019) 7 *Theory and Practice of Legislation* 85 and Rebecca Thorburn Stern, 'Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light of the 2015 "Refugee Crisis"' in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2018) 233–62.

presumably as a result of the increasing trend of securitisation of migration, the adjustment to the Schengen system and, towards the end of the 1990s and onwards, harmonisation with EU law in the area of migration and asylum.<sup>45</sup> Despite the increasing Europeanisation of migration and asylum policy generally, Sweden retained its reputation as being comparatively generous in terms of both approval rates and reception conditions, exceeding the EU minimum standards at least regarding reception. Moreover, as a rule, Sweden granted permanent residence permits to persons in need of protection.

Exceptions were nevertheless made on several occasions to this generous approach. Such exceptions were motivated by a declared need to curb the number of asylum seekers arriving in Sweden. Early examples include the so-called ‘Lucia decision’ of 1989, which limited the possibilities of being granted asylum in Sweden to Convention refugees only and to individuals with particularly strong protection needs,<sup>46</sup> and the introduction of visa requirements for citizens from former Yugoslavia in 1992 and 1993.<sup>47</sup> These restrictive measures were all framed as a necessary reaction to a crisis, the crisis being that there were too many asylum seekers arriving during a short period of time, and that Sweden was unable to cope with the influx, including providing reception conditions to an acceptable standard.<sup>48</sup> Referring to ‘crisis’ and ‘exceptional circumstances’ as a means of rationalising and legitimising certain measures was thus nothing new or untested prior to 2015.

### 13.3.2 *The 2015 ‘Crisis’: Consequences for Legislation, Policy and the Influence of Populist Approaches to Migration*

‘Crisis’ became the key watchword in the autumn of 2015, when large numbers of asylum seekers, many from Syria, arrived in Europe. Towards the end of November 2015, more than 149,000 asylum seekers had arrived in Sweden since the beginning of the year.<sup>49</sup> This was almost twice as many as the year before, and more than 100,000 more than the number that was seen

<sup>45</sup> See, e.g., Carl-Ulrik Schierup, Peo Hansen and Stephen Castles, *Migration, Citizenship and the European Welfare State: A European Dilemma* (Oxford University Press 2006).

<sup>46</sup> Riksdagsprotokoll 1989/ 90:46, 78.

<sup>47</sup> Elisabeth Abiri, ‘The Changing Praxis of “Generosity”: Swedish Refugee Policy during the 1990s’ (2000) 13 *Journal of Refugee Studies* 11.

<sup>48</sup> The situations are described in more detail in Thorburn Stern ([2018] n 43) 259–61.

<sup>49</sup> Migration Agency statistics on asylum seekers in 2015 <[www.migrationsverket.se/download/18.7c00d8e6143101d166daab/1485556214938/Inkomna%20ans%C3%B6kningar%20om%20asyl%202015%20-%20Applications%20for%20asylum%20received%202015.pdf](http://www.migrationsverket.se/download/18.7c00d8e6143101d166daab/1485556214938/Inkomna%20ans%C3%B6kningar%20om%20asyl%202015%20-%20Applications%20for%20asylum%20received%202015.pdf)> last visited 25 October 2020.

to have caused a crisis in 1989.<sup>50</sup> The large influx caused the then Swedish Prime Minister (Mr Stefan Löfven, Social Democrat), to declare in November 2015 (in sharp contrast to his previously generous stance towards refugees and asylum seekers, declared repeatedly in public speeches and debates) that this was a crisis situation and that Sweden was on the brink of collapse. Löfven declared that Sweden had done far more than its share and was in dire need of ‘breathing space’<sup>51</sup> and that the influx of asylum seekers immediately had to stop or significantly decrease in order to avoid core parts of the social welfare system breaking down.<sup>52</sup> The vast majority of the parties in the Riksdag agreed with this understanding of the migration situation as a serious crisis for Sweden and for the need to adopt drastic measures to curb the influx. This included parties generally positive towards migration such as the Green Party (which was in a coalition government with the Social Democrats at the time).

The measures presented in November 2015 aimed to significantly curb the number of asylum seekers arriving in Sweden in two ways. One was to make it more difficult to get to Sweden and claim asylum. This was to be achieved through introducing border controls and identity checks<sup>53</sup> (in particular, at the Danish border), making it difficult to reach and enter Swedish territory without a valid passport – something which most asylum seekers do not possess. The first border controls and identity checks were introduced in late November 2015 and an ordinance on identity checks entered into force in December 2015. The border controls are still in place at the time of writing, the basis for them today being national security rather than the need to curb migration flows.<sup>54</sup> The effects for migrants, however, remain the same.

The second set of measures aimed at making Sweden less attractive as a country of asylum. This included reducing the number of protection grounds and grounds for residence permits to a minimum, keeping only those to which Sweden is bound by its international obligations, further restricting the possibilities of family reunification by limiting access to family reunification only to those who have been granted residence permits on certain grounds and

<sup>50</sup> Statistics from the Migration Agency on asylum seekers in 1989, available at [www.migrationsverket.se/download/18.2d998ffec151ac3871598171/1485556079445/Asyls%C3%B6kande+till+Sverige+1984-1999.pdf](http://www.migrationsverket.se/download/18.2d998ffec151ac3871598171/1485556079445/Asyls%C3%B6kande+till+Sverige+1984-1999.pdf), last accessed 23 October 2020.

<sup>51</sup> Swedish Government Inquiries Report (SOU) 2017:12 Att ta emot människor på flykt i Sverige hösten 2015, Ch. 7.

<sup>52</sup> SOU 2017:12, Ch. 4–6.

<sup>53</sup> The new border and identity control regulations entered into force earlier, in December 2015. Förordning (2015:1074) om vissa identitetskontroller vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.

<sup>54</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en), last accessed 22 February 2021.

linking it to strict maintenance requirements, and making temporary residence permits (3 years for conventional refugees, 13 months for persons granted subsidiary protection or a residence permit on humanitarian grounds) the main rule.<sup>55</sup> These are the essential elements of the 2016 Temporary Law<sup>56</sup> which entered into force in July 2016, replacing the 2005 Aliens Act on matters on which they overlap. The law, which was prolonged in 2019, applied until July 2021. The effects of the Temporary Law as a deterrent to asylum seekers and migrants has been questioned: the decreasing number of asylum seekers in Sweden after the law was introduced in 2016 is likely to have been equally or more related to border controls at EU external borders than to Swedish legislation.

When introducing the deterrence measures outlined above, all imposing severe limitations on migrants' rights, the crisis narrative – just as it was in 1989 and the early Nineties – was used to legitimise restrictions on migrants' rights and to justify a policy that clashed with the humanitarian ideals that had constituted an important part of Sweden's self-image.<sup>57</sup> The effects of the crisis on the political discourse on migration, however, became more substantial this time around. The crisis narrative, and the notion that restrictive policies on migration are required to deal with said crisis, continued to gain ground after restrictive measures were implemented. The fact that the influx of migrants decreased significantly towards the end of 2015 and the beginning of 2016 did not seem to matter in this regard. Instead, several political parties in the years following 2015 have adopted positions on migration similar to those of the Sweden Democrats regarding, for example, limitations on the right to seek asylum and to family reunification, although so far not adopting the ideological foundations of these positions as well.<sup>58</sup> In addition, despite the fact that SD do not in any way conceal their position on migration, asylum and migrants, some parties in the Riksdag (the Conservatives and the Christian Democrats in particular) today seem to have considerably fewer misgivings than before about collaborating with SD on various issues, including migration. These changes in migration policy discourse – what is accepted and what is not – are illustrated by the final report<sup>59</sup> of the all-party Commission of Inquiry on Migration, made public in late September 2020.

<sup>55</sup> Granting permanent residence permits to individuals granted international protection was the norm until 2016.

<sup>56</sup> Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

<sup>57</sup> Stern (n 10).

<sup>58</sup> SOU 2020:54 En långsiktig hållbar migrationspolitik.

<sup>59</sup> SOU 2020:54.

The Commission of inquiry, with representatives from each party in the Riksdag, was tasked with laying down the general outlines for a future Swedish migration policy. While the Commission could not agree on a joint final proposal, its conclusions formed the basis for a government bill on making the bulk of the provisions of the Temporary Law permanent by including them in the Aliens Act.<sup>60</sup> The Riksdag passed the bill, and the legislation entered into force in July 2021. The impact of the crisis narrative is partly visible in the Commission's conclusions, but even more so in some of the reservations and separate opinions of Commission members. Examples include the Conservatives arguing that Sweden is in an integration crisis as a result of 'decades of high numbers of immigration combined with a defective integration policy'<sup>61</sup> and that a restrictive migration policy is the only cure; the Christian Democrats speaking of an 'integration debt'<sup>62</sup> which needs to be paid off and that an austere migration policy is required for this to be possible; and SD describing immigration as a threat to fundamental Swedish values and the Swedish 'Folkhemmet', and that in order for the tide to turn, asylum-related migration must be 'below zero'.<sup>63</sup> Things indeed have changed since the then Prime Minister, Mr Fredrik Reinfeldt (Conservative) in the early 2010s declared that his party would never accept support from or work with SD because of their xenophobic attitudes towards immigration and their political roots.

While some of the political parties in the Riksdag continue to strongly oppose SD on migration policy – the Centre Party, the Green Party and the Left Party being their strongest opponents – it seems clear that the populist, xenophobic SD, formerly regarded as extreme, has been very successful in influencing the political discourse in Sweden on migration, and have achieved this without softening their position. For it is not primarily SD who over the years have become more moderate, even though, as shown above, they have made some efforts to tone down their most controversial ideas (or at least how these are framed). SD's main ideas on migration, national identity and assimilation remain the same as when they were more

<sup>60</sup> Prop. 2020/21:191 Ändrade regler i utlänningslagen. It may be noted that the bill reintroduced humanitarian grounds for residence permits, a possibility severely limited in the Temporary Law (see Kompletterande promemoria till betänkandet En långsiktigt hållbar migrationspolitik (SOU 2020:54).

<sup>61</sup> SOU 2020:54, 516.

<sup>62</sup> SOU 2020:54, 552.

<sup>63</sup> SOU 2020:54, 579–82.

or less outcasts in Swedish politics. Instead, it could be argued that the parties on the mainstream right have moved substantially further to the right, thus contributing to normalising and mainstreaming radical right ideas on immigration. Mudde refers to this process as the radicalisation of mainstream political parties.<sup>64</sup> This mainstreaming also has the effect of normalising the populist radical right, allowing it to become ‘tolerated, and even embraced’<sup>65</sup> by business, media and political circles. Mudde notes that when mainstream parties have increasingly adopted the frames of the populist radical right, the populist right parties increase not only their electoral base but also their political impact, including influencing government agendas on migration.<sup>66</sup> This, we argue, is a fair and accurate account of the development in Sweden in the past few years.

Summing up so far, it seems clear that the Sweden Democrats and their populist, right-wing politics, not least in their narrative of migration as a ‘crisis’, have had a considerable impact on the migration discourse in Sweden, including other political parties adopting parts of their agenda. What was mainstream politics before 2015 is today considered by many as left-wing liberal and radical right ideas have become normalised and therefore likely to be more palatable to the electorate. Limitations on migrants’ rights today also appear to be regarded as much less problematic by many mainstream political parties, with keywords for migration policy today including restrictiveness, control, deterrence, and an increased focus on returns. There is also more attention being placed on the need for immigrants to ‘adapt’ to Swedish society, culture and norms, and on the connections between criminality and immigration. However, it would be hard to say for certain to what extent this mainstreaming of populist radical right views on migration and how it has contributed to the erosion of migrants’ rights is a result of constitutional crisis and democratic decay in Sweden *per se*. This is partly because the restrictive migration laws and policies are not mirrored by excessively restrictive rights limitations on other groups, or attacks on the independence of the courts. In the Swedish case, restrictions on migrants’ rights and democratic decay thus do not seem to be directly linked. In the following section, we turn to the question of how core values or ideals established in the Swedish Constitution may contribute to legal resilience against the erosion of migrants’ rights.

<sup>64</sup> Cas Mudde, *The Far Right Today* (Polity 2019) 219–20.

<sup>65</sup> Mudde (n 64) 225.

<sup>66</sup> Mudde (n 64) 219–20.

#### 13.4 THE CONSTITUTIONAL FRAMEWORK, CORE CONSTITUTIONAL VALUES AND LEGAL RESILIENCE

In order to understand a country's core constitutional values, it is necessary to look to its history. A country's constitutional order and the values it expresses reflect the country's political development and the ideals and experiences shaping that particular society.<sup>67</sup> In Sweden, the way in which public power may be exercised as well as the relationship between government, parliament, the courts, government agencies and citizens draws on administrative structures and traditions established centuries ago, with the strong position of public administration being a defining feature. It can be noted that for centuries, institutions of public administration (government authorities, public officials) were where citizens directed their complaints. Courts were less important and relatively inaccessible to the average citizen or resident.<sup>68</sup> The important role played by public administration remains a key factor in Swedish constitutionalism today.

The Swedish Constitution consists of four fundamental laws: The Instrument of Government, the Act on Succession (from 1810), the Freedom of the Press Act (from 1949, dating back to 1766), and the Fundamental Law on Freedom of Expression (from 1991). Since the seventeenth century, the country has had several fundamental laws entitled the Instrument of Government. A key purpose of the Instruments of Government over the years is to provide the framework for the exercise of public power. The 1809 version of the Instrument of Government focused on separation of powers. In 1921, while this nineteenth-century Act was still in place, parliamentarism was introduced and the balance of power accordingly shifted from the King to the parliament and the government. However, this reshuffle was not reflected in the Constitution: instead, for decades an informal agreement between the King, the parliament and the government on accepting and adapting to the new forms of democracy guided their interactions and the division of powers. Political focus instead was on anchoring the young welfare state more firmly to Swedish society and administration by a number of significant societal reforms. The informal agreement on 'the rules of the game' of Swedish democracy were not formalised until 1974 when a new Instrument of Government entered into force, removing

<sup>67</sup> Helle Krunke and Bjørg Thorarensen, Introduction, in Helle Krunke and Bjørg Thorarensen (eds), *The Nordic Constitutions* (Hart Publishing 2018), 2.

<sup>68</sup> Mats Kumlien, *Professorspolitik och samhällsförändring* (Institutet för rättshistorisk forskning 2019), 102–109.



the idea of a pure separation of powers from the Constitution and instead formally recognising that the will of the people is supreme. The first article of the Instrument of Government thus reads as follows:

All public power in Sweden proceeds from the people.

Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It is realised through a representative and parliamentary form of government and through local self-government.

Public power is exercised under the law.

That *all public power proceeds from the people* is the core value of the Swedish Constitution and its basic principle. It means that power, at least in theory, lies primarily with the parliament and the parliamentarians (the representatives of the people). The second part of the gateway article, stating that public power is to be exercised under the law, reflects two additional core values, namely the *principle of legality* and the *principle of objectivity*.<sup>69</sup>

That all public power in Sweden proceeds from the people means that the country belongs to a minority of modern parliamentary democracies which does not apply the Montesquieuean separation of powers, with its emphasis on the role of the courts and with substantial powers accorded to the executive branch. Consequently, Sweden does not have a constitutional court. Instead, the Instrument of Government provides *all* courts and public bodies with the right as well as the duty to put aside any legislative act which contradicts the Constitution or which has been decided in a way not in accordance with the constitution.<sup>70</sup> A system where judicial review is performed only when the legislation has entered into force and its application in a concrete case has led to difficulties related to the constitutional aspects of the act, has been referred to as decentralised or weak-form judicial review.<sup>71</sup> This limited approach to judicial review – which Sweden shares with the other Scandinavian countries – must, however, be understood in the context of the constitutional history and the parliamentary-centred conception of democracy in these countries, both of which differ from many European states where constitutional courts play a key role, including in their review of acts passed by parliament.<sup>72</sup> This approach should also be seen in light of socio-political factors common to the Scandinavian welfare states, such as faith in the state as

<sup>69</sup> See also the Instrument of Government, Chapter 1, Section 9.

<sup>70</sup> The Instrument of Government, Chapter 11, Article 14, and Chapter 12, Article 10.

<sup>71</sup> Iris Nguyễn Duy, 'New Trends in Scandinavian Constitutional Review' (2015) 61 *Scandinavian Studies in Law* 11, 13.

<sup>72</sup> Nguyễn Duy (n 71) 14–23.

a protective institution and an emphasis on the common good of the community rather than on individual rights.<sup>73</sup>

There is indeed a constitutional body – the Council on Legislation – tasked with advising the government in the legislative process on whether a proposed act might impact on a constitutional matter or infringe upon fundamental rights. While the reports of the Council are only advisory and not binding, they are usually accorded considerable weight by the government in their drafting of the final version of a government bill. The Council's comments and recommendations on controversial suggestions are often also picked up by the media. The Council thus exercises real influence in the legislative process. Yet there has been a tendency to accord less weight to the Council's recommendations when there is a strong political incentive to put certain legislation in place, regardless of its quality. This is what happened with the legislation on migration proposed by the government during and after the 2015 'refugee crisis' (briefly outlined above). The Council on Legislation provided devastating criticisms of both the proposal for the 2015 ordinance on border control and identity checks, as well as the proposal for the 2016 Temporary Law and the 2019 proposal on prolongation. The Council was critical of the poor quality<sup>74</sup> of the legislation, both as regards the legislative process and the legislation itself.<sup>75</sup> Regarding the 2015 ordinance, the Council in its comments said that the legislative process in this case did not live up to minimum standards due to the great haste which characterised it, the absence of an analysis of the constitutional implications of the proposals on border controls and the inadequate preparations of the proposal in general.<sup>76</sup> The critique did not, however, have much effect as the government presented a revised proposal to the Riksdag in mid-December 2015 that was then adopted just before Christmas 2015. The 2016 proposal on the Temporary

<sup>73</sup> Jens Elo Rytter, 'Judicial Review of Legislation – Sustainable Strategy on the Enforcement of Basic Rights', in Martin Scheinin (ed) *The Welfare State and Constitutionalism in the Nordic Countries* (Nordic Council of Ministers, Nord 2001).

<sup>74</sup> On quality of legislation, see, e.g., Marta Tavares Almeida (ed.), *Quality of Legislation* (Nomos 2011).

<sup>75</sup> In addition to the three pieces of legislation discussed here, there has been a number of additional changes and amendments to legislation also related to migrants and the large number of asylum seekers arriving in 2015, for example, regarding housing and additional grounds for residence permits for particular groups. Similar criticism has been directed towards these Acts and their legislative process. See, e.g., Thorburn Stern ([2019] n 44) and Lovisa Widerström, 'Rätt snabbt – beredning av (brädslande?) lagstiftning' (2019/2020) 1 *Juridisk Tidskrift* 89.

<sup>76</sup> Lagrådet, utdrag ur protokoll vid sammanträde 7 December 2015, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.

Law received equally severe criticism: the Council emphasised that this proposal had also been hastily prepared, leading to unsatisfactory analysis of the proposal's efficacy as well as its consequences.<sup>77</sup> The Council furthermore was critical of the material content of the law, questioning its compatibility with Sweden's international obligations and Swedish legal tradition. However, in this case, the government went ahead with the proposal and drafted (with only minor revisions of the previous proposal) a bill which was presented to the Riksdag, in which a large majority in June 2016 voted in favour of the law. When the government proposed a prolongation of the 2016 law, the Council on Legislation for similar reasons was equally critical of the legislative process, albeit to no avail.<sup>78</sup> The conclusion to be drawn is that while the Council of Legislation usually functions as an obstacle for poor legislation, including such that has implications for the rights of individuals or groups or other constitutional matters, its advisory function means that the government can ignore its recommendations without doing anything formally wrong. It could be argued that this has a negative effect on the legal resilience of the system towards attacks on fundamental constitutional values.

The *independence of the administration* is another core value in the Swedish Constitution. The administrative bodies governed by the government are tasked with implementing and realising government policy. At the same time, they are independent in the sense that neither the government, the Riksdag, nor any other public authority 'may determine how an administrative authority is to decide in a particular case involving the exercise of public authority vis-à-vis a private subject or a local authority, or the application of law'.<sup>79</sup> This independence, deeply rooted in Sweden's constitutional and administrative law history, is also linked to a firm prohibition of government ministers making individual decisions in government affairs. This means that individual government ministers do not have a right of command over the administrative authorities and therefore cannot, for example, intervene in politically sensitive issues and/or individual cases, such as controversial cases of impediments to expulsion orders due to *non-refoulement* issues. The principle of the independence of the administration is closely linked to the ideal of *the public servant as the guardian of democracy* tasked with alerting their superiors (including politicians) when their actions are illegal, unethical

<sup>77</sup> Lagrådet, utdrag ur protokoll vid sammanträde 20 April 2016, Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

<sup>78</sup> Lagrådet, utdrag ur protokoll vid sammanträde 23 April 2019.

<sup>79</sup> Instrument of Government, [Chapter 12](#), Section 2.

or improper.<sup>80</sup> As a public servant, one is responsible for each decision one takes and one has the duty to decide in all matters indicated by the law in accordance with the law. Public servants in this sense are instrumental in the realisation of the rule of law. The independence of the administration and the role to be played by the civil servant contribute to legal resilience against political influence being exercised in concrete cases.<sup>81</sup>

The *transparency of the legislative process* constitutes another key element or value in the Swedish Constitution. All government bills are subjected to a multi-step preparation process involving different parliamentary committees, government inquiries and a consultation process through which the necessary information and opinions shall be obtained from the public authorities concerned (and local authorities as necessary).<sup>82</sup> Organisations and individuals are also to have the opportunity to express an opinion as necessary. Following constitutional practice, consultation is considered mandatory in legislative matters.<sup>83</sup> The objective is for the legislative proposal to be as good as possible in order to avoid difficulties in implementation (for courts and other agencies), which could ultimately undermine the legitimacy of and trust in the system. The legislative process is subject to certain timeframes – the consultation process, for example, is generally to be allowed a minimum of three months – aimed at allocating sufficient time for preparation of draft legislation to ensure its quality. In addition, the timeframes are put in place for the protection of the minority in the Riksdag by allowing for deliberations to be held before the vote. These are thus measures introduced to put constraints on the will of the majority and its chances of ruling unchallenged. The system is accordingly construed in such a way that time in itself is a safeguard and a means to ensure legal resilience.

It should, however, be noted that the majority of the steps included in the legislative process are not explicitly stated in the Instrument of Government, but are instead ‘informal’, unwritten rules, developed through well-established practice. In the case of the 2015 border control and identity check regulation, these informal rules were upheld in name only. Consultations were indeed carried out, but public authorities and other actors were given no more than

<sup>80</sup> Lennart Lundquist, *Demokratins väktare. Ämbetsmännen och vårt offentliga etos* (Studentlitteratur 1998).

<sup>81</sup> These comparatively rare features can also be found in the Constitution of Finland, dating back to the two countries’ common history. In other countries, individual ministers have much more power in individual cases and decision making. Instrument of Government, [Chapter 7](#), Section 2.

<sup>82</sup> Instrument of Government, [Chapter 7](#), Section 2.

<sup>83</sup> Report by Konstitutionsutskottet 2008/09: KU10, 63.

around forty-eight hours to analyse and respond to proposals that included serious rights limitations on the right to seek asylum and the right to movement and which would provide the government with far-reaching powers to close Sweden's borders and effectively introduce a state of emergency.<sup>84</sup> This lack of respect for the consultation process was a key part of the Council of Legislation's characterisation of the legislative process in this case as sub-standard (as described above). In the case of the 2016 Temporary Law, while the constitutional practice on timeframes for the consultation process indeed was followed not only in form but also in substance (albeit with a tight schedule), the impact of the comments on the final product, the government bill, were minimal, even though a majority of the consultation bodies had been very critical of the proposal, not least regarding rights limitations. The Council on Legislation again heavily criticised the government for the legislative process's lack of quality. This critique was picked up by the media and prompted significant debate.

The weakness of informal rules on how the constitutional safeguards are to be applied is such that they can be more easily disregarded than rules explicitly included in the Constitution. This is what happened in Sweden when the legislation during and in the aftermath of the 2015 'refugee crisis' was drafted. In these cases, the feeling of crisis and of urgency, promoted and pushed by politicians both within and outside of government, was allowed to trump the informal rules that are intended to provide context to and fill the written rules of the Constitution with meaning. While this erosion of essential elements is not<sup>85</sup> a phenomenon limited to migration, it has been particularly evident in this context.<sup>86</sup> In the current system, there is no real possibility to prevent poor legislation from being adopted, as long as there is a majority for it in the Riksdag. A Constitution that relies on all actors playing according to both formal and informal rules, and where respect for the democratic system is implicit rather than spelled out, becomes vulnerable in situations when the common understanding of 'how things are done' is put aside or ignored. This might occur when the government decides that a certain matter is of such urgency that immediate action is required, or when the country is in an exceptional situation. The 2015 'refugee crisis' was such a situation.

<sup>84</sup> See Thorburn Stern ([2019] n 44) 92.

<sup>85</sup> See, e.g., comments by the Council on Legislation on proposals for legislation on measures to be taken during the coronavirus pandemic. Lagrådet, Utdrag ur protokoll vid sammanträde 6 April 2020.

<sup>86</sup> Widerström (2019/2020), Thorburn Stern ([2019] n 44).

Lastly, we turn to *fundamental rights protection* as a core value. Sweden is an interesting case as its Constitution on the one hand includes specific Acts protecting certain rights and freedoms, namely the Freedom of the Press Act<sup>87</sup> and its ‘sister act’, the Fundamental Law on Freedom of Expression, which together provide a constitutional structure exclusively applicable and construed to guarantee the highest possible degree of protection for transparency and free speech. On the other hand, it can be argued that protection of fundamental rights and freedoms has *not* been a core priority in the Constitution, whose ‘catalogue of rights’ (Chapter 2 of the Instrument of Government) is relatively limited (civil and political rights only), and was only introduced in 1980.<sup>88</sup> The reluctant approach to ‘rights talk’ must, like the approach to judicial review discussed above, be understood in the context of the emphasis on establishing a strong government and a welfare state. It is equality and inclusiveness, rather than fundamental rights protection, that characterised much of twentieth-century politics in Sweden, dominated for decades by the same party (the Social Democrats).<sup>89</sup> In addition, the school of Scandinavian Legal Realism and its insistence on the primacy of politics over law which constituted a dominant presence in Nordic legal and political discourse in the mid-twentieth century, has been held to be, as Strang puts it, ‘a major reason for the comparatively weak protection of minority, individual and human rights in the Nordic countries’.<sup>90</sup> The position of rights protection on the constitutional level in Sweden, however, was significantly strengthened with the incorporation into Swedish law of the European Convention on Human Rights in 1995 and the general Europeanisation of

<sup>87</sup> See Anna-Sara Lind, ‘Sweden: Free Press as a First Fundamental Right’ in Markku Suksi et al (eds), *First Fundamental Rights Documents in Europe* (Intersentia 2015) 51–162 and Anna-Sara Lind, ‘The Freedom of the Press Act – from then to now’ in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Transparency in the Future: Swedish Openness 250 Years* (Raguilka förlag 2017) 51–64.

<sup>88</sup> In the Instrument of Government from 1809, fundamental rights were not excessively included. In one article, Article 16, constitutional rights were mentioned although their content, scope and effect were not fully clear. Skrivelse nr 362 (1938); SOU 1041:20, 7–8; see Anna-Sara Lind, *Sociala rättigheter i förändring – en konstitutionellrättslig studie* (Uppsala universitet 2009) 55–56.

<sup>89</sup> It was not until the 1970s that the issue of constitutionally guaranteed rights became a major focus for the parliament. In fact, the Social Democrats underlined that fundamental rights for the individual guaranteed by a constitution may have a detrimental impact on the rapid development of the modern society as judges and courts might erect obstacles for the implementation of measures decided by politicians. Nils Herlitz, ‘Regeringsformen och folket. Blickar tillbaka och framåt’ (1973) *Svensk Juristtidning* 754.

<sup>90</sup> Johan Strang, ‘Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law’ (2018) 36 *Nordic Journal of Human Rights* 202, 204.

Swedish law due to joining the European Union in the same year, both of which have led to rights protection enjoying greater priority in courts as well as in policymaking than before. In this sense, fundamental rights as a core constitutional value have gained ground. This is visible also in the courts. In the context of migration, recent case law from the Migration Court of Appeal exhibits the resilience of the legal system against excessive limitations on migrants' rights. In a 2018 case concerning the right to family reunification based on the 2016 Temporary Law, the Migration Court of Appeal found that refusing an eight-year-old boy with subsidiary protection status the right to reunite with his parents in Sweden would be contrary to Article 8 ECHR and the Convention on the Rights of the Child.<sup>91</sup> This judgment prompted the government, in the 2019 bill on prolonging the Temporary Law, to open up the possibilities for family reunification for the category of subsidiary protection.<sup>92</sup> In a 2020 judgment<sup>93</sup> on the right to remain in Sweden on humanitarian grounds, the Migration Court of Appeal found that expelling a fourteen-year-old girl born in Sweden but who for long periods of her life had not had a residence permit would be contrary to Sweden's obligations under Article 3 of the Convention on the Rights of the Child (the Convention was formally incorporated into Swedish law as of 1 January 2020). Both judgments are examples of when the rights of individual migrants are found to trump the interest of the state in limiting and controlling migration.

Finally, a few words should be said about how the Swedish Constitution, in particular the core values outlined above, functions in times of crisis, emergency or in other times of urgency. While there is a chapter on war and danger of war in the Instrument of Government (Chapter 15) and provisions on how constitutional power can be transferred from the Riksdag to the government,<sup>94</sup> the Constitution does not include any specific rules addressing crisis or other emergencies in peacetime. While there is a certain preparedness for such situations included in the legal system (including acts allowing the government to decide on a range of matters in urgent situations), the Constitution as such does not allow for general diversions from the division of powers, the legislative process, or how fundamental rights may be limited. Instead, situations of crisis are intended to be handled within the existing framework, including the unwritten rules established by constitutional practice referred to

<sup>91</sup> MIG 2018:20.

<sup>92</sup> Prop. 2018/19:128 Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

<sup>93</sup> MIG 2020:24. See also MIG 2021:18.

<sup>94</sup> See, e.g., Instrument of Government, [Chapter 8](#), Sections 3–4.

above.<sup>95</sup> This means that in a situation such as the 2015/2016 ‘refugee crisis’, or the (at the time of writing) ongoing coronavirus pandemic, there is no constitutional support for abandoning standard procedure. While the system indeed allows for some leeway, for example, as regards timeframes for the drafting of new legislation and the consultative process when new legislation urgently needs to be put in place, the fact remains that a crisis narrative (such as the one framing the large influx of refugees and migrants in 2015) cannot be used to legitimise serious derogations from core constitutional rules, values and practice.<sup>96</sup>

In sum, then, we hold that the core values described here, taken together, form the legal resilience of the Swedish system. There are, as discussed above, weaknesses built into the system such as the relatively limited system of judicial review, the trust placed in adherence to informal rules, and the limited scope of fundamental rights included in the Constitution. At the same time, core values such as the independence of the administration and the transparency of the legislative process are powerful tools to prevent anti-democratic and anti-pluralist parties or politicians from pushing through their ideas. The Council on Legislation, while having an advisory function rather than that of a constitutional court, nevertheless plays an important role. It is suggested here that the inherent inertia of the administrative system and the legislative process is a key element of legal resilience against rights erosion, for migrants as well as for other vulnerable groups. The protection of fundamental rights as a core constitutional value and the increasing weight accorded to individual rights protection in the courts, including migrants’ rights, contribute to the legal resilience of the system against rights erosion. In addition, the fact that the Swedish Constitution does not allow for derogations from these standards and values except for in very specific situations – war or danger of war – further contributes to the stability of the system. Therefore, at least on the surface, constitutionalism seems to provide a basic protection against populism and acts as a guarantee for liberal pluralism in Sweden. That said, there remains a warning sign in the extent to which the right-wing populist narrative on migrants and migration, for so long advocated by the Sweden Democrats, appears to have taken root, and the effects that this might have on further rights limitations for migrants and indeed for other groups, such as

<sup>95</sup> In the preparatory works, it is stated that the Constitution should be prepared to handle issues as they appear. Johan Hirschfeldt, ‘Mänskliga rättigheter och andra konstitutionella kärnvärden när krisen slår till’ in Anna-Sara Lind and Elena Namli (eds), *Mänskliga rättigheter i det offentliga Sverige* (Studentlitteratur 2016) 198.

<sup>96</sup> SOU 2008:61, 43.



minorities. The envelope indeed has been pushed on this point, and may be further so, particularly if mainstream political parties on the right continue to facilitate and normalise radical right-wing populist views and narratives, even adopting them as their own.

### 13.5 CONCLUSION

So, the question arises, what can be done? Can one limit the growth and influence of populism? Gustafsson suggests two ways in which this can be done (although how fruitful they might be is another matter). Firstly, one could change the rules relating to populist groups. This is, however, not the easiest thing to do. It is never easy to limit and prohibit authoritarian political parties and organisations – at least in a democracy. Prohibitions of political parties and organisations are difficult to introduce and to apply. This is even more difficult when talking about populist parties that have become important actors in elections and public debates.<sup>97</sup> This leads us to the second option: to limit the rights relating to freedom of expression, organisation, rule of law and legitimate opposition. By taking these measures, it would be more difficult for populist parties to gain and retain power. In the Swedish context, the Constitution includes a possibility to prohibit racist organisations.<sup>98</sup> Although this possibility has been investigated on several occasions in recent decades,<sup>99</sup> the prohibition has yet to be used. The tools inserted in a democratic constitution seem to be rather difficult to combine with upholding the constitutional framework, especially when the key values of transparency, free speech and political rights are intimately intertwined with the core principle of the ‘will of the people’. Unfortunately, seeking to prohibit populist and anti-democratic movements often ends up violating the very values and norms one seeks to protect. Perhaps instead, the answer is tolerance and to strive not to use the whole spectre of constitutional powers. In addition, the respect for and understanding of informal constitutional rules, individual rights, and the value of constitutional norms in practice as well as in theory should be strengthened.

Every country has its own constitutional experience. In Sweden, particular challenges for understanding the importance of protecting fundamental human rights and the value of a strong constitution might be posed by the fact that for centuries Sweden has not experienced emergencies such as wars

<sup>97</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Penguin 2018).

<sup>98</sup> Cf. Prop. 1975/76:209, 113–14.

<sup>99</sup> See, e.g., Lagstiftning mot rasdiskriminering (SOU 1968:68); Om hets mot folkgrupp (SOU 1981:38); Mångfald mot enfald, Lagstiftning och rättsfrågor (SOU 1989:14).

and revolutions that could have forced us to make crucial decisions threatening different interests at the same time. Nor has Sweden been under authoritarian rule. When a country has not experienced a state of emergency, authoritarianism and limitations on fundamental civil and human rights, it might be more difficult to appreciate the importance of strong democratic safeguards of constitutional values such as the rule of law, transparency and protection of fundamental rights. By no means do we suggest that such negative experiences might act as a vaccine against authoritarianism or populism; this would be naïve given the numerous examples indicating the opposite. Rather, we suggest that the development in Swedish migration policy since 2015 towards restrictions of migrant's rights, the willingness of mainstream political parties to adopt and act according to radical right-wing narratives on migrants and the lack of respect for various elements in the legislative process in the name of urgency may at least in part be a consequence of not having experienced what it means to live in a society where democracy and rights are limited, not for all, and in form more than content. Perhaps one should not lay the blame solely at the feet of the populists for the lack of a democratic compass in recent years but also look to those politicians and political parties that pave the way for them, transforming fundamentally extreme ideas into mainstream politics without admitting the risks this might entail for core democratic values. To argue that Sweden is in a situation of constitutional crisis and democratic decay as a result of the restrictions of migrants' rights would, however, be going too far, given the absence of vital signs of democratic backsliding such as erosion of the judiciary's independence, limitations on the freedom of the press and electoral manipulation. Instead, the changes in approach to migrants and migration should be understood as a development that may coincide with a broader pattern of challenges to core democratic values but which nevertheless is a separate phenomenon.

## 'Populism? It's Administrative Law, Stupid!'

### How Administrative Law Subverts Legal Resilience

BAS SCHOTEL

#### 14.1 INTRODUCTION

The editors of this volume put two research questions to the contributors. First, what is the connection between populism, restrictive migration laws and democratic decay? Second, what are the possibilities of legal resilience against restrictive migration laws? In this chapter, I argue that administrative law lies at the heart of both questions. Triggered by the first research question this chapter asks how populist anti-migration discourses have made it to actual laws and legal decisions. It asks what legal infrastructure makes restrictive migration laws possible in the first place. My answer is administrative law.<sup>1</sup> Rather than understanding populist restrictive migration policies as a failure of ECHR, EU and constitutional law to protect migrant rights, this chapter looks at how administrative law is distinctively well-suited to produce restrictive migration laws. By distinctive I mean better than criminal and civil law. The focus on administrative law also informs my answer to the second question: resilience against restrictive migration laws will remain marginal and incidental as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies, that is, administrative law.

Section 14.2 briefly explains why the first research question about the connection between populism, restrictive migration laws and democratic decay leads to the question about the legal infrastructure underpinning populist restrictive migration laws. The Section also identifies some basic

I thank the reviewers of this volume for their comments on an earlier version of this chapter.

<sup>1</sup> I rely on Bas Schotel, 'Administrative Law as a Dual State. Authoritarian Elements of Administrative Law' (2021) 13 *Hague Journal on the Rule of Law* 195. The article was based on a paper presented at the Lund workshop in 2020 that constitutes the basis for the present edited volume.

features of restrictive migration policies which the legal infrastructure must cater for. To this end, it relies on the descriptions and analyses of the restrictive migration policies from the country studies in this volume.

Section 14.3 identifies the distinct features of general administrative laws or law-making, namely forward-looking, dynamic, and the capacity to categorize people. These features make it easier, compared to other branches of law, to translate restrictive migration discourses and policy objectives into law.

Section 14.4 explains how individual administrative acts grant authorities the discretion and legal legitimacy needed to implement the restrictive migration policies in ways not possible under criminal law.

Section 14.5 concludes on a pessimistic note. It critically examines the current instances of legal resilience against restrictive migration policies. It finds that the three types of legal resilience, namely judicial interventions by the ECtHR, CJEU and constitutional courts, signal and legitimize the lack of legal resilience within administrative law.

#### 14.2 POPULISM, RESTRICTIVE MIGRATION POLICIES AND DEMOCRATIC DECAY

The contributions in this volume examine the possible connections between populism, restrictive migration policies and democratic decay. The picture that emerges from the country studies is not straightforward.<sup>2</sup>

First, the country studies record restrictive migration policies and crumbling migrant rights.<sup>3</sup> Furthermore, a new wave of populist parties and movements has found access to the formal channels of state power. Either because the parties obtained an absolute or coalition majority in parliament,<sup>4</sup> or because conventional parties co-opt the popular discourse and policy stances.<sup>5</sup>

<sup>2</sup> See for a recent comparative and systematic analysis, Katharina Natter, Mathias Czaika and Hein de Haas, 'Political Party Ideology and Immigration Policy Reform: An Empirical Enquiry' (2020) 2 *Political Research Exchange*.

<sup>3</sup> Kriszta Kovács and Boldizsár Nagy, 'In the Hands of a Populist Authoritarian: The Agony of the Hungarian Asylum System and the Possible Ways of Recovery' (hereafter 'Hungary'); Barbara Mikolajczyk and Mariusz Jagielski, "'Good Change" and the Migration Policy in Poland: In a Trap of Democracy' (hereafter 'Poland'); Margit Ammer and Lando Kirchmair, 'The Restriction of Refugee Rights during the ÖVP-FPÖ Coalition 2017–2019 in Austria: Consequences, Legacy and Potential for Future Resilience Against Populism' (hereafter 'Austria'); Stefano Zirulia and Giuseppe Martinico, 'Criminalising Migrants and Securitising Borders: The Italian "No Way" Model in the Age of Populism' (hereafter 'Italy'); Ellen Desmet and Stijn Smet, 'Right-Wing Populism, Crumbling Migrants' Rights and Strategies of Resistance in Belgium' (hereafter 'Belgium').

<sup>4</sup> Hungary 1; Poland 1, 2; Austria 1, 2; Italy 1.

<sup>5</sup> Belgium 1, 2.

Anti-migration discourse is a crucial part of the populist political agenda and one of their main electoral selling points. Arguably, there is thus a close connection between populism and restrictive migration policies. By the same token, the country studies also indicate that many restrictive migration policies predate the new populist parties and movements (e.g., Austria, Italy). It suggests that conventional parties were already populist *avant la lettre* or that the anti-migration discourse is simply not unique to populism. This raises a question about the general legal infrastructure that makes it possible to enact and implement restrictive migration laws, regardless of who is in power: populists or conventional parties.

Second, the country studies, in line with the burgeoning literature on rule of law and democratic decay in Europe, show a clear link between populism and an authoritarian rule of law.<sup>6</sup> Crucial in this respect is the breakdown of constitutional safeguards, especially judicial independence of the highest courts.<sup>7</sup> The populist strategy is clear. If the constitutional constraints are lifted, the populists can have it their way: retain power and marginalize political opponents and social opposition. Again, this raises questions about the nature of the basic legal infrastructure that can continue to operate its daily business without constitutional constraints. To put it differently, what kind of law is able to maintain its legal character while the constitution is breaking down? Why do we speak of a constitutional breakdown but not of the breakdown of administrative law? The answer might be that normal administrative law is already quite well-suited to make populist, anti-migrant or authoritarian agendas legally possible.

Third, though anti-migration policies and laws may amount to instances of democratic decay and an authoritarian rule of law, the reverse is not always the case: democratic decay is not tantamount to anti-migrant policies. Empirical studies have shown that authoritarian regimes may in fact adopt policies that are relatively favourable to immigration.<sup>8</sup> Yet those policies do not grant legally enforceable rights to migrants. So probably if there is a connection between authoritarianism and anti-migrant policies, it is not so much that authoritarians necessarily oppose migrants, but they do oppose rights.

<sup>6</sup> For an overview of the literature see Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9.

<sup>7</sup> Poland 2; Hungary 2, 3.

<sup>8</sup> Katharina Natter, 'Autocratic immigration policymaking: The illiberal paradox hypothesis', (IMIn Working Papers; No. 147), (MADE project paper No. 4) (2018) International Migration Institute Network, available at [www.migrationinstitute.org/publications/autocratic-immigration-policymaking-the-illiberal-paradox-hypothesis](http://www.migrationinstitute.org/publications/autocratic-immigration-policymaking-the-illiberal-paradox-hypothesis).

Hence, the connection between populism, restrictive migration laws and democratic decay is not clear-cut. But precisely because restrictive migration laws cannot be traced back to populism and democratic decay, a fundamental legal question emerges: what is the legal infrastructure then that makes anti-migration policies possible in the first place, irrespective of populism and democratic decay? Or what is the legal infrastructure that allows populists to turn anti-migrant discourses into law? My answer is administrative law.

Administrative law has particularly distinctive features that allow authorities to do things that would not be possible under normal criminal and civil law. Since migration policies are largely matters of administrative law, politicians and authorities can benefit from these distinct features when legislating and executing immigration policies. While migration policies have become a matter of administrative law for historical reasons, there are also practical reasons for why administrative law is distinctively well suited to enact and implement immigration policies.<sup>9</sup> When enacting immigration laws, policy makers generally find that administrative law gives them the freedom to incorporate highly politicized discourses. And when executing immigration policies, the administration is granted significant *de facto* and legally sanctioned freedom to act. By the same token, this freedom to make and execute immigration law is governed by law, thus granting authorities a legality bonus.

In the sections below, I will discuss the distinctive features of general administrative laws and of individual administrative acts. But first, I will briefly return to the country studies in this volume. For if we want to see how administrative law distinctively caters for – populist – restrictive immigration policies, we need to know what the basic ingredients of anti-migration policies are. In other words, what do populist policymakers need for their restrictive migration laws? Or if we want to ask the question from the perspective of administrative law: what do populists want from administrative law?

The first ingredient of anti-migration policies is an anti-migrant discourse. Populists need to have their anti-migrant language and logic incorporated in legal instruments. Thus statutes should be capable of integrating the language whereby people can be categorized in terms of ‘us’ and ‘them’.<sup>10</sup> The law must be able to adopt language whereby certain migrants can be considered wanted

<sup>9</sup> For this historical development with references to the literature see Bas Schotel, ‘From Individual to Migration Flow: The European Union’s Management Approach and the Rule of Law’ in Martin Geiger and Antoine Pécoud (eds), *Disciplining the Transnational Mobility of People* (Palgrave 2013), 63; Bas Schotel, ‘Legal Protection as Competition for Jurisdiction: The Case of Refugee Protection through Law in the Past and at Present’ (2018) 31 *Leiden Journal of International Law* 20.

<sup>10</sup> Italy 2; Poland 3.2; Hungary 2; Austria 2.1.

and others unwanted.<sup>11</sup> The challenge of populism, however, is that the categorization is not so much based on actual behaviour, but on expected behaviour and ascribed properties of the particular groups (ethnicity, country of origin, etc.). For example, the legal instruments used to enact and implement anti-migration policies must be able to depict unwanted migrants as dangerous or criminal, but without the normal legal provisions and mechanisms of criminal law.<sup>12</sup> Normal criminal law actually defies the populist logic of making quasi existential distinctions between groups of people ('us' versus 'them'; 'good citizens' vs 'dangerous people'). Normal criminal law requires a clear statutory definition of a particular *behaviour* that is prohibited, as opposed to merely ascriptive qualities (e.g., race, nationality, religion, gender, etc.). Next, criminal law investigations and criminal prosecution pertain to alleged criminal behaviour of *individuals*, as opposed to groups. Furthermore, the alleged criminal behaviour must be established in fact by an independent court, as opposed to mere speculations and allegations. Finally, when convicted the person does not become a 'criminal'. In fact the notion 'criminal' to designate a person who has committed a crime does not exist in criminal law. One is a suspect, defendant, perpetrator, or convicted person. So strictly speaking it is conceptually impossible to use criminal law to depict migrants as criminals.

Second, as populists are typically on a permanent election campaign,<sup>13</sup> there is a constant need to adapt policies to the new discourses and policy objectives. In other words, populists need a kind of law that they can change by a stroke of the pen.<sup>14</sup> Of course, formally speaking legislation is the primary source of law in all branches of law, except for international, human rights and constitutional law. And in theory this allows for rapid and instant changes in the law. But in civil and even criminal law the main substantive legal norms change slowly over time and are often the product of a long interpretative practice, inside and outside the courts.

Third, restrictive migration policies are largely about making life difficult for unwanted migrants. It means one needs a kind of law that can govern the life of unwanted migrants as much as possible. This may mean actively intervening through coercive actions.<sup>15</sup> But it may also include non-coercive measures or simple passivity, for example, denying social, economic,

<sup>11</sup> Italy 2; Hungary 4.2; Poland 3.1, 3.2.

<sup>12</sup> Austria 3.1.

<sup>13</sup> See for this point Nadia Urbinati, *Me the People. How Populism Transforms Democracy* (Harvard University Press 2019), Chapter 3.

<sup>14</sup> Austria 2; Belgium 2.2; Italy 2.

<sup>15</sup> Italy 3, 4; Austria 3; Belgium 3.2.2.

educational assistance and limiting the practical possibilities to apply for permits and benefits.<sup>16</sup> The measures may target migrants directly, or those that are helping them, for example, NGO's or captains of vessels at the High Seas.<sup>17</sup> Again, non-coercive measures can be extremely effective in this respect; for instance, by denying subsidies or checking the transparency of funding (Poland, Hungary). Another useful tool is the capacity to take measures that are unlawful but nevertheless have immediate effect and which, until annulled by a court, can make life really difficult for a migrant (e.g., unlawful denial of a visa, see below Section 14.4.2).

Fourth, in order to implement restrictive migration laws, the authorities need sufficient freedom to act. This is especially relevant for populists. Though they may incorporate their populist discourse into the recitals of legislation and general objectives, it is more difficult to introduce outright racial, religious and ethnic considerations into actual legally binding criteria, especially when it comes to asylum law. What is needed is a mechanism whereby the migration authorities have discretion to determine whether the legal and especially factual conditions for a migration decision are satisfied. In other words, there must be a point up to which the migration authorities need not further justify and substantiate their decisions. This space of discretion should be sufficiently large to cover up for the populist motives underlying the migration decisions. Of course, such a mechanism runs the risk of being perceived as mere prerogative and arbitrary power. Thus, the mechanism must also provide for legal legitimacy. A proven tactic for legal legitimacy is technical expertise. Accordingly, the migration authorities are not presented as political agents but are technical experts in the field of migration. They deserve to have discretion because they are politically neutral experts. Another source of legal legitimacy is to ensure – at least on paper – that migration decisions are susceptible to review by an independent court. Yet, the downside is that genuine judicial review may significantly limit the discretion of migration authorities. Hence populists have an interest in a legal infrastructure that has enough judicial review to grant legal legitimacy but that in practice is sufficiently limited to maintain wide discretion. Populists need a legal infrastructure that provides for full access to the courts on paper, but that also allows authorities to *de facto* limit access to the courts. A case in point is limiting or abolishing independent legal aid for migrants. Another way for the legal infrastructure to grant both legal legitimacy and discretion is to have

<sup>16</sup> Belgium 3.3.2; Austria 2.4, 2.5; Hungary 4.3.1, 4.3.2, 4.3.3.

<sup>17</sup> Italy 8; Hungary 4.3.4; Poland 3.4.1.



courts that have – or think they have – only a limited mandate to review individual migration decisions.

So in order to enact and implement their anti-migration policies populists need at least four things from the law. First, they need a kind of law that can easily incorporate ‘hyper’ political discourses and objectives which are often new or alien to traditional legal concepts. Second, they need a type of law that is accustomed to constant and immediate change. Populists must be able to constantly adapt the law to what is politically topical as they are on a permanent electoral campaign. Third, they need a form of law that is capable of categorizing groups of people on the basis of ascriptive qualities rather than individual behaviour. Finally, they need a legal infrastructure that gives the administration the freedom to implement populist policies but while maintaining a veneer of legal legitimacy.

In the next sections I will show how administrative law caters for these things. For analytical purposes it is helpful to distinguish between two levels of administrative law: general administrative laws and individual administrative acts. For the purposes of this chapter, I define general administrative laws as the general legal norms issued by Parliament, government and administrative agencies that are governed by the general rules of administrative law, as opposed to criminal and civil law. For example, an Alien Act enacted by a national legislator is a general administrative law; royal and ministerial decrees further implementing an Alien Act also constitute general administrative laws. General rules, regulations and guidelines issued by Immigration Authorities constitute general administrative laws in my definition. The individual administrative decisions are legally binding acts issued by the administration and directed at individuals, for example, granting or denying asylum, granting or refusing a building permit, withdrawing social aid. The distinction between general administrative laws and individual administrative decisions is helpful because they cater for different ‘populist needs’. The characteristics of individual administrative acts are well suited to enable populists to enact populist policies. The characteristics of administrative law are well suited to enable populists to implement their policies.

#### 14.3 GENERAL ADMINISTRATIVE LAWS: FORWARD-LOOKING, DYNAMIC AND CAPABLE OF CATEGORIZING PEOPLE

General administrative laws have three qualities that are particularly well suited to cater for anti-migration policies. Administrative law-making is largely forward-looking, dynamic and has the capacity to categorize people. General administrative laws are forward-looking in the sense that they are about

improving the existing social, economic, cultural, environmental, and public ordering of things and people, rather than simply maintaining and restoring the existing order.<sup>18</sup>

Certainly civil laws also reflect political preferences and choices. But the objectives are much more general and indeterminate (e.g., individual autonomy, efficient markets). They are not forward-looking in the sense of seeking to improve and change the existing order. Rather civil laws are supposed to be an expression of or a medium for the existing order. For the civil laws (e.g., the Civil Code) do not tell people how to behave in precise and concrete ways: the precise and concrete content of civil laws are largely determined by individual consent and custom, and not by particular political objectives.<sup>19</sup> It also means that courts, not politicians, play a crucial role in specifying what behaviour is required or permitted. Often when legislators enact civil laws they explicitly indicate that the content of particular legal standards needs to be further developed by the courts. It implies that the legislator welcomes legal conflicts as they may result in case law. This is typically not the case for general administrative laws. These seek to immediately impact and improve the existing order. The administrative lawmakers (Parliament, national government, local administration or agencies) often issue highly detailed standards that – at least on paper – should allow the implementing authorities and citizens to immediately adapt their behaviour. In this respect general administrative laws rather seek to avoid these problems being brought to the courts.

Similarly, normal criminal laws (as opposed to the criminal provisions in administrative laws) are not about improving or changing the existing order but about restoring the order. Most normal criminal laws only tell you what not to do but do not tell people how to behave in order to improve the economy, environment, cultural life, etc. Normal criminal laws do not give concrete and detailed norms of behaviour in order to achieve a particular political objective.

The direct consequence is that while in civil and criminal law the content of particular substantive legal norms is determined by legal practice inside and outside the courtroom, in administrative law the lawmakers take the lead. This

<sup>18</sup> For a historical and theoretical account of these features, see Luca Mannori and Bernardo Sordi, 'Science of Administration and Administrative Law', in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence. Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Springer 2009), Sections 6.3–6.6 and 6.10–6.11; Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010), Ch. 14 'Potentia', Ch. 15. 'The New Architecture of Public Law'.

<sup>19</sup> For analytical purposes I consider the standard for negligence as a customary rule.

also explains the highly dynamic nature of administrative law-making. The production of new general administrative laws is prolific, especially compared to normal civil and criminal laws. But also the number of changes made to laws in a single functional field is impressive. Rather than having legal practice fill out the content of substantive norms, lawmakers constantly adapt the content of administrative law to meet new practical, bureaucratic or purely political needs.

The forward-looking and dynamic nature of general administrative laws makes administrative law the field of law that is most responsive to political ambitions and political discourse. I believe this basic feature of administrative law-making explains why administrative law constitutes an ideal legal infrastructure for populist anti-migration discourse. Administrative law is the field of law where law-making easily follows the particular political agenda of the lawmakers and does not feel the need for any long-term embedding in actual legal practice inside or outside the courts. If existing migration policy discourse and objectives are felt too soft, they can be replaced easily by new general administrative laws with a stricter discourse and policy objectives. To be clear, this is not specific to or distinctive for populist anti-migrant discourse. General administrative laws might just as well incorporate discourses that are progressive, multicultural and oriented at social equality. The point here is to show that, of all branches of law, administrative law is most capable of immediately translating political platforms into law.

The forward-looking nature of general administrative laws also means that administrative law is largely permissive and instructive. Contrary to criminal laws that are largely prohibitive, administrative laws seek to promote particular activities because they allegedly will improve the social, economic, environmental and cultural order, or even create a new one. A quintessential mechanism in this respect is the system of permits and licenses. In effect, in migration law, permits to enter and stay in the territory constitute the central legal mechanism. A permit system offers legal certainty to migrants who have a permit because they know *ex ante* that their entry and stay are lawful provided they comply with the conditions of the permit. This is typically not possible under the system of prohibitive criminal law rules that does not offer citizens the possibility to seek clearance rulings with the public prosecutor. But it also means that general administrative laws have the potential to intervene actively in many aspects of social life and impose particular types of behaviour. Furthermore, the system of permits also implies that migrants must proactively seek contact with the administration and apply for a permit. The migration authorities can then make life difficult for the applicant by stalling the procedure or refusing the permit. This is not possible under criminal law.

If authorities want to make life difficult for migrants through criminal law they must actively start legal proceedings against them.<sup>20</sup>

Closely related to the forward-looking and dynamic nature of general administrative laws and the ambition to improve or even change the existing social and economic order is the welfare state. Certainly, administrative law does not necessarily entail a fully-fledged welfare state, but a welfare state does require a well-developed administrative law. A large part of the welfare services is only accessible through the system of social benefits. It means that individuals have to pro-actively contact the administration and apply for social benefits. Here again the administration can make life difficult for individuals by stalling the procedure or denying the benefit. In most European countries today, social and economic structures are such that it is difficult for a person without a regular paid job to live a decent life without the minimal social and educational benefits provided for by the welfare state. This is even more the case for migrants. If so, then the welfare state and administrative law are both a means to help migrants and an instrument to make their lives extremely difficult. Furthermore, since the benefits are largely governed by administrative law, they do not have the same legal status as normal enforceable civil subjective rights. In other words, the distribution of the benefits is more a matter of policy than rights.

Another crucial feature of general administrative laws is the capacity to categorize people on the basis of ascribed qualities rather than their actual behaviour and will. Not only for policing people but also for benign measures, especially providing public services in the context of a comprehensive welfare state, it is essential to divide people in categories that are perceived relevant for the administration (age, gender, ethnicity, income, type of profession, medical condition, postal code, religion, domicile, number of children, etc.).<sup>21</sup> Furthermore, it is necessary that the categories are sufficiently formal in order to be incorporated in the bureaucratic apparatus. Finally, the authorities must be able to adapt the categories swiftly for reasons of either administrative or political expediency. The ability to categorize people on the basis of ascribed qualities makes it possible to immediately target people and distinguish between people without the need to establish their actual behaviour. It is therefore a powerful instrument to include and exclude people. The inclusion

<sup>20</sup> Of course, if one considers the deterrent effect of criminal law, then criminological studies have shown that perceived detection and punishment rates are main factors of deterrence.

<sup>21</sup> To be sure, some of these properties are strictly speaking the result of particular behaviour of the individual, but depending on the country and era many of these properties are also largely socially determined and often beyond the effective individual control of people.

and exclusion can be used for benign social and emancipatory purposes (e.g., comprehensive welfare state). But it can also be used for purposes of enacting restrictive migration policies, making it possible to distinguish between wanted and unwanted migrants on the basis of ascriptive qualities. In the field of labour migration it is possible to distinguish between wanted and unwanted migrants on the basis of seemingly neutral economic selection criteria such as education, training, work experience and language skills, which can operate as a proxy for more suspect criteria such as gender, ethnicity and religion. In the area of humanitarian visas it is possible to openly select on the basis of such suspect criteria. For example, a populist government may pro-actively decide to grant humanitarian visas to a particular group of Christian migrants. Since the humanitarian visas are a matter of favour and not right, the categorization will not be considered discriminatory. This form of categorization is even possible when a populist government pro-actively grants asylum to migrants located in an UNHCR refugee camp. This will not be considered a form of discrimination provided that the government leaves open, at least on paper, the possibility for other migrants to seek asylum.

Of all areas of law, administrative law is the best suited to categorize legal subjects in function of ascribed qualities. Criminal law and civil law look mainly at the actual behaviour and will of legal subjects. A case in point is the ruling by Italian constitutional court of 2010 annulling a Decree that made irregular stay an aggravating circumstance for any offence committed by a foreigner.<sup>22</sup> Of course, in civil law the ascribed properties of the person (e.g., gender, age, descent) are crucial in family law, the law of persons and estate law. But the categories have remained quasi the same over centuries and in practice cannot be changed swiftly. In administrative law legislative and regulatory change at both parliamentary and executive level is extremely fast and prolific compared to criminal and civil law.

#### 14.4 INDIVIDUAL ADMINISTRATIVE ACTS: DISCRETION AND LEGALITY BONUS

As we saw in the previous section, general administrative laws are well-suited to accommodate the highly political logic of populist anti-migration discourses and policy objectives. General administrative laws can easily and quickly translate political discourses and policy objectives because they are predominantly forward-looking and dynamic. General administrative laws can

<sup>22</sup> This case was presented by Stefano Zirulia during the workshop in Lund in 2020.

accommodate anti-migration discourses and objectives because they have the capacity to continuously make new categorizations of people. General administrative laws are thus a crucial element of the legal infrastructure that makes anti-migration policies possible.

Arguably, general administrative laws are often a sufficient tool for politicians. In many cases it may suffice for politicians to show they adopted laws that directly reflect a particular popular political position. The actual implementation, let alone effectiveness, of the laws is irrelevant. This seems particularly the case when it comes to migration policy. Across the political spectrum lawmakers have shown no interest in either the real empirical causes and modes of migration or the empirical effects of migration policies.<sup>23</sup> It suggests that the real effectiveness of migration policies and laws is often irrelevant from a political and electoral perspective. Probably for the majority of voters (and thus politicians) what really matters is their perception of migration and migration policies, not the actual effects. Still, general administrative laws do get implemented. Even if the overall effectiveness of migration policies is doubtful, sometimes migration authorities must take immediate and concrete action either to address real incidents or to appear tough in the media. Migration policies may not be effective, but they do have consequences.

If general administrative laws are the instrument to enact populist migration policies, then the individual administrative act is the instrument to implement the policies. The individual administrative act is another crucial element of the legal infrastructure that makes populist anti-migration policies legally possible. Elsewhere, I identified and analyzed the authoritarian elements of administrative law in European jurisdictions. My analysis focused on the typical features of the individual administrative act: i) presumption of legality and the privilege of execution; ii) policy and factual discretion for the administration; iii) judicial deference to policy and factual discretion.<sup>24</sup>

Presumption of legality means that the administrative act is deemed to be lawful; it has immediate legal effect and must be complied with accordingly. Only when the administration withdraws the administrative act or a court annuls it, does it lose its legal effect and validity. Furthermore, the administrative act can be executed, even by force, without the need to seek prior

<sup>23</sup> H. De Haas, M. Czaika, M-L. Flahaux, E. Mahendra, K. Natter, S. Vezzoli and M. Villares-Varela, 'International Migration. Trends, Determinants and Policy Effects' (2018) *IMIN Working Paper Series 142/DEMIG Paper*, 33.

<sup>24</sup> See Schotel 2021, *supra* note 1, 207 at footnote 49 with references to textbooks on European domestic and comparative administrative law.



conventional view has it that from discretion necessarily follows judicial deference. Judicial deference means that when reviewing an administrative decision, administrative courts do not make their own judgments of the merits of the case but rely on the decision of the administration. Particularly relevant in daily practice is judicial deference to fact-finding by the administration.<sup>25</sup> This means that the court does not establish the facts of the case but ‘only’ checks whether the fact-finding by the administration was reasonable. In other words, the court only establishes the reasonableness of the facts but not their truth.<sup>26</sup> Again, this is another feature of administrative law that gives the administration an advantage over citizens, which it does not have under normal criminal law.

The crux of the features of administrative acts is that they confer on authorities sufficient freedom and leeway to take measures that would not be possible under civil and criminal law. Through individual administrative acts, authorities can infringe the rights of people and harm their social and economic interests in ways that would not be possible under normal civil and criminal law. But that does not mean that administrative acts are taken in a legal void; they must be based on (statutory) law and are susceptible to judicial review. These features of the individual administrative act ensure that the actions by the authorities retain a lawlike character granting the authorities what I have called a legality bonus. It is the combination of the freedom to act beyond civil and criminal law and the legality bonus that makes administrative law such a convenient legal infrastructure for anti-migrant measures. As was discussed in Section 14.2 populists may loathe and despise liberal democracy and the rule of law, they still need the benefits of legal legitimacy.

What makes administrative law so convenient is the fact that on paper legal protection is available to migrants but in practice it remains extremely limited. Indeed, the contributions in this volume contain many references to limited judicial protection for migrants. For reasons of space I will concentrate on

<sup>25</sup> German administrative law is an exception in Europe as the administrative courts have a constitutional duty to establish the facts. For references to the legal literature see Schotel 2021 *supra* note 1, 212.

<sup>26</sup> One may distinguish between four types of facts: 1) facts that can be ascertained precisely (e.g. height of a building); 2) facts that must be ascertained through estimation (e.g. market size); 3) facts that must be ascertained through projections (e.g. environmental impact assessment); 4) facts that involve an evaluative judgment (e.g. threat to public order). Administrative courts typically conduct a reasonableness test when it comes to facts of type 2), 3) and 4). To be certain in criminal law, courts do not use a standard of 100% factual certainty either. But in criminal law the standard of proof is higher than in administrative law, namely beyond reasonable doubt. See Schotel 2021 *supra* note 1, 213–214.



three topics that are discussed in some of the contributions: alien detention, humanitarian visas and denial of free legal aid for inadmissibility cases.

#### 14.4.1 *Alien Detention*

A clear picture emerging from the country studies is the widespread use of alien detention.<sup>27</sup> Populist and right-wing parties in or outside government promote alien detention in order to fight abuse of the asylum system and illegal stay and to ensure effective return of failed asylum seekers. In addition, though not a lawful purpose, alien detention is used as a securitization measure. This contributes to more repressive and restrictive migration policies. But the country studies also show that alien detention predates the rise of populism and the securitization logic. This raises the question how largescale alien detention has been possible when liberal democratic parties had full control over parliament and the executive. Furthermore, how come the courts have not halted the widespread practice of alien detention? There are probably many factors that play a role here, but I believe that administrative law plays a key role.

To be clear, detention in and of itself is not a characteristic or typical product of administrative law; it is both a pre-trial measure and form of punishment under criminal law. However, detention without prior judicial authorization and not based on reasonable suspicion of a serious offence is highly problematic from a normal criminal law perspective. In the logic of administrative law, however, detention of aliens does not appear awkward and problematic for the following reasons.

Firstly, it is precisely the unique comparative advantage of administrative law that the administration can act without the prior authorization of a court, which explains the acceptability and normalization of detention as an administrative measure in the migration context. The presumption of legality and the privilege of execution warrant immediate factual action by the administration. From an administrative law perspective, the detention of aliens without prior judicial authorization is *qua* logic no different from any other immediate factual action taken by the administration. The fact that the administration can detain an alien without first seeking approval from a judge means that the procedural ball is put in the court of the alien. If for whatever reason the alien does not lodge an appeal against the detention before a judge, in some Member States it may mean that the alien can be detained for up to

<sup>27</sup> Austria 3; Hungary 4.3.2; Poland 3.4.2; Belgium 3.2.1; 3.3.3.

four weeks without any judicial check on the legality of the detention (e.g., the Netherlands).

Secondly, from the perspective of administrative law it is much easier to find alien detention proportionate than if one were to adopt a criminal law perspective. In criminal law the proportionality of pre-trial measures and punishment is codified. Criminal law has thresholds that determine when a certain measure or punishment is proportionate. So the period and type of imprisonment are explicitly laid down in laws, and the prosecutor and the judge only have certain bandwidth to propose or determine the proportionality of the punishment in relation to the seriousness of the offence committed. Similarly, even if there is reasonable suspicion and the detention of a suspect would serve the legal objectives of pre-trial detention (e.g., risk of absconding), it would simply not be permitted if the offence was not punishable with an explicitly stated minimal period of imprisonment (e.g., minimal four years in the Netherlands). In other words, in criminal law matters, the legislature has explicitly balanced the various costs and benefits and determined the thresholds of proportionality. Let us further explore how alien detention is considered proportionate under administrative law, while it would be difficult to justify it in terms of criminal law.

In administrative law proportionality is also a fundamental principle laid down in statutory law and/or case law in probably all Member States. However, in the actual practice of the administrative courts in many Member States the proportionality test turns out to be rather superficial. Specifically, in the many areas where there is room for a proportionality test, the administration also has factual and/or policy discretion. It is thus the administration that makes the first assessment of whether a measure is necessary and whether the benefits outweigh the costs for the affected individual. The administrative court can then check whether this assessment of the administration was reasonable. But as we have seen in many jurisdictions and in most areas of administrative law, the administrative courts show deference to the administration when it comes to factual assessments and balancing of interests.

If we were to consider alien detention from a criminal law perspective it would be difficult to find it lawful. Firstly, the administration has an incredibly wide bandwidth for the period of detention (e.g., up to eighteen months in the Netherlands). Administrative law thus grants enormous discretion to the administration. Secondly, in criminal law the maximum term of pre-trial detention is much lower than and in proportion to the minimal time of imprisonment for the offence of which the detainee is suspected (e.g., in the Netherlands: 110 days pre-trial versus minimal 4 years imprisonment).

A similar logic is impossible in alien detention because there is simply no offence to be penalized by imprisonment. Paradoxically, precisely because alien detention is not considered a punishment, it eludes a meaningful proportionality test.<sup>28</sup>

If the situation of the detainee is not exceptionally dire in the eyes of the judge, and the detention has a legal basis, the judge reviewing the detention decision only needs to check whether the detention serves the legal objective, for example, effective return. But this is largely a factual assessment of future events: namely risk of absconding and likelihood of expulsion. Under administrative law, these are matters in which the administration has large factual discretion (because of its alleged expertise). Consequently, in most jurisdictions the administrative court is likely to defer to the assessment of the administration. The court will limit itself to checking the reasonableness of the assessment by the administration. By way of hypothetical comparison, in the context of pre-trial detention a criminal court makes its own assessment of the risk of absconding and the risk for public order; it will not merely check the reasonableness of the State's decision to detain the suspect.

Against this background, the wide use of detention and the fact that administrative courts have not generally opposed this practice should come as no surprise. My point here is that alien detention is not merely a matter of the failure of human rights when it comes to migrants. I submit it is largely due to the fact that alien detention is a matter of administrative law and that limited judicial protection is a key characteristic of this body of law. It may help explain what many contributors to this volume have observed: the repressive and restrictive migration policies promoted by populist and right-wing parties are simply a continuation of techniques already used by liberal democrats.

#### 14.4.2 *Humanitarian Visas*

In the previous paragraphs, I explained how the administrative law practice of judicial deference paved the way for wide-scale alien detention. In theory,

<sup>28</sup> To be clear, I do believe that administrative courts can and should conduct a genuine fact-based proportionality test in light of the official objective and nature of alien detention. Alien detention is a form of administrative coercion, not punishment. Administrative coercion is an instrument to entice an individual to comply with or execute a legal obligation. In the case of alien detention, the migrant is coerced into obeying the order to leave the country. In other words, the alien detention must be proportionate to achieving this objective. I think it would be difficult to convince a reasonable person how alien detention can contribute to this objective if it does not result in immediate expulsion. Any alien detention beyond this point seems proof of its own ineffectiveness.

judicial deference should not take place when it comes to asylum cases. Pursuant to Article 46 (3) of the EU Asylum Procedure Directive asylum decisions should be subject to 'a full and *ex nunc* examination of both facts and points of law'. The provision was introduced in order to implement case law of the ECtHR and CJEU to this effect. Many experts of migration law, of course, welcomed this improvement. But it did not raise any questions about administrative law procedures in general. Paradoxically, the Directive confirms the special status of *asylum* procedures and thereby normalizes the fact that for migration cases, *other than asylum and international protection*, it is perfectly fine not to have a full examination of the facts. The Directive is an illustration of how the legal community accepts or acquiesces to the fact that under administrative law the default is not to have full examination of facts and points of law by an independent court. Again the default in administrative law is judicial deference. The idea of a default is important because it helps to analyze two developments described in some country reports: politics of humanitarian visas and the abolition of free legal aid for appeals against negative asylum decisions for reasons of inadmissibility.

Desmet and Smet describe the so-called humanitarian visa incident whereby the Federal Government in Belgium refused to execute orders by the courts to issue a short-term humanitarian visa to a Syrian family.<sup>29</sup> The Belgian courts held that the migration office failed to state reasons why the family should not get a short-term humanitarian visa immediately. Zirulia reported how under the populists in Italy a special Decree repealed the humanitarian visa and replaced it with an exhaustive list of grounds for humanitarian visas.<sup>30</sup> Humanitarian visas are clearly a tool for all sorts of political games. But what makes them so fit for that purpose is the fact that neither the EU Visa Code nor the Asylum Procedure Directive and the ECHR apply to humanitarian visas. As a result, these visa decisions are not subject to a full judicial examination of the facts. In other words, the default regime of judicial deference applies. This is aggravated by the fact that under domestic law, granting humanitarian visas is a matter of administrative discretion *par excellence*. Also under the Italian mechanism of an exhaustive list of grounds for granting a visa there is wide discretion, because the grounds only permit the administration to grant a visa. It does not *require* the administration to do so if conditions are satisfied. In this respect, it should be noted that in the Belgian visa case, if the administration had made the effort of stating some plausible reasons for refusing a humanitarian visa, the administrative court

<sup>29</sup> Belgium 3.4.

<sup>30</sup> Zirulia *supra* note 22.

would have probably shown deference to the administration's judgment. In other words, since humanitarian visas are governed by default by administrative law, judicial deference applies and they can remain a tool for hyper political games.

#### 14.4.3 *Inadmissible Asylum Applications and Denial of Free Legal Aid*

The country studies also show how free legal aid is denied for appeal cases that are expected to be unsuccessful.<sup>31</sup> The denial of legal aid applies to appeals against decisions whereby the migration office found the asylum application inadmissible because the applicant is a national of a safe third country. Articles 33–38 of the EU Asylum Procedure Directive provide for a mechanism whereby the Member State may designate third countries that are considered safe. Applications from nationals from these countries can be treated as inadmissible after the migration office has examined the application and conducted an interview. The rationale is efficiency. The EU Asylum Procedure Directive also requires Member States to ensure free legal aid for applicants in the stage of appeal against the asylum decision before a court (Art. 20(1)). However, Member States may provide that free legal aid is not granted when the appeal is deemed to have no tangible prospect of success (Art. 20(3)). Appeals against inadmissibility are typically considered to have little chance of success. The practices described in the country studies are thus in compliance with the EU Asylum Procedure Directive.

Indeed, appeals against inadmissibility cases have little chance of success because the burden of proof is put virtually entirely on the applicant. He must show that either his country of nationality is not a safe country, or that there are serious grounds for considering the country not safe in his particular circumstances (Art. 36(1) EU Asylum Procedure Directive). In theory according to the Directive, courts must always conduct a full examination of the facts in asylum cases, including appeals against inadmissibility; and in theory courts are not formally bound by the designation of the safe third country but it is clear that in practice courts tend to defer to the expertise of the administration. However, precisely in situations where a court tends to be extremely deferential, applicants need professional legal aid to build the strongest case possible.

Denying legal aid in cases when it is most needed is a clear limitation of effective judicial protection. It would not be out of place in an authoritarian

<sup>31</sup> Austria 2.4.

regime. However, it is fully sanctioned by the Asylum Procedure Directive and predates populist and right-wing law-making. I believe it can be understood as a product of the logic of administrative law. It is a clear example of the dominance of the central purpose of administrative law, namely effective administration and public policy. Furthermore, contrary to what is the case in most civil and criminal law procedures, representation by a lawyer is not required in the administrative courts in most jurisdictions. Ironically, the reason was to promote access to justice. Administrative law in general and administrative court procedures in particular were supposed to be less technical and formal. It meant that the average citizen could seek justice without the help from an expensive legal counsel. This benign rationale turns out to be very useful in ensuring limited access to justice in migration cases.

#### 14.5 RESILIENCE

The first research question posed by the editors of this volume pertained to the connection between populism, restrictive migration laws and democratic decay. I turned this question around and asked what legal infrastructure makes it legally possible to enact and implement the populist restrictive migration laws that break down the rule of law. My answer is administrative law. This answer largely informs my response to the second research question: what are the possibilities of legal resilience against populist restrictive migration laws? Little, is the short answer. If we do not address some structural features of administrative law *from within*, there is little legal resilience against restrictive migration policies.

The country studies report seemingly promising instances where restrictive migration laws and individual decisions have been stalled, halted or annulled in the name of the law. Three types of law have been successful in this respect: ECHR, EU and constitutional law. Of course, in some countries constitutional law cannot do the job because the constitutional courts are packed by the populists. Also, the impact of ECtHR and CJEU decisions on unwilling populists ruling in states that are in democratic decay is far from straightforward. Still, the courts and lawyers did what they were supposed to be doing: challenging unlawful state practices.

The question is how to understand these instances of resilience. Is it the beginning of a practice whereby the unlawful features of migration policies will be structurally scrutinized by the ECtHR, CJEU and constitutional courts? Or does it actually reinforce and legitimize the current legal infrastructure by only addressing the migration laws and decisions that actually

make it to court and that have the most sloppy legal and factual justifications? I am inclined to adopt the pessimistic position.

When jurists predominantly rely on the three types of law (ECHR, EU and constitutional law) to challenge restrictive migration policies they already concede too much. The reason is that they overlook the structural features of the basic legal infrastructure, the administrative law, that underpin migration law. Let me explain my point with a counter example from criminal law. The country study on Italy contains a great example of legal resilience: the case where the Court of Cassation declares illegal the criminal arrest of a Commander who resisted a public official executing a ban to enter an Italian port.<sup>32</sup> The alleged criminal offence committed by the Commander was resisting a public official. Under administrative law, the order by an official is presumed to be lawful, must be obeyed immediately and can be executed by force. However, instead of the administrative law route, the authorities pursued the route of criminal law since they wanted to establish that the Commander committed a criminal offence. However, criminal liability for resisting a public official vanishes, if the administrative order issued by the official conflicts with another legal obligation. The duty to rescue at sea is such a legal obligation. It then follows that the criminal law logic puts aside the administrative law logic of presumption of legality and privilege of execution, at least for the purposes of the criminal law case.<sup>33</sup> The Court of Cassation simply made use of the legal resilience within criminal law. It is a basic feature of criminal law that a conflicting legal obligation may remove criminal liability for violating another criminal provision. This is not a typical human rights law principle but a basic notion of criminal law practice itself. In fact, probably any criminal lawyer regardless of his or her political preferences could tell you why upholding the criminal liability of the Commander is problematic from a criminal law perspective.

Of course, the resilience potential of criminal law is extremely limited when it comes to migration policy. This is not a defect of criminal law, but simply because most migration policies are not matters of criminal law.

<sup>32</sup> Italy 5.

<sup>33</sup> The logic of criminal liability is simply asymmetric to the administrative law logic of the duty to obey officials. The asymmetry may also work in the opposite direction, i.e., against the duty to rescue at sea. Imagine the Commander complied with the administrative order and had to violate his duty to rescue at sea. Depending on the situation, the administrative order may excuse the Commander from fulfilling his duty to rescue at sea. Also, it should be noted that border guards who were enforcing the administrative order are probably also covered by the presumption of legality and privilege of execution attached to the administrative order.

In fact, authorities – especially those implementing and executing migration policies – have a clear incentive to circumvent criminal law.<sup>34</sup>

The point of the criminal law example is to show the centrality of legal resilience from within the legal infrastructure. Criminal law clearly has such resilience. But it also means that authorities will only use criminal law to a very limited extent when it comes to migration policies. The dominant legal infrastructure remains administrative law. Ironically, the three types of law (i.e., ECHR, EU and constitutional law), which according to the country studies display the most legal resilience, signal two things. First, administrative law lacks the legal resources of its own to resist restrictive migration policies. Second, the rulings of the ECtHR, CJEU and constitutional courts legitimize this state of affairs. In particular, in the case where the ECtHR, CJEU or the constitutional courts intervened, they found nothing legally wrong with the legal infrastructure underpinning the restrictive migration policies. As a result, there is no legal incentive for administrative courts, practicing jurists and academics to re-examine and challenge the basic features of administrative law.

As a consequence, I cannot help but conclude on a pessimistic note. There are no signs that the legal profession will take up the task to challenge the legal infrastructure of immigration policies from within. So far, the basic features of administrative law in most European jurisdictions have remained unchallenged. Probably the clearest illustration is the widespread practice of alien detention. To date the legal profession has not come up with legal arguments from within administrative law to the effect that the institution of alien detention in itself as we know it, may be unlawful. At best, the legal profession can come up with legal arguments to make the *conditions* of detention more humane.<sup>35</sup> Domestic administrative law in cooperation with the ECtHR produced a sophisticated mechanism enabling long term detention of unwanted persons without a criminal trial while benefiting from an uncontested legality bonus. Though this mechanism was developed under liberal democracies and predates the new wave of populist governments, it constitutes a perfect tool for any authoritarian regime, populist or otherwise.

<sup>34</sup> See Schotel 2021 for references to reverse ‘cimmigration’ *supra* note 1, 217–219.

<sup>35</sup> Belgium 3.3.3.



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