

## 9 The European Union's Refugee Policies

### Cosmopolitan and/or Democratic?

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#### 1. Introduction

The European Union has never been shy about its normative commitments. Built on the ashes of the Second World War, its successive representatives made abundantly clear that the integration of the different policy areas was but a means to a higher end: namely, intertwining the interests of its member states to make any conflict between them unconscionable. What really drives the European Union is not a unified internal market, a common agricultural policy or a student exchange programme; it is to urge an ever-closer union between its member states based on their shared respect for universal norms and values. However, the sudden influx of refugees over the summer of 2015 acted as a litmus test of the EU's commitment to the universality of its norms.<sup>1</sup> For, as compelling as the rosy depiction of the integration process is, it overlooks the fact that European norms and values appear to have, as a matter of fact, a limited scope.<sup>2</sup> Judging by the European Union's scramble to contain the refugees' arrivals and to restrict their access to the European territory, the European Union does not weight equally the fundamental rights of *all* persons, regardless of their origins and belongings.

This story of disappointed normative hopes is a familiar one.<sup>3</sup> But it would be too simple to reduce the refugee crisis of 2015 to a moral narrative in which the European Union gets castigated for failing to meet the idealistic goals it set for itself. There is another issue at stake. The question of the alleged democratic deficit of the European Union intersects with its commitment to values and norms. Undoubtedly, the European integration proved to be a challenge to well-established national democracies. Peter Mair contends that it contributed to the hollowing out of democracy at the domestic level without providing a surrogate democratic activity at the European level.<sup>4</sup> From that perspective, as a result of this democratic impoverishment, contesting an allegedly top-down imposition of norms and values can now be depicted as a form of democratic resistance, a popular struggle to reassert national sovereignty against undemocratic exogenous constraints.<sup>5</sup> Nationalist governments in Eastern and

Southern Europe have picked up on this general theme and turned it into a powerful rhetorical weapon in the context of migration policies.<sup>6</sup> The staunch refusal by the countries belonging to the Visegrád group in 2016 to accept any relocation of asylum seekers according to a plan drafted by the European Commission<sup>7</sup> was justified, in those exact terms, as an expression of dissent by a democratic people refusing to surrender their right to self-determination to a faceless bureaucratic authority.

Upon closer inspection, neither of those two frames is entirely convincing though. The refugee crisis of 2015 can be ascribed neither to a breakdown of the EU's commitment to its norms and values nor to an alleged democratic deficit. Both accounts fail to capture to their full extent the normative stakes of the political debate regarding the right to asylum in the European Union after 2015. Both frames are too one sided and overlook the complexity of migration issues at the European level. To present the reader with a more compelling understanding of the current political debate, this chapter makes two distinct but interrelated claims. First, to make sense of the EU's reaction to the 2015 migration crisis, we need to acknowledge the existence of a dilemma between two European norms: democracy and presumably universal individual rights (the right to asylum, in this case, epitomising those universal rights). Second, I will contend that this political tension can be ironed out (but not fully expunged) on the condition that we acknowledge that the refugee regime is not an exogenous constraint on democracy but one of its constitutive components.

The chapter will first argue that the European Union is a political project that insists on seeing itself as normatively driven. In the following section, it will contrast the Union's normative commitment to assist and protect asylum seekers with its actual refugee policies, revealing that the Union falls short of respecting the standards set in the Geneva Convention. In a third section, I will cast a critical glance at the intellectual tradition within political thought that depicts the European Union as a cosmopolitan polity in the making. I will argue that the Union's failure to live up to its commitment to provide asylum makes this cosmopolitan label inappropriate. I will conclude this exploration by taking issue with the argument according to which the Union must make a dramatic choice between cosmopolitanism and democracy. Using the question of asylum as a case in point, I will argue that these concepts are mutually supportive and that, by respecting unconditionally the Geneva Convention, the Union would turn out to be both more cosmopolitan and more democratic.

## **2. The Normative Commitments of the European Union**

The preamble of the European Union's Charter of Fundamental Rights may be replete with bold normative commitments, but it is also the apparent

result of a compromise between distinct political cultures and worldviews.<sup>8</sup> As a result, its wording is as ambitious as it is ambiguous: “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”.<sup>9</sup> The list of the values on which the European Union claims to be based is certainly impressive, but it falls short of explaining how this wide spectrum of values is meant to be articulated. How does the EU plan to reconcile freedom and equality? Why is solidarity a “value” while democracy is presented as a “principle”? Those first exegetical issues are further compounded by the next two lines of the preamble stating that “[the Union] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”.<sup>10</sup> Here, the preamble runs into a philosophical issue as old as the original *Déclaration des droits de l’homme et du citoyen*: who exactly is the subject of this political order? The individual or the citizen? Any person, regardless of their social, legal and political status or the recognized member of the political community? Where should one lay the emphasis: on the recognition of universal rights that one holds by the simple virtue of being a human being or on the importance of bonding the citizens within a common political community?

Nevertheless, this ambivalence does little to undercut the political importance of the Charter. Its wording may have some loose ends, and its overall structure may be fuzzy, but the very fact that it has been written down, approved by democratically elected representatives of the member states and eventually integrated into the European acquis decisively shaped the European integration process.<sup>11</sup> For, beyond the exegetical debate on the exact content of the Charter, its possible inner contradictions and its elusive concrete applications, it cements the idea that the European project is normatively driven.<sup>12</sup> Its end goal is neither to establish a new superpower on the international scene nor to monopolize the legitimate means of violence at a continental scale. Rather, it is to foster cooperation between some member states that decided to adopt a norm-based behaviour in their respective interactions as well as on the international scene because of their shared troubled past.

### 3. . . . And the Contrast With Its Actual Refugee Policies

It is thus all the more troubling to witness the panicked behaviour of the EU towards refugees after their exceptional influx in the summer of 2015.<sup>13</sup> One would be hard pressed to reconcile the lofty normative commitments of the EU towards the universal value of equality or its focus on the freedom of individuals with its actual practices at its external borders. In theory, refugees are under the protection of a robust international legal regime, duly acknowledged by Article 18 of the European Charter (“The right to

asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees”). And yet, the European Union has played a detrimental role, either directly or indirectly, in the reception of refugees on several occasions – severely eroding the right to asylum in the process.

According to David Owen, “the fundamental norm of the contemporary refugee regime . . . is that of non-refoulement”.<sup>14</sup> The norm of non-refoulement is a binding principle according to which a state is under the obligation not to return a person meeting the criteria of refugeehood.<sup>15</sup> Originally linked to refugeehood, this norm now can also apply to persons who do not formally meet the criteria of refugeehood but whose human rights risk being violated if they were returned. To access the status of refugee, one must demonstrate that “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion”<sup>16</sup> compelled one to flee his or her country and to lose, as a result, his or her political membership. Though formulated negatively, the principle according to which persons cannot be returned to a country in which they would likely face persecutions requires the states to take some practical steps. States must not just refrain from returning indiscriminately newcomers; they must also create a specialised branch of their legal system to assess the various asylum claims and develop some hosting capacities to accommodate the asylum seekers while their claims are being processed. Ideally, they should also provide the asylum seekers whose claims have been proven to be founded with some assistance to integrate as smoothly as possible into their new political community.

The European Union has been found wanting in its obligations towards refugees in every single one of those aspects. In December 2020, members of the European Parliaments called for the resignation of Fabrice Leggeri, the executive director of the EU Border and Coast Guard Agency (formerly known as Frontex), after a parliamentary hearing during which he failed to disprove some serious allegations that his agents had been involved in illegal “pushbacks” in the Aegean Sea (a practice in which a sea vessel is returned to its point of departure while the claims to asylum of its passengers are ignored).<sup>17</sup> Furthermore, a specialised NGO, the Border Violence Monitoring Network, compiled hundreds of migrant testimonies in a *Black Book of Pushbacks*, alleging that police violence towards migrants is widespread at the borders of Greece, Italy, Croatia, Slovenia and Hungary.<sup>18</sup> Commissioned by the GUE political group in the European Parliament and made public in December 2020, this report claims to document 12,000 cases of migrants being violently pushed back in those places since 2016.<sup>19</sup> If those different allegations were proven true, they would amount to a severe violation of the non-refoulement principle. Unfortunately, this is far from being the only shortcoming of European refugee policies.

The EU also struck a diplomatic deal with Turkey in March 2016 in which Erdogan's administration agreed to enforce strict control of the Turkish land and sea borders with Europe in exchange of a grant of roughly six billion euros. The deal dramatically reduced the number of migrants crossing the Aegean Sea in dangerous conditions and has consequently been considered an effective solution by the European authorities.<sup>20</sup> But this charitable assessment overlooks the fact that Turkey is a party to the 1951 Geneva Convention but not to its 1967 New York Protocol, which lifted the restriction of the Convention's scope (initially limited to European refugees only in a post-WWII context) and made the application of its principles truly global. As a result, the protection of the fundamental rights of non-European refugees in Turkey is weak at best and subject to arbitrary decisions.<sup>21</sup> What is even more distressing is that this diplomatic deal is part of a larger pattern of diplomatic behaviour. The EU has made migration control one of its central concerns in all its discussions and exchanges with its neighbouring countries in a transparent attempt to externalise this sensitive issue.<sup>22</sup> But the delegation of the control of migration to countries such as Morocco, Lybia and Egypt, whose right-protection records are heavily criticised by independent NGOs (and that are not all parties to the Geneva Convention), ought to be scrutinised. It is fair to assume that this outsourcing of the European responsibilities in matters of migration can only result in a further erosion of the international refugee regime.

There are still two more ways in which the EU could be said to endanger the refugee regime. In March 2020, in the context of some increasing diplomatic tensions between Ankara and Brussels, Erdogan decided to turn migrants into a bargaining chip. He lifted temporarily Turkish control of its land border with Greece and urged migrants to seize this opportunity to cross to Europe. Greece reacted swiftly, closed its border with Turkey and temporarily suspended the right to asylum in violation of Article 18 of the European Charter.<sup>23</sup> Far from being castigated for its action, Greece received a delegation of high-level European officials, including the presidents of the Commission, the European Parliament, and the European Council. During their visit, they offered the support of their respective institutions to Greece, and Ursula von der Leyen even praised the country in a public speech for being the "*aspida*" of Europe (the "shield" in Greek).<sup>24</sup> This chain of events, though it was prompted by a norm-shattering decision made in Ankara, set a dangerous precedent – throwing many unsuspecting asylum seekers into harm's way in the process.

One last element ought to be pointed out. As indicated earlier, having a robust international refugee regime requires more than just refraining from rejecting migrants. It implies the development of some public capacities to process the asylum seekers' claims and to accommodate them during that time. This, obviously, comes at a cost. Though migrants may afterwards

prove to be valuable assets to their new political communities, the latter first have to shoulder the burden of providing for them temporarily. And within the European Union, the burden of providing for the asylum seekers is distributed very unevenly.<sup>25</sup> It is mostly a function of the member states' geographical location and of the attractiveness of their respective labour markets. Far from mitigating this disequilibrium, the Dublin Regulations that govern the EU's Common Asylum System exacerbate it.<sup>26</sup> They establish that asylum seekers must apply in the member state through which they entered the EU's territory, meaning that Greece and Italy and, to a lesser extent, the countries located on the "Balkan route" into Europe bear the brunt of this responsibility. Far from being part of the solution, the EU is part of the problem here too. Its regulations prompt the return of migrants from lightly affected countries to heavily burdened Southern European countries in which the migrants are now increasingly accommodated in squalid refugee camps with subpar health and safety conditions.<sup>27</sup>

#### **4. The Problem With the Thesis of a Cosmopolitan Europe**

This quick overview of the recent European refugee policies is sobering and would appear to call for a toning down of the European rhetoric on norms and values. Either the EU holds the rights of individuals dear regardless of whether they belong to one of its member states, or the EU prioritises the securitisation of its borders over foreigners' rights.<sup>28</sup> Sandra Lavenex, for instance, does not mince words and calls the current Common European Asylum Policy a form of "organized hypocrisy"<sup>29</sup> since it pits a sustained rhetoric of protective claims against the practice of increasingly protectionist policies. Though the wording is harsh, her analysis is not aiming to pass judgment. She rather intends to highlight that the decoupling between norms and practices is largely the result of practical necessity. In her view, though several institutions of the EU (such as the European Commission and the European Parliament) are genuinely concerned by the level of rights protection enjoyed by asylum seekers and try to set some demanding benchmarks in that respect, the European Council and the Council of the European Union must also take into consideration the reluctance of several of its member states to commit to any ambitious reform of their refugee policies. Squeezed between a rock and a hard place, and plagued by inter-necine institutional conflicts, the European Union eventually fails to reconcile organisational obligations and normative commitments, at the expense of the asylum seekers.<sup>30</sup>

Assuming that Lavenex's diagnosis is right, what could be the way out of this conundrum? How could the distinct European institutions, with their conflicting agendas, reconcile their normative discourses with their political practices in the field of refugee policies? We owe Garrett Wallace Brown

a convincing answer to that question. Summed up abruptly, his suggestion is that the European institutions should double down on their normative commitments and make sure that their practices are consistently aligned with their stated universal values.<sup>31</sup> To make his case, Brown leans heavily on a body of literature that describes the political system of the European Union as a cosmopolitan polity in the making.<sup>32</sup> According to that perspective, the European Union could be construed as having adopted Kant's philosophical pamphlet *Towards Perpetual Peace* as a blueprint for its integration process.<sup>33</sup> To understand why those authors find it legitimate to look at the European integration process as a Kantian project, we need to briefly unpack the latter's insights about the possible construction of a cosmopolitan polity.

Kant's project for perpetual peace is as much part of the social contract theory as it contributes to its renewal. It starts conventionally by putting forward the argument that political communities are the results of a hypothetical contract passed between all citizens and embodied in a republican state. Kant goes on to expand the scope of the natural law theory by adding that this social contract cannot be restricted to the domestic level. For the pacification of domestic social life cannot be sustained if those republican political communities are under constant threat of an aggression from their lawless neighbouring political communities.

Hence, the need for another social contract at a new scale between the republican states. However, Kant advocates against a simple reproduction of the logic adopted at the domestic level, which would suggest that the states place themselves under higher authority. Kant rather suggests that the states should enter a permanent supranational association – a “federation of free states” – in which their sovereignty would be respected but nevertheless curbed by their voluntary submission to the authority of international law. (“The law of nations shall be founded on a federation of free states”).<sup>34</sup>

However, according to Kant's own logic, this solution is far from perfect or definitive. If states retain their sovereignty, even if they jointly form a supranational league, the prospect of an armed conflict remains. The possibility of a sovereign member of the association turning rogue and behaving aggressively cannot be excluded since there is no higher authority able to police non-compliance with international norms.

Hence, the need for yet another social contract between states and foreign individuals, granting the latter a universal right to hospitality. (“The rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality”).<sup>35</sup> In Kant's view, this right of hospitality allows individuals to travel freely between states and to establish some cross-border contractual relations (but not to settle permanently) in a foreign state. This constant transnational flow of individuals will ultimately contribute to the resilience

of the permanent association of states because it will result in a tightly knit network of cross-border relations and interweave the different civil societies so closely that states would have no remaining incentive to engage in any bellicose behaviour on the international scene.<sup>36</sup> It is equally noteworthy that Kant opens his discussion of hospitality by pointing out, "One may refuse to receive him [a stranger] when this can be done without causing his destruction".<sup>37</sup> Written in 1795, long before the Geneva Convention turned refugee law into a regime of positive international law, Kant's proviso foresees the distinction between refugees and other types of migrants. While migrants only enjoy a right to temporary sojourn and could thus hypothetically be returned to their home state if they overstayed their welcome, the migrants at risk of persecution in their home country benefit from an additional legal protection, anticipating the principle of non-refoulement.

According to Jürgen Habermas and Jean-Marc Ferry, the European Union can be shown to have drawn its inspiration from Kant's cosmopolitan project. However, contends Garrett Wallace Brown, they both neglect the fact the European Union falls spectacularly short on the issue of the right to hospitality. What is uncontroverted, for all three authors, is that the Union shares some traits with Kant's cosmopolitan association of free states. Wallace Brown concurs with Ferry and Habermas that the Union fulfils the first two conditions to be on the path to becoming a cosmopolitan polity. Where their opinions diverge is thus with regard to the cosmopolitan law. Let us look briefly at how Ferry and Habermas apply Kant's framework to the European project, in order to better pinpoint the origin of their disagreement with Wallace Brown.

First, according to Ferry and Habermas, the Union conforms to Kant's suggestion that the original core of a cosmopolitan league of states will be made of an exclusive club of republican states or, in more contemporary terms, of liberal democracies. The Copenhagen criteria, so called since they were agreed on during a 1993 European Council held in the Danish capital, made explicit the political conditions to join the European Union in the context of the Eastern enlargement and the accession of former communist countries. Those criteria stated:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.<sup>38</sup>

Second, the Union is neither a confederation (or an international organisation) in which the constitutive parties retain their full sovereignty nor a federation in which federated entities have abdicated their sovereignty to



a higher federal authority.<sup>39</sup> Since the *Van Gend en Loos* case in 1963, the European Court of Justice has asserted the primacy of European law over domestic law, but member states are nonetheless free to leave the Union at any time.<sup>40</sup> Kant's apparent oxymoron, the "federation of free states", thus turns out to provide a surprisingly apt description of the current constitutional architecture of the European Union.

Up to this point, Habermas, Ferry and Brown are thus in broad agreement regarding the cosmopolitan credentials of the European Union. The point of contention revolves around the understanding of Kant's third level of its multi-layered social contract: the cosmopolitan law creating mutual obligations between states and foreign individuals. Habermas and Ferry argue that the European Union also fulfils that third condition for two distinct reasons. First, the Union's internal borders have been largely dissolved by the creation of the Schengen area, allowing the free movement of goods and persons across most of the European continent.<sup>41</sup> Second, the 1992 Maastricht Treaty materialised the shift from an economic to a political union by granting all nationals of the member states European citizenship. This new kind of citizenship, which supplements but does not substitute itself for their national citizenship, allows them not only to travel across the Union but also to settle, work, enjoy social benefits and even participate in local and European elections in a member state other than their own.<sup>42</sup> Both provisions would go even further than Kant's limited right to hospitality and pave the way for the sort of transnational network intermingling private interests that Kant thought would bring a much-needed robustness to the free federation of states (according to a prescient neo-functional logic, though this concept would not be coined until much later).

However, according to Brown, one perspective goes missing in this description of a generous right to hospitality. Habermas and Ferry exclusively consider European foreign individuals and conclude on that basis that they enjoy a nearly total freedom of movement that goes well beyond Kant's prescription. First, this calls for a caveat. There are indeed some restrictions on that internal freedom of movement, even for Europeans. European citizens can stay in another member state for a period longer than three months only "if they (a) are workers or self-employed persons in the host Member State, (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State".<sup>43</sup> This condition has been used in the past to restrict and constrain the mobility of Roma families from Bulgaria and Romania.<sup>44</sup> But, more tellingly perhaps, Habermas and Ferry secondly fail to take into consideration the migrants referred to in the European legislation as third-country nationals: that is, foreign individuals from outside Europe. The perspective of the latter on mobility and access to the European territory offers a stark contrast. As developed at some length

in the previous section, from the perspective of refugees, EU's migration policies could hardly be characterised as hospitable. The limited requirement of a universal but temporary right to sojourn cannot be met if a battery of protectionist and exclusive policies, ranging from illegal pushbacks to diplomatic efforts aimed at the externalisation of border controls and an increasingly tighter and more demanding access to visas, remains in application at the external borders of the European Union. Even introducing an asylum claim is made impossible by several of those measures, thus weakening the special protection that the refugee status is supposed to offer. The analogy between Kant's cosmopolitan project and the European Union would thus stop here. Garrett Wallace Brown concludes that, if the European Union truly wants to be a cosmopolitan polity, it should amend its treatment of third-country nationals and align it with the requirements of a universal right to hospitality.

Garrett Wallace Brown is certainly right to underscore the discrepancy between an internally cosmopolitan European Union and its disregard for non-European foreigners. He is equally right to infer that Habermas and Ferry conclude too hastily that the European Union embodies a form of cosmopolitan vanguard. But I would like to argue that his critique may be missing a larger point: namely, that the advocacy of a more liberal and universalistic right to hospitality is likely to be met with fierce backlash and would not register well with several member states. For this question is not just a matter of degree ("to which extent is the Union committed to observe and protect the right to asylum?"); it also springs from a puzzling conflict between two norms that are central to our liberal-democratic regime.

## 5. Pitting Democracy Against the Right of Asylum

No EU member state rejects the right of asylum outright, even though several governments may be actively pushing back migrants and offering few opportunities for them to register an asylum claim. The disregard for the right to asylum is rather construed as being part of a larger debate on the best way to preserve democracy against the assault of liberal norms. Orbán's rhetoric provides us with the most clear-cut example of this attempt to reframe the issue.<sup>45</sup> In a highly polemical speech delivered in 2014, Orbán famously claimed that "a democracy is not necessarily liberal". He elaborated further:

[I]n this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny the foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.<sup>46</sup>

Orbán's speech lacked the rigor and the conceptual substance of an academic exercise in political theory. But its key conceptual point, the idea of an "illiberal democracy", can nonetheless be reconstructed along some familiar lines. It blends the communitarian condemnation of liberalism's alleged inability to cement social cohesion (for it would be a mere society of individuals whose only bonds are fleeting private interests)<sup>47</sup> with a staunch nationalist rebuke of the perceived intrusiveness of international norms into domestic decision-making.<sup>48</sup> Unsurprisingly, Orbán was also one of the fiercest critics of the European Commission's relocation scheme, according to which asylum seekers arrived in 2015 would have been redistributed across the different European member states. Here again, he chose to frame it as an issue regarding the democratic deficit of the European Union rather than a frontal opposition to asylum as such. During an interview, he asked: "When and who voted for admitting millions of people who entered illegally, and distributing them among EU member states? What is happening lacks democratic foundations".<sup>49</sup> This sketch of the political issue pits the alleged popular appetite in Hungary for more restrictive migration policies against the Commission's authoritative imposition of liberal norms.

My contention is that a part of Orbán's take on the issue is, as a matter of fact, insightful. He is right to point out that one cannot understand the debate on the right to asylum if one fails to perceive that it relates to a larger discussion regarding democracy. However, conceding this point does not imply that we must accept Orbán's subsequent conclusion: namely, that democracy is at odds with the right to asylum.

The undeniable appeal of Orbán's rhetoric stems from the fact that it alludes to an uncomfortable truth about our modern liberal democracies. Modern liberal democracies are indeed "paradoxical"<sup>50</sup> political regimes since they conflate two political traditions (liberalism and democracy) partly at odds with each other. Schematically, liberal democracies draw their legitimacy from two philosophical sources resting on distinct political tenets, whose articulation is neither obvious nor straightforward. This alternative does not exhaust the wide spectrum of possible understandings of democracy (many more nuanced definitions of democracy are currently available), but the tension between those two theoretical poles structures the contemporary debate about democracy's nature and, more specifically, the debate about democracy's relationship to foreigners.

Democracy could be said to be conceptually close to autonomy. Adopting an etymological viewpoint, the similarity is obvious. Drawing on the prefix *auto* for "self" and on the substantive *nomos* – that is, "law" – autonomy literally means "ruling oneself", which could also be used as an elegant and concise way to describe democracy's inner logic. But it leaves one question unanswered. Whose autonomy is crucial to democracy? For

the sake of clarity, we could present the answer as an alternative between two diametrically opposed views. It could be either the people's or the individual's autonomy, either the whole or its parts, laying the emphasis on a public or a private form of self-rule. This branching understanding of autonomy leads to two distinct democratic models.

The first model, drawn from Rousseau's *Social Contract*,<sup>51</sup> associates self-rule with people's self-determination, elevating the latter to the status of the core democratic principle. According to Rousseau, democracy is nothing but the "exercise of the general will"<sup>52</sup> – that is, the (ideally unanimous but actually majoritarian) expression of the people's will. On the condition that each citizen is a rigorously equal part of the political community – a condition that is best ensured through a total subjection of each citizen to that polity, suggests Rousseau – the general will expresses adequately what is in the public interest and should therefore be granted absolute sovereignty.<sup>53</sup> Turning universal norms into safeguards of the democratic process or moral boundaries restricting the range of the general will's decisions would thus be antithetical to this democratic model. In Rousseau's view, so long as the general will is adequately expressed, no norm should infringe upon the absolute sovereignty of the people's will. Were a conflict to arise between public and private autonomy, Rousseau is of the opinion that the collective and democratic decision should always trump individual rights. Rousseau also thinks that – since the individuals are the constitutive members of the political community – a discrepancy between private and public autonomy is unlikely, if not impossible. There would thus be no real tension between those two principles. But, in actually existing democratic regimes, this condition of total subjection to the community of citizens is rarely (if ever) met – opening the door to a contradiction between public and private autonomy.

According to the second liberal model of democracy, there is nothing sacred or intrinsically good in the expression of the popular will. In that view, what individuals aspire to is not to have a say in the political decision-making process; it is to rest assured that neither the public authorities nor other individuals will violate their fundamental rights. The right to participate in the public deliberation is thus more modestly a means to achieve this end, but not an end in itself.<sup>54</sup> Consequently, as a political regime, democracy's aim is not to decide on some collective goals or to sketch the future fate of the political community. Democracy's aim is more modest. As a political regime, democracy is legitimate as far as it is instrumental in protecting fundamental individual rights.<sup>55</sup> And democracy fares much better in this regard than competing political regimes, precisely because it must take into account this ongoing public deliberation. Democracy amounts to a loose and conflictual association of individuals, each with their own aspiration and worldview but united in their primary concern

for their private welfare. Consequently, democracy's function is restricted to ensuring the conditions of justice necessary to the peaceful coexistence of a wide range of differing life projects.<sup>56</sup> The relationship between public and private autonomy is thus turned upside down. The liberal model of democracy asserts that, in case of conflict, private autonomy should take precedence over public autonomy, individual rights should trump the majority decision.

Nowhere is this tension between public and private autonomy, intrinsic to the distinction between the two democratic models, more tangible than at the borders of the political community.<sup>57</sup> If the popular will is absolutely sovereign, it should be allowed to make unimpeded decisions, including with regard to its migration policies. In other words, migrants' fundamental rights could not be opposed to a sovereign democratic decision. If a political community decides democratically to reject all future foreign newcomers because it wants to protect its national culture and identity, there would be no ground on which to object to this decision. Popular sovereignty could legitimately be exclusive.<sup>58</sup> By contrast, if the legitimacy of the democratic regime is conditioned by its ability to protect, better than any other regime, the fundamental rights of human beings, democracy would be expected to adopt a more universalist stance. For it would be committed to respecting the fundamental rights of *all* individuals, regardless of their political status and nationality. The universality of those rights does not necessarily imply that no border should exist, that the right to asylum should be unconditional or that any form of border control is illegitimate. But it nevertheless provides some robust grounds on which to contest the most coercive and/or discriminatory border control practices.<sup>59</sup> As a result, the liberal definition of democracy would prove more inclusive and would lean towards a more cosmopolitan approach.<sup>60</sup>

However, this neat conceptual contrast between two democratic models is too schematic to prove convincing. Orbán may be content to use to his advantage this oversimplified opposition between a sovereign will of the people and a set of universal norms protecting individual rights, but the role of the political theorist is to point out that our current political situation is, as a matter of fact, a little more complex.<sup>61</sup> The fundamental problem with the two models I presented too briefly here is that they work under a misguided assumption. They assume that individual rights act as an external constraint on popular sovereignty, as if popular sovereignty and individual rights were two entirely distinct principles that could be neatly distinguished. Based on that premise, it is easy for the Orbáns of the world to frame fundamental rights as being both a liberal delusion and a severe threat to ~~civilisational~~. The realm of the political would work according to its own logic (be it the raw exercise of might, the existential struggle between friends and foes or the unanimous expression of a supposedly

monolithic nation), independently of our moral commitments.<sup>62</sup> In Orbán's rhetoric, the situation is even worse since those rights would not only be ineffective but they would also promote an individualistic lifestyle, bordering on existential selfishness.<sup>63</sup> As a result, they would represent a grave danger to the Christian values he claims to hold dear and that supposedly provide the basis of the social cohesion of Hungarians. Hence, his support for an "illiberal democracy": that is, a democracy that would explicitly put some daylight between its political principle (the self-determination of its nationally defined people) and some unwanted alien norms forced upon them by a supranational organisation (the European values listed in the Charter of Fundamental Rights, including the right to asylum). The particularistic demands of the former would be at odds with the universalist streak of the latter.

Interestingly, the specific case of the right to asylum proves that this picture rests on a misconception. There is a rich intellectual tradition, ranging from Hannah Arendt to Claude Lefort, arguing that it is misleading to depict fundamental rights as being at odds with popular sovereignty. According to that tradition, fundamental rights are political in nature for at least two reasons. First, because they amount to a political speech act.<sup>64</sup> If rights were simply granted to the citizens by a superior authority, they would amount to a legal protection but lack a political dimension. What matters politically is that those fundamental rights have historically not been granted but have been *declared* in an assembly of citizens: that is, an assembly of individuals who regarded each other as equals by virtue of their common membership of the polity and who granted each other the benefits of those fundamental rights. Thus, the fact that they were first uttered in an assembly and then enshrined in some legal texts (the Charter of the Fundamental Rights in the case of the European Union) only formalises the pre-existing assumption that citizens ought to treat each other as equals. Because of the mutual recognition embedded into the structure of its speech act, any declaration of fundamental rights rests on a principled equality, regardless of the content of its articles. The expression of those fundamental rights limits itself to setting the stage for future political debates.<sup>65</sup>

From that perspective, the relationship between fundamental individual rights and popular sovereignty turns out to be much more ambivalent than the Manichean opposition portrayed so far. Upon closer inspection, those two principles appear to stand in a dialectical relationship. For, as I just argued, fundamental rights are first a precondition of popular sovereignty. They establish a principled equality without which sovereignty could not claim to be popular in any meaningful sense. They also posit that sovereignty is not derived from any higher authority but actually stems from a worldly convention between those individuals who agree to mutually

recognise each other as legitimate right holders. Thus, because they are constitutive of popular sovereignty, fundamental rights are entitled to constrain it. But this ability to restrict the collective decision is not exogenous to democracy. The liberal tradition is not, as Orbán would have us believe, alien to democracy. It does not attempt stealthily to curtail its decision-making authority in the name of abstract universal principles. Abstract universal principles, enshrined in fundamental rights, rather shore up democracy by preventing it – precisely – from turning particularistic (for instance, systematically favouring those belonging to stable majorities). In this way, it ensures that the principle of public autonomy remains respectful of private autonomy: that is, the ability to lead one's life as one wishes, within the boundaries of the democratic law.

Conversely, private autonomy would be vain and frail if it was not articulated in some meaningful ways with public autonomy. Fundamental rights do not just amount to a selfish freedom to act as one pleases. Several fundamental rights are explicitly meant to protect the possibility to build meaningful social interactions or, in other words, to defend our ability to live not as isolated monads, but rather as participants in a political community.<sup>66</sup> Would freedom of expression be of any worth if there was nobody to listen to what one has to say? What would be the use of the freedom of association in a world of scattered individuals? Or the purpose of a right to protest without the underlying assumption that citizens collectively form a body politic? Just as public autonomy makes private autonomy one of its constitutive principles, private autonomy is caught in a web of public decisions in which it wishes to participate, at the very least with the intent of defending itself against the potentially excessive reach of public decisions. In this regard, public and private autonomy are mutually constitutive and, thus, necessary conditions for one another.

As Hannah Arendt aptly pointed out, the right to asylum perfectly epitomises the social nature of fundamental rights. At its core, it is a moral claim to be provided with a legal status allowing inclusion in a political community, a defence against the worldlessness that asylum seekers suffer from.<sup>67</sup> The right to asylum results from the fact that an ever-more-fundamental right – that is, the right to be a member of a community – is thrown into jeopardy by the current division of the international community into nation states. As Joseph Carens puts it: “States have a duty to accept refugees that derives from their own claim to exercise power legitimately in a world divided into States”.<sup>68</sup> David Owen elaborates on this assumption. According to him, the current organisation of the international community means that some individuals fall through the cracks of its division into sovereign states and end up being deprived of any legal status giving them access to a political standing. It is therefore up to the international community to redress the wrongs done to those individuals by providing them

with a surrogate membership. First, this membership takes the form of a refugee status, offered by a host state and normally leading to full membership status within a reasonable amount of time.<sup>69</sup>

But Arendt goes further than claiming that asylum is a right to be granted a surrogate membership. As she strikingly put it, the right to asylum can also be considered to amount to a “right to have rights”.<sup>70</sup> This stronger formulation circles back to our previous discussion regarding democracy. From this perspective, the right to asylum expresses in a nutshell the idea that no human being – not even if he or she is made stateless, deprived of legal status and socially marginalised – can be stripped of a *claim* to have some legitimate rights. Nobody can be deprived of a right to attempt to reclaim at least some rights.<sup>71</sup> But it would be a mistake to assume that those rights will just be handed over by benevolent authorities. Claiming rights involves stepping into the public sphere to make oneself seen and heard. Claiming rights involves – paradoxically – acting as a citizen, regardless of one’s status.<sup>72</sup> In the long run, obtaining a legal protection from the state remains a crucial goal since it is the most expedient way to protect asylum seekers from the worldlessness described and dreaded by Arendt. But the “right to have rights” acts as an even more fundamental moral claim. It states that, even in the absence of status, one is always entitled to take a stance in the public realm and make their voice heard. Acting on the political scene is thus never illegitimate, regardless of one’s status, title, skills etc. In that respect, Arendt highlights the fact that the right to asylum carries a deeper truth: namely, that democracy cannot be sealed off.

## **6. Conclusion: More Democratic to Be More Cosmopolitan**

We could summarise the previous section by saying that, contrary to what Orbán claims, liberalism and democracy are mutually constitutive. Though their respective logics may put them at odds on some issues, democratic self-government is nevertheless the political regime which protects best individual rights. Likewise, fundamental rights are the bedrock and the main tools of the people’s exercise of their sovereignty. And if Arendt is to be believed, no right illustrates this better than the right to asylum, which, in her view, is more fundamentally a right to political participation.

Understanding the intimate relation between liberalism and democracy puts us in a better position to assess the shortcomings of the discourse about hospitality. If cosmopolitanism is associated with the right to hospitality and if the latter is (1) presented as a unilateral gift from the European citizens to third-country nationals and (2) decided top down by European institutions, it is likely to backfire. It will comfort the European citizens with the idea that hospitality is given as a matter of charity, rather than granted as a fundamental right necessary to democracy, as Arendt would



argue. Furthermore, it will confirm for them the idea that European institutions are disconnected from European citizens and enforce undemocratically a liberal political agenda. It then becomes way too easy for Orbán and his allies to present their “illiberal democracy” as a critical response to the “undemocratic liberalism” of the European Union.

My suggestion is thus that the case for the right to asylum should be made differently. The issue is not really whether the European Union is cosmopolitan enough, *pace* the neo-Kantians. The issue is whether the European Union functions as a democracy or not. In this regard, the right to asylum provides us with a privileged entry point into this discussion. The right to asylum is not a right to a temporary refuge in the context of a humanitarian crisis. For those situations, another set of rights may be claimed, such as subsidiary protection. The right to asylum is much more specific. It amounts to the recognition that some individuals have been unlawfully stripped of their previous political belongings and should, as a matter of remedy, be provided with a surrogate political membership.<sup>73</sup> It is thus a corrective instrument to ensure that no individual can be made stateless or be pushed, as a result, beyond the boundaries of the political. Its purpose is to restore the principled equality that serves as a prerequisite of democracy.

One could even go one step further and claim, following Arash Abizadeh’s trailblazing argument, that granting asylum seekers refugee status is a way to honour the requirement of the self-determination principle attached to popular sovereignty.<sup>74</sup> If one drops the assumption that the sovereign people should be a well-defined and stable community, Rousseau’s idea that no one can be subjected to a law if he or she cannot consider himself or herself as the author of that law would now have a wholly different outcome. It would advocate in favour of granting asylum seekers the right to have a say on refugee policies since they are the most affected by this legal regime. Consequently, the further upshot of considering the right to asylum as a democratic rather than a cosmopolitan issue is that it dispels the misconception according to which the exercise of popular sovereignty would legitimately be exclusive and particularistic. If we consider fundamental rights to have an inner relationship with democracy (rather than being an external constraint on the sovereign people’s decision), we end up with a renewed picture of liberal democracy: that is, a liberal democracy that makes the right to asylum one of its prerequisites, not in the name of a cosmopolitan liberalism but because it is a prerequisite of democracy itself.

From that perspective, the alternative delineated in the title of this chapter eventually proves to be misleading. The European Union is not left with the obligation to make a dramatic choice between a commitment to either universal values or democracy. Viktor Orbán and some liberal authors weary of democracy would like us to believe that there is an intrinsic contradiction between popular self-government and fundamental rights,

therefore setting the stage for a conflict between democracy and liberalism. My exploration of the right to asylum in the context of the European integration process aims to dissolve this false alternative. The right to asylum is indeed a necessary building block for a more cosmopolitan world. But this right is not only justified by a (perfectly valid, in my view) moral claim to respect the moral worth of each individual, regardless of their legal and political status. It is also justified by the obligation for any democracy to address the structural shortcoming of the division of the world into self-contained polities and to provide stateless individuals with a surrogate membership. The right to asylum is, from that perspective, in line with the idea that nobody can be forced to live forever outside a public community. A careful examination of the right to asylum reveals it to be *both* cosmopolitan and democratic. Such a conclusion allows for a rather optimistic prospect for the European Union. By taking the necessary steps and public policies to respect unconditionally the right to asylum of third-country nationals, the European Union would thus have the opportunity to kill two birds with one stone. It could partly bridge its democratic gap *and* honour its commitment to cosmopolitan values. But as long as the idea that there is an intrinsic contradiction between cosmopolitan values and democracy prevails in European circles (most importantly, at the negotiating table of the European Council), the right to asylum will go on chipping away, one breach of the Geneva Convention at a time.

## Notes

1. Rizcallah 2019.
2. Kamminga 2017.
3. Manners 2008.
4. Mair 2013. He is not the only one holding this view; see also Bickerton 2016 and Scharpf 1999.
5. Manent 2007.
6. Merkel/Scholl 2018.
7. Zaun 2018.
8. Facchi/Parolari/Riva 2019.
9. European Union 2012.
10. Idem.
11. Eeckhout 2002.
12. Manners 2008.
13. Niemann/Zaun 2018.
14. Owen 2020.
15. Ibid., 24–34.
16. UN General Assembly 1951.
17. *Euronews* 2020. In the period between the writing of this chapter and its publication, Leggeri has been forced to step down. However, his resignation has done little to dispel the worry that pushbacks have become an institutionalized practice endorsed by the Frontex agency.

18. *The Guardian* 2020a.
19. Border Violence Monitoring Network 2020, 5.
20. *EUObserver* 2016.
21. Peers 2016. See also Amnesty International 2017.
22. Zapata-Barrero/Ferrer-Gallardo 2012.
23. *Euractiv* 2020.
24. *The Guardian* 2020b.
25. Guild/Costello/Garlick/Moreno-Lax 2015.
26. Bauböck 2018.
27. Thielemann 2018.
28. Moreno-Lax 2018.
29. Lavenex 2018.
30. One could argue that this situation is not new and that the EU had been failing to reconcile those two commitments long before the 2015 crisis; see, for instance, Guiraudon 2018.
31. Brown 2014.
32. Beck/Grande 2007 and Eriksen 2006.
33. Habermas 2012 and Ferry 2005. See also Bohman 1997.
34. Kant 2008, 78.
35. *Ibid*, 82.
36. I'm aware that this interpretation is not universally shared. I rely here on the work of Chauvier 1996. For a contrasting view, see Benhabib 2004. For an in-depth historical exploration of the text in its context, see Cavallar 2002.
37. Kant 2008, 82.
38. Presidency Conclusion Copenhagen European Council 1993.
39. Magnette 2005.
40. Vauchez 2010.
41. "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States". Treaty on the Functioning of the European Union, Article 21.
42. Delanty 2007.
43. Directive 2004/08/EC ("on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States"), Article 7.
44. Groud 2013.
45. Wodak 2019.
46. Orban 2014.
47. Sandel 1984.
48. Baudet 2012.
49. *Euractiv* 2015.
50. Mouffe 2005.
51. Or rather a certain interpretation of Rousseau that can be traced back to Constant 1986, 271. I am aware that competing interpretations exist, including a liberal construal that emphasises convincingly Rousseau's concerns for individual rights, cf. Derathé 1995.
52. Rousseau 1992, 51.
53. Prokhovnik 2008, 98.
54. Girard 2019.
55. Locke 1997, 207.
56. Rawls 1987.
57. Deleixhe 2016.

58. Taylor 1998.
59. Bertram 2018.
60. Sager 2018.
61. Carens 2004.
62. Orbán is, of course, not alone in thinking that. There is a long intellectual tradition aiming to prove that human rights are a mere chimera, from Burke to Schmitt and, more recently, MacIntyre. See Schmitt 2008 and MacIntyre 2013.
63. Ironically, for a self-professed anti-communist, this criticism owes much to the young Marx's depiction of human rights in *On the Jewish Question*. One should note, however, that Marx's critique has been used widely among neo-conservative circles recently. See, for instance, Gauchet 1980.
64. Lefort 1994.
65. This paragraph and the next owe much to Lefort/Macey 1988. For a deeper exploration of this topic, see Ingram 2006.
66. Lacroix 2016.
67. Tassin 2003. See also Ingram 2008.
68. Carens 2013, 196.
69. Owen 2020.
70. Arendt 1968, 388.
71. Balibar 2010.
72. Deleixhe/Lacroix 2015.
73. Owen 2020.
74. Abizadeh 2008.

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