COSMOPOLITAN NORMS AND EUROPEAN VALUES

ETHICAL PERSPECTIVES ON EUROPE'S REFUGEE POLICY

Edited by
Marie Göbel and Andreas Niederberger

Cosmopolitan Norms and European Values

This volume offers a systematic philosophical analysis of the normative challenges facing European refugee policy, focusing on whether the response to it can be based on European values. By considering the refugee policy through the lens of European values, cosmopolitan norms and universal human rights, the contributions expose the weaknesses and limitations of existing regulations and make proposals on how to improve them.

The EU is often seen as a cosmopolitan project. Europe is supposed to be a community of states that aspires to be guided by cosmopolitan norms. However, the idea of a cosmopolitan Europe has never been unanimously shared, and in recent years, it has come under increasing scrutiny, particularly with regard to the EU's refugee policy. The guiding idea of this book is that a deeper philosophical understanding of the normative issues at stake can foster greater conceptual clarity and enrich political debates on the future of European refugee policy. The first part of the book revolves around the question of whether the rise in refugee numbers over the past decade has led to a crisis in the EU and, if so, how this crisis relates to or impacts European values. The second part traces the history of the discourse on "European values" and examines from a philosophical perspective how we can plausibly understand these values in terms of their moral grammar, their normative content and their implications for the behaviour of the EU and its member states. Finally, the third part puts forth recommendations for a feasible and normatively more compelling European refugee policy based on human rights, human dignity, justice and democratic self-determination as the decisive normative requirements.

Cosmopolitan Norms and European Values: Ethical Perspectives on Europe's Refugee Policy will be of interest to researchers and advanced students working in ethics, political philosophy, political science, social sciences and law.

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Contents

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Introduction

Marie Göbel and Andreas Niederberger

Since the Russian war of aggression against Ukraine began on February 24, 2022, the European Union has taken in several million refugees from Ukraine. This is much more than the number of refugees who came to Europe in any other year in recent decades. Despite this high number, hosting the Ukrainian refugees is not a significant problem for either the EU or the main member states involved. Unlike the "summer of migration" in 2015, the common refugee policy towards refugees from Ukraine has – at least so far – tended to strengthen the EU rather than plunge it into crisis. The activation of the mass influx directive even allowed refugees from Ukraine to determine where they take refuge themselves.[1] Thus, the EU has chosen a solution to the otherwise highly controversial issue of refugee allocation among EU member states which seemed impossible before. Interestingly, the EU explains its policy towards Ukrainian refugees in terms of values: Russia should not succeed in its illegal and unlawful war of aggression, so fleeing should not be a factor forcing Ukraine to give up its resistance.[2] And even more generally, the EU claims to support Ukraine as a defender of universal values.[3]

This book discusses European refugee and migration policy, especially before the Russian war of aggression. From what has been said so far, this analysis could be seen as outdated given the way the EU dealt with the Ukrainian refugees in 2022. Indeed, if the handling of these refugees had been the result of the EU's new overall refugee and migration policy, the EU would have overcome many of the difficulties of the last decade. But the issues that have been at the forefront at least since the refugee crisis in the mid-2010s are still relevant. The handling of refugees from Ukraine does not represent a new direction in EU refugee and migration policy. As far as we can see so far, it is a special provision responding to the particular character of the conflict between Russia and Ukraine and, above all, to the special interests of the Eastern European EU member states in this conflict. The problems of the general refugee and migration policy still remain or are even worsening. This is particularly evident in the ongoing controversy

within the EU, parallel to the handling of refugees from Ukraine, about how to deal with refugees who came again in increasing numbers to the EU in 2022 via the so-called Balkan route or the Mediterranean Sea. The war in Ukraine has also brought no change to the precarious humanitarian situation on the borders between Belarus and Poland or between Turkey and Greece. Moreover, some EU member states are signalling that accepting Ukrainian refugees should free them from further obligations to other refugees in the medium and long term.

Since 2015 at the latest, the treatment of refugees and migrants has had a particularly strong impact on the public perception of the problems facing the European Union. Yet this is not necessarily the biggest challenge. The security situation, the economic and socio-political difficulties arising from new and old military threats, the post-pandemic situation, inflation and possible de-globalisation and the worsening climate crisis certainly affect many more people more directly than the refugee and migration issue. Nevertheless, it is precisely because of the relatively limited dimension of the refugee issue and the immediate consequences that policies in this area have for refugees that the contradictions between the EU's normative self-description or normative claims and its actual policies become particularly evident. In the other areas, there are different interpretations of expected developments and controversies about what is normatively correct and how to deal efficiently with the problems at hand. Here, too, there are important ethical questions about the use of military force, the achievement of social justice and the consideration of future generations. In the area of refugee movements, however, there is a supposed normative consensus that has also been laid down in international and European law, against which the EU appears to be acting. Some are even calling for a different consensus that moves away from the protection of basic human rights and focuses on the fulfilment of particular identitarian interests. But if this supposed consensus on refugees is abandoned, the EU will be giving up essential normative foundations that are also relevant far beyond the refugee sphere. If there is no longer recognition of the human rights claims of people who are obviously in situations where their human rights are at risk, the question also arises for Europeans as to what significance their fundamental rights have in the European multi-level system. Do their rights really count at times when being able to rely on them is critical, including with respect to the political system?

This volume focuses on the normative contradictions of the EU's refugee and migration policy and, against this background, asks for a normatively more convincing way of dealing with forced displacement and migration. In doing so, it approaches this policy field by means of philosophy. It asks what the normative challenge for the EU in this area actually is and whether the EU has so far failed to meet this challenge, thereby creating and contributing to

several crises. In its Charter of Fundamental Rights and the Lisbon Treaty, the EU refers to values that it claims to embody and promote: human dignity, freedom, equality, solidarity, democracy and the rule of law.[4] Many therefore see the EU's failure in the area of refugee movements and migration as a failure of the EU to live up to its values. In such statements, the term "values" is often used generically as a collective label for very different types of normative claims and goals. Not violating human rights is then just as much a value as promoting prosperity in Europe. Several contributions to this volume examine "European values" in light of the possibilities for differentiation and specification which philosophy offers and ask whether it is correct to refer to the relevant normative reference points as values or whether it would be better to speak of norms or rights. Contrary to some existing suggestions to abandon the language of values altogether in the context of the EU and its policies, this book includes proposals on how to give serious consideration to the references to values in their specific meaning and to explain what it would mean for the EU to pursue its values.

Talk of values can and does serve different purposes. Sometimes it aims to identify something unifying and motivating that goes beyond mere interests or arbitrary inclinations. People may pursue different interests, but if they share values, they may be willing to put those interests aside and act in accordance with or to promote the values. Values can therefore have a special motivational power. Sometimes, however, values are also used to distinguish people, groups or entire communities based on their supposedly different values. In this case, there may even be common interests, but different values make it difficult to imagine a good and uncomplicated coexistence between the different people and groups. While these views also attribute a special motivational power to values, they do not understand this in an integrative way. Instead, they find that there are no common goals and ways of acting if there are no shared values.[5]

The idea that the EU is a values-based project can therefore be perceived in two very different ways. On the one hand, it presents the EU as a political entity that not only serves contingent interests, but also exists to realise values, that is, normatively valuable things. Because of its values, the EU thus transcends a narrow "Europe first" perspective. Instead, it sees itself as an essential building block of a cosmopolitan order, with important implications for its relations with all others in the world, especially in pursuing the goal of securing human rights for all. On the other hand, the reference to European values is also used to distinguish Europe and Europeans from those who allegedly have different values. Standing up for European values, in this view, means defending what is most valuable to Europe against those who want to set other priorities.

In the area of forced displacement and migration, these two ideas are in direct competition: do European values require Europe to set aside immediate

interests and inclinations in order to implement values calling for the protection, reception and integration of refugees and other migrants? Or are European values to be protected from immigrants who allegedly do not share these values or dispute their validity? This tension becomes particularly problematic when we realise that the supposedly particular European values are, in fact, universal values, or values that emphasise the very universality of the foundations of the European project. Some notions of human dignity, freedom, equality, solidarity, democracy and the rule of law may have their origins in Europe. But it is precisely in these supposedly European ideas that these values represent something that transcends particular claims and corresponding obligations or expectations tied to specific relationships. What can it mean that the universality of Europe must be defended against the particularity of the values of those who come to Europe? How can such a Europe pretend to stand for universality? The contributions to this volume therefore also revolve around the question of how the cosmopolitan and, in the case of forced displacement and migration, primarily human rights dimension of "values" relates to determinations of Europe's particularity.

The transition from philosophical-normative considerations to political recommendations is not easy since such a transition involves additional dimensions and factors that the sometimes idealised view of philosophy tends to neglect. Nevertheless, philosophical considerations can lead to suggestions as to where the EU should be criticised, where there is a need for change and how reform efforts could be initiated. In this sense, the contributions to this volume emphasise the importance of human rights for the legitimacy of European politics on the one hand while pointing to the further democratisation of the EU on the other. However, they also underline that trading off human rights and democracy against each other, which is characteristic of many positions in the field of forced displacement and migration, is neither normatively convincing nor politically helpful. Human rights cannot achieve the validity they strive for without democratic embedding. And democratic procedures that recognise no limits to their own impact on the protection of human rights and the participation of all who are subjected to them in one way or another cannot claim legitimacy. The European project, then, for all the friction between its respective goals or "values", requires that human rights and democracy be pursued jointly and together.

On the Structure and Contributions of This Volume

The first part of the book revolves around the question of whether the rise in refugee numbers over the past decade has led to a crisis in the EU and, if so, how we should understand this crisis. As of 2015, there has been

much talk of a "refugee crisis". However, many have rightly pointed out that this vocabulary makes refugees either the crisis themselves or the core of the crisis in European societies, institutions or politics. A large number of newly arriving refugees is certainly a challenge for the different levels of the European multi-level system and especially for municipalities, which are often responsible for the initial care of those arriving as well as for their transition to a more normal daily life and their integration into society and the labour market. However, as we saw in the case of the refugees from Ukraine, such challenges do not necessarily lead to crises. And looking at the situation in the EU in 2015 and since, the tensions only marginally concern the material resources needed to care for and integrate refugees. The disputes clearly were and are primarily political and legal in nature. They have mainly centred on the application and future of the Dublin system and the EU's general future refugee and migration policy – often understood as the question of how best to protect Europe from further irregular migration.

In his contribution, *Matthias Hoesch* therefore first defines what a crisis is. Against this background, he considers what meaning the term "European refugee crisis" could reasonably have. For there are various possible understandings of the term, each of which sees a particular object as the theme of the crisis. The consideration shows that proposals to understand the refugee crisis as a crisis of refugees, as a crisis of the concept of refugees, as a crisis of refugee care, or as a crisis of European societies caused by refugees are not convincing. Hoesch argues that the term "European refugee crisis", properly understood, refers to a crisis of the European asylum system. This is the comprehensive system that grants or denies the right to asylum in each case, allocates responsibility for refugees and provides them with the necessary resources to protect them during their status determination and beyond. This more precise understanding of the crisis allows for a more specific assessment of the importance of norms and values in relation to the crisis and its resolution.

Andreas Niederberger, in his contribution, also starts from the crisis already diagnosed by Hoesch. He points out, though, that we should see this crisis of existing procedures and institutions in Europe, which are no longer able to decide or enforce controversial allocations, distributions and redistributions – e.g. of refugees or financial resources – in the context of a second crisis. Forced displacement and migration to Europe are in fact the result of a crisis of legitimacy of the global order. Many people are no longer willing to stay in places where, for political, economic, social, ecological or cultural reasons, they are unfree and, thus, unable to live a decent life. We must therefore also assess the impact of attempts to "solve" the European crisis: for example, by democratising the EU and its policies or by giving member states greater freedom to opt out of European policies on the

global crisis. Niederberger shows how the two legitimation crises mutually reinforce one another. The strong tensions between them make it difficult to find a simple and common solution to both crises. Niederberger therefore rejects recent proposals to prioritise overcoming the legitimacy crisis within Europe or overcoming the global crisis. Instead, he outlines a principle for addressing the global legitimacy crisis that also takes into account the legitimate concerns of European populations for democratic control and participation in decision-making.

The EU sees itself not only as an instrument that serves the interests of the member states; it also views itself, as already outlined, as an expression and embodiment of shared values in Europe. This commitment to values does not always play a central role in shaping European policy. However, it is brought into play in some situations, either to give European politics a more general and unifying horizon or to problematise the policies or interests of individual member states when or because they contradict European values. Despite all attempts to develop these values into a control mechanism that can also be used as a legal instrument, the reference to values has so far remained primarily a discursive option. The second part of the book, therefore, starts by tracing the history of the talk of "European values". It becomes clear that such talk has not always served unproblematic purposes, even if great relevance is attached to these values. This, in turn, also explains why many shy away from referring to European values. Indeed, "European values" are often suspected of being mere and disingenuous rhetoric. The values in the fundamental legal documents of the EU, however, of course provide an important starting point for evaluating the EU in terms of key normative claims. Especially from the philosophical perspective of clarifying the EU's legitimacy or the normative soundness of its operation, it certainly makes sense to use these legal assertions for an internal or immanent critique of the EU. The second part of this volume therefore also attempts to clarify from a philosophical perspective how we can plausibly understand European values in terms of their moral grammar and normative content. This entails specifying the implications and effects that European values might or should have for the behaviour of the EU and its member states.

European values are often presented as an expression of Europe's long history and thus as an essential and clearly defined foundation of the European integration project since its beginnings in the 1950s. In his contribution, *Wim Weymans* instead argues that it was not until the late 1990s that the EU institutions in particular began to invoke European values as a means of legitimising the European project, replacing more ambitious and substantive (but perhaps less successful) ideas such as a "European identity" or a "social Europe". In order to be acceptable to all, these European values first had to be stripped of the clear and substantive content that

they had had up to that point, when mainly Christian politicians defended such values in a narrow conservative sense. Yet the increasing reference to values by European bodies and others at the turn of the century had little to do with this earlier conservative agenda. At the same time, the current populist reinterpretation of these values, especially in the context of the "refugee crisis", should not be understood as a simple reincarnation of this older conservative understanding of values either. Moreover, a look at the use of European values in European politics shows that these values do not provide the EU with a clear normative framework. However, this lack of conceptual clarity of these values can also be an advantage, as it can help foster a debate on the normative core of the European project, provided that an appropriate political space is created.

The questions of how we should understand values and what values mean to those who consider them as such are not only politically controversial and a matter of public negotiation. They are also the subject of philosophical attempts at clarification, which can be directed at both the normative content and the logic of values. In her contribution, *Marie Göbel* presupposes that the reference to "European values" in political discourses can be normatively problematic for a number of reasons, especially in the context of forced displacement and migration. However, she argues that much could be gained from a clearer understanding of what we mean when we talk about "European values" and from a more careful and reflected use of the phrase accordingly. To this end, she carries out an analysis of the basic meaning of the term "European values" which focuses especially on the value character of European values: in what sense are "European values" values, and what does this imply for the relevant concept of "European"? This leads her to the proposal that "European values" should be understood as a normative self-commitment of European policy to a set of universal moral ideas. So, on the one hand, the analysis shows that it is possible to interpret the term "European values" in a plausible fashion, which also does justice to both the particularity of Europe's normative foundation and the universal moral ideas it is meant to reflect. On the other hand, Göbel argues that it is crucial to distinguish between the concept of a value and other normative concepts such as principles and human rights. Based on this, she shows how framing Europe's human rights obligations in terms of (European) values, especially in the refugee context, implies the danger that questions regarding the respect of human rights are secretly replaced by questions regarding the protection of a European value order.

In the area of forced displacement and migration, pro-refugee activists continue to criticise the EU for not adhering to its own values. In his contribution, *Philipp Schink* starts from the plurality of values as they can be found in the European Treaties and, with a view to the aforementioned criticism, examines what practical attitude we could expect from the EU if the values

laid down were indeed its values. To this end, he explains that the values contained in the Treaties are not all on the same level and must therefore be considered as being in a hierarchical order. Some values may be intrinsically valuable while others have more of an instrumental importance with respect to other values. We need to see the values as a network and further determine their respective content and interrelations in political procedures. Even more essential with respect to the practical application of values is, however, that values can stipulate both a goal and the way in which goals are to be achieved. Adherence to values may therefore require both their promotion and their respect – and it may be that promotion and respect do not simply go hand in hand but that promotion requires disrespect for values, or vice versa. Now, according to Schink, the analysis of the European Treaties tends to suggest a promotion meaning of European values: the EU has the task of guaranteeing the respect of values, especially in the workings of the member states. This does not mean that the EU itself should not be held accountable for its actions in the area of forced displacement and migration. Rather, it means that we must understand the EU's failure to control its member states as a "serious and persistent breach" of the values set forth in the Treaties.

The second part of the book thus attempts to provide adequate understanding of the existing discourse on values as well as the values enshrined in the Treaties and to consider them in terms of their normative content. The third and last part of the book makes suggestions, drawn more directly from the philosophical discussion, on what the normative foundations of European refugee and migration policy should look like. It thus contributes to the clarification of what European values could and should be. Approaches to the philosophical debate on displacement and migration usually share the view that the EU can only claim legitimacy as part of or as a contribution to an overarching cosmopolitan order. In explaining what this means, however, they refer to quite different normative considerations to determine what is normatively required or permissible. This is reflected in the contributions to this final part of the book, which invoke human rights, human dignity, justice and democratic self-determination as the decisive normative requirements. And all these suggestions also include indications of where and how a more convincing and appropriate policy in the area of forced displacement and migration could be implemented.

Marcus Düwell, in his contribution, assumes that human rights form the core of European values and that these human rights are in turn based on human dignity. It follows from the assumption that the "European" in European values does not point to a specific set of values. Rather, it serves to identify the primary addressees: namely, European agents. Against this background, Düwell examines what the basis of European values in human dignity means for dealing with those who do not have EU citizenship. More

precisely, he shows that duties towards refugees can only be determined in comparison to possible duties towards non-Europeans "in need" who are not (yet) refugees. This, in turn, raises follow-up questions about what exactly the duties of Europeans towards refugees are and how the possibly limited capacities of duty bearers are to be deployed.

In his contribution, too, *Jos Philips* assumes that Europe must safeguard the human rights of refugees. This task has already been partly translated into legal obligations, such as the requirement of non-refoulement or the right to asylum. In other respects, the protection of refugees' human rights remains a moral idea in need of interpretation, given the possibilities but also the disputes in which the EU and its member states currently find themselves. Philips argues that in the most plausible interpretation, the human rights nature of the task at hand means that refugees are not to be admitted only up to a fair share in a European or global scheme for distributing refugee responsibility. Because human rights are at stake, the EU and its member states also bear responsibility for refugees beyond their respective fair share if others do not fulfil their own. They can only limit bearing this responsibility if its fulfilment would lead to sizeable costs for European citizens – and even this should only provide a possible argument for not taking on further responsibility. Nothing would oblige the EU and its member states in this case not to assume further responsibility.

For *Therese Herrmann*, we need to consider the EU's refugee policy in the light of philosophical discussions about justice that extends beyond nation state contexts. There is widespread agreement that states must be the expression and instrument of a just basic structure in order to claim legitimacy. What is less clear, however, is whether justice must also be realised in relation to those who are not members of the respective state orders. In her contribution, Herrmann distinguishes between a number of cosmopolitan approaches that agree that non-members also have norma-tive claims. They differ, however, in their definition of the respective char-acter and scope of the claims and, in particular, whether they understand them as claims of justice. For it turns out that a key difference is that some understand the duty owed to refugees as a humanitarian one: i.e. ultimately as a duty of assistance. Like all duties of assistance, such humanitarian duties to refugees would give the duty bearers discretion in terms of inter-preting and fulfilling the duties. Duties of justice, by contrast, would refer to solid rights-duties relations and, accordingly, they would grant refugees claims that they could assert in a legal-institutional order. Despite the dif-ferent strength of humanitarian and justice duties, however, an evaluation of EU policy in their light shows that even with regard to humanitarian duties, the EU cannot be said to fulfil them to a sufficient degree. Thus, even from the perspective of a weak cosmopolitanism, the EU proves to be illegitimate in this respect.

The final contribution to this volume also addresses the question of the EU's cosmopolitan character or of cosmopolitan demands on EU refugee and migration policy. For *Martin Deleixhe*, however, the normative horizon within which the EU operates cannot simply be limited to demands of cosmopolitan justice. Failure to meet such demands for justice is often excused by reference to competing but equally or even better justified normative demands for democracy. The necessary analysis of the arguments for an alleged tragic tension between cosmopolitanism and democracy shows, however, that a supposed incompatibility cannot be proven. On the contrary, cosmopolitanism and democracy are both necessary, and they can be mutually reinforcing. Deleixhe therefore ends with a proposal that the EU, by unconditionally fulfilling the demands of international refugee law, can also be fully in line with its democratic character.

So far, the percentage of migrants in the world population has remained relatively stable, and the UN hopes that progress towards the sustainable development goals in more countries will create incentives for people to stay and contribute to further development.[6] However, economic inequality and injustice, dictatorial and authoritarian political conditions, climate change and other ecological transformations, as well as military conflicts, are also important factors in decisions to flee and migrate. In view of the expected developments in these fields, there will certainly be more reasons for displacement and migration in the coming decades than in the past.[7] The EU, or rather Europe at all its levels, must therefore come up with a functioning policy in this area. Simply closing the borders and allowing migration only to the extent that it directly serves Europe's own interests is normatively unacceptable but also practically impossible. The practical impossibility is also closely linked to the normative issue because normative unacceptability undermines the willingness of potential refugees and migrants, as well as of significant parts of the European population, to accept an exclusive border policy.

This book pinpoints the contradictions of existing European migration and refugee policy. It identifies new approaches to normatively acceptable or even necessary and practically achievable solutions. And it outlines concrete perspectives for political action in this area, based on normative principles already found in the European project which do not have to be brought in from the outside. It thus shows that and how philosophy can contribute to the discussion of the future in the field of forced displacement and migration without having to limit itself to the role of a moral preacher.

Notes

1. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022 PC0091> [December 9, 2022].

2. Bosse 2022.
3. Cf., for instance, <www.epp.eu/papers/united-in-solidarity-with-ukraine-defending-european-values-against-putins-war> [December 9, 2022].
4. "Conscious of its spiritual and moral heritage, 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. It 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.

   The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

   To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". (Charter of Fundamental Rights, Preamble, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [December 19, 2022]).

   "Art. 2. The Union is founded on the values 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". (Treaty of Lisbon, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urise rv%3AOJ.C_.2008.115.01.0001.01.ENG&toc=OJ%3AC%3A2008%3A115 %3ATOC> [December 19, 2022]).
5. One can also understand recent diagnoses in political science in this sense, which explain major conflicts in the transnational political sphere in terms of value orientations and thus call for a reassessment of interest politics. Cf. Münkler 2017; Kreuder-Sonnen/Zürn 2020.
6. Cf. <www.migrationdataportal.org/themes/future-migration-trends> [December 19, 2022].
7. Cf. on this also the most recent IOM *World Migration Report* (<https://world-migrationreport.iom.int/wmr-2022-interactive/> [December 19, 2022]).

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Part 1

The European "Refugee Crisis" – A Crisis of What?

1 The European Refugee Crisis: What Is It a Crisis Of?

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1.1 Introduction

The concept of the "European Refugee Crisis" is contested. Many have argued that it unjustly casts refugees in a negative light because they then appear to be the cause of the crisis rather than vulnerable agents fleeing persecution or war.[1] Others have pointed out that the world in 2015–2016 was in actual fact faced with a humanitarian crisis in Syria and not a refugee crisis in Europe.[2] Still others have feared that talk of a "crisis" in Europe emphasised the apparently exceptional situation in Europe and thereby served to justify extraordinary or even illegal measures to prevent people from arriving.[3]

The term is already questionable, however, because it is difficult to see what "European Refugee Crisis" could actually mean. In what sense is the European Refugee Crisis a "refugee" crisis, what is the object that is in crisis, and what is the link between the crisis and Europe? Putting the three words "European", "refugee" and "crisis" together seems to leave these three questions unanswered.[4] Concerns about using the term are likely partially rooted in this conceptual indeterminacy.

As a consequence of the conceptual problems, many writers now distance themselves from the term by talking about the "so-called refugee crisis", and some even avoid the term completely. However, it seems undeniable that the situation in Europe in 2015 and 2016 (and perhaps later) had some features of a crisis and that these features had something to do with refugees. Thus, although criticism of an unreflective use of the concept is certainly justified, we might ask: is there a defensible way to use the concept? What should we, in the best interpretation of this apparently bizarre term, consider the object in crisis, in what sense is it a "refugee crisis", and what is its link to Europe?

This chapter starts in Section 1 with a conceptual analysis of the term "European Refugee Crisis". It will transpire that the term is underdetermined in that it allows for several interpretations of which object is in

crisis, meaning that we can distinguish different understandings of the term, each of which sees one particular object as the object in crisis. Not all these understandings are appropriate, though. I will establish three criteria that any appropriate understanding must fulfil.

In Section 2, I use these criteria to discuss several of these possible understandings of the concept of the European Refugee Crisis. Although none of them, in my view, offers an appropriate understanding, most do contain important insights that should be maintained. In Section 3, I offer an appropriate explanation of the term by perceiving the European Refugee Crisis as a crisis of the European asylum system.

An appropriate view of what the Crisis[5] is should also include an approach to how normative considerations come into play. For that reason, in the last section, I take up the guiding questions of this volume: I investigate how the European Refugee Crisis, understood in the appropriate way, is linked to values and norms. From a conceptual perspective, a "solution" to the Crisis does not necessarily meet certain moral standards, be they requirements of cosmopolitan norms or European solidarity. For that reason, ending the Crisis must not be seen as the only or the highest goal of migration policy, as is often suggested in political rhetoric. Instead, politicians ought to search for solutions to the crisis that meet moral standards.

1.2   The European Refugee Crisis: A Conceptual Analysis

What is a crisis? As is often the case, the concept is best understood in relation to a complementary concept. Following a common approach, I contrast *crisis* and *routine*. My emphasis will be on social, as opposed to individual, crises.

In short, a social crisis has the following scheme. Societies, understood in a wide sense that might refer to national society, to European society, or even to global society, permanently manage tasks and problems. We call the established way of addressing certain problems and of ensuring the functioning of certain social tasks the "routine" of managing these problems and tasks. A situation in which a problem or task persists but for some reason the established way no longer works is called a "crisis". Since in a crisis, adequate answers to some social tasks are lacking, a crisis always involves a threat to one or more social goods. Once a new way has been established, there is a new routine that usually diverges from the old. Termination of the crisis can typically only be determined retrospectively, after some new way of addressing social problems has already been the established way for some time.

Thus, in order to talk justifiably about a crisis, we should first identify a previous routine that has been disturbed. That said, a crisis involves other essential features. Not all deviations from a routine and not all changes

to how social tasks are mastered are crises. I believe that crises have three essential features.[6]

Firstly, the crisis is unexpected. Knowing that some event will occur and that this event will have negative effects usually prevents us from talking about a crisis. Secondly, during the crisis, there is a high level of uncertainty about how to manage the social task in question. If we are faced with a kind of unexpected problem but we already know how to proceed, then we are not in a crisis. Consequently, decision-making in a crisis is always like groping in the dark: it is impossible to foresee whether some solution to the problem is adequate in all its dimensions. Thirdly, decision-making in a crisis is of particular importance. The crisis is a kind of turning point where society sets the course for the new routine, the new way of dealing with things in the future. Radical rearrangements (even "system changes") that seem to be unfeasible in times of routine often become real options once a crisis has occurred.

In part, calling something a crisis is of course more an interpretation of a state of affairs than a description of it. We will always find attempts at trying out new ways of responding to social problems that might give us reason to talk about a crisis. And in periods that we are used to calling crises, we will find many things that continue in the old routine.[7] Whether we are willing to call a certain state of affairs a crisis often depends on political attitudes and goes beyond the objective description of what is actually happening. Whilst the arrival of refugees in the EU in 2015–2016 was seen as a crisis, the influx of a much higher number of Ukrainian refugees in 2022 is, at least to date, not usually interpreted in the same way. The academic use of the concept, however, requires sufficient empirical evidence that a routine has been unexpectedly broken and left us in a situation of uncertainty about how we ought to manage things in the future.

The term "European Refugee Crisis" adds two features to the general term "crisis": namely, that it is a "European" crisis and a "refugee" crisis. The first specifies that we are faced with a geographically limited crisis. The state of affairs with which the European Refugee Crisis is concerned is located in Europe or at Europe's borders. And it does not affect just one place in Europe but concerns Europe as a whole, or at least large parts of the continent.[8]

Less clear is the meaning of the second feature. While "refugee" might refer to the legal definition of a refugee in the Geneva Convention, it might, in common language, also mean a person who has fled their home in a broad sense, encompassing all asylum seekers and those living in refugee camps. As we will see, nearly all interpretations of the Crisis assume the broad common meaning, but the legal meaning is also an option, of course. The crucial question, however, is how "refugee" stands in relation to the term "crisis". Linguistically, the term "refugee crisis" implies that the crisis

has something to do with refugees (or with "the refugee" in the singular). However, as I see it, the term does not imply a particular relation between refugee(s) and the crisis. It is simply not clear whether refugees form the general area to which the crisis is related (analogous to the term "financial crisis", in which the crisis concerns the financial sector); whether refugees are the cause of the crisis (analogous to the term "Coronavirus crisis", in which the virus is the cause, but not the area or thing in crisis); whether refugees are the objects that are in crisis (analogous to what is plausibly meant when talking about the Syria crisis: namely, that the state of Syria is in crisis); or whether the relation is to be specified in some entirely different way.

The meaning of the term "European Refugee Crisis" is therefore indeterminate. First and foremost, it is unclear which object is in crisis – the Crisis is a crisis *of what*? Once we have determined what the object of the crisis is, it should also be possible to state how refugees are linked to the crisis. In the following, I will thus discuss several proposals as to what the object could be. Different ways of spelling out what the object in crisis is constitute different possible understandings of the term "European Refugee Crisis".

Yet not all these understandings are appropriate. To determine what an appropriate understanding of the term could be, I will make use of three criteria. First of all, any appropriate understanding must be compatible with the analysis of the term "European Refugee Crisis" presented: it must be possible to describe the object in crisis in terms of an unexpected disruption of some established routine that has something to do with refugees and is linked to Europe. Second, the description of the object in crisis should be in accordance with the basic empirical facts of the phenomenon that we call the European Refugee Crisis. I will not provide a detailed analysis of how the Crisis unfolded, what it brought about, and how severe it was compared with other crises, but I do believe that there are several uncontroversial data points about what happened in the Crisis. Third, any appropriate understanding of the term should be compatible with its common meaning. I assume that there is a vague common use of the term: it is fairly clear in daily discussions what somebody means when they make use of it, namely a set of refugee-related events occurring in 2015–2016. The common meaning is vague, however, as it does not determine what exactly the Crisis consists of and what role refugees play for the Crisis to be a crisis. Any appropriate understanding of the term should be compatible with, but less vague than, that common meaning. I will refer later only to few features of the common meaning and hope that the reader will share my intuitions on what it involves.

An appropriate understanding of the term requires that all three criteria are met. If we find an understanding of the European Refugee Crisis that,

although consistent in itself, does not correspond to the empirical facts we know about the thing commonly called "European Refugee Crisis", then we should abstain from using that term to denote that thing. The same is true if we find an understanding that is appropriate at the levels of conceptual criteria and data but violates our common meaning. In this case, we should discard the term in order to avoid confusion.

1.3   The European Refugee Crisis – What Is It a Crisis Of? Some Proposals

I will start my search for an appropriate understanding by critically examining several proposals in the literature and the public debate. Although all contain useful insights, none will prove satisfactory. Only in the next section will I defend an attempt that covers all the insights gained by discussing these proposals. It should be noted that when I reject proposals from the academic literature as to how to understand the European Refugee Crisis, I am making claims regarding the definition or the use of that concept only and am not rejecting any of the substantial claims that these authors make about the events related to the Crisis.

a)   A Crisis of Refugees?

A natural understanding of "refugee crisis" is perhaps to interpret it as a crisis of refugees, which would imply that the refugees themselves are in a crisis. Such an understanding has been proposed, for example, by Schulze Wessel,[9] who claims that there are several justifiable understandings of the European Refugee Crisis, one of which is to see it as a crisis of refugees.

This view has the advantage that it remedies the problems of the talk of a crisis mentioned at the beginning of this chapter. Whilst many authors fear that the concept in its common meaning unjustly makes refugees appear to be the cause of the crisis and legitimises exceptional means to prevent them from arriving, understanding the Refugee Crisis as a crisis of refugees presents the circumstances in their proper light. Those who suffer most in the Refugee Crisis are undoubtedly the refugees themselves.

I do not doubt that the situation of most refugees should be seen as a crisis because they lost the routine that shaped their former lives (although, in some cases, the state of being in flight or living in a refugee camp has endured for so long that it has become a new routine, a fact that might be even worse). Nevertheless, I reject the view that the concept of a European Refugee Crisis could appropriately refer to a crisis of the refugees themselves. The essential concern about interpreting the European Refugee Crisis as a crisis of refugees is that the common meaning of the European Refugee Crisis sees it as one social crisis rather than as many individual

crises. Many individual crises do not always aggregate to form one social crisis. On the contrary, the occurrence of individual crises is, from the point of view of society, usually a routine that health and welfare systems manage. Thus, the fact that many refugees are in a crisis does not imply that there is a crisis at the social level too.

A second problem is that the understanding in question would not meet the geographical and temporal limits that are embedded in the concept and the common meaning of the European Refugee Crisis. The world has experienced the suffering of millions of refugees for decades. There is no reason to conceptually single out those refugees who have been in a crisis on European territory or at European borders since 2015.

Schulze Wessel (ibid.) mentions two facts that, in her view, explain why her understanding refers to the particular space and time of the European Refugee Crisis. First, international organisations report increasing numbers of refugees, especially in the years in question. Secondly, it was previously inconceivable that a crisis of refugees could continue after they had arrived on European territory. Appalling and often life-threatening conditions in refugee camps and thousands of refugees living without shelter or in private camps are new phenomena in Europe.

Later, I will establish that this fact is indeed one essential feature of the European Refugee Crisis, understood correctly. However, I will frame it as a failure of a social task, and not as the conglomerate of individual crises. The fact that there have been more refugees than before does not establish that individual crises now form a social crisis, nor is the fact that the crises suffered by refugees continue on European territory a sufficient reason to talk about "European crises of the refugees" – their crises started elsewhere and are not intrinsically linked to Europe.

b)   *A Crisis of the Concept of a Refugee?*

As a second approach, Schulze Wessel[10] introduced the idea of understanding the European Refugee Crisis as a crisis of the concept of a refugee. This understanding might explain why "refugee" in "Refugee Crisis" appears in the singular – the crisis is now conceived as being about "a refugee" as such and not about the persons who are refugees. Furthermore, it involves a temporal dimension that the first understanding lacks. When the concept of a refugee was introduced into international law in 1951, it was adjusted to the needs of the time. During the Cold War, the concept was used primarily to offer the possibility of emigration to political oppositionists in the communist states. For that historical reason, the concept focuses on "political persecution". Recent developments, however, might have placed the concept in crisis: many of those in need today are not people who are persecuted due to their political convictions in a narrow sense, but instead

people fleeing civil war, failed states, or ecological destruction. According to such an understanding, the last few years have revealed that the concept of a refugee is therefore no longer adequate to address the present needs of those who are fleeing.

Understanding the Refugee Crisis as a crisis of the concept of a refugee faces two objections. First, like the first understanding, it does not capture the geographical and temporal limits that we find in the concept and the common meaning of the Refugee Crisis. Secondly, it is doubtful in light of the relevant empirical findings that the concept of a refugee is in crisis at all.

First, although this understanding of the Refugee Crisis is built on a diachronic view of the concept of a refugee, it does not explain why the year 2015 should count as the starting point of the Crisis. Many of those seeking asylum in the 1980s and 1990s also did not count as refugees in the sense of the Geneva Convention, and lawyers and academics at the time were entirely aware of the limits of the concept.[11] Even more problematic is the geographical limitation. Understanding the Crisis as a crisis of the concept of the refugee cannot explain any geographical limits. In other regions, especially in North America, academics have observed the same conceptual shortcomings in international law.

It should be added that these objections also rule out other attempts to understand the European Refugee Crisis mainly or purely as a crisis of normative beliefs or normative concepts. If we have reason to believe that moral or legal norms behind international commitments to protecting refugees have eroded, thereby destroying the established routine of normative judgments on refugee protection, then we should *prima facie* expect this process to occur slowly and across the entire globe.

Second, although the concept of a refugee obviously has some systematic deficiencies, I would doubt that the concept is in crisis overall. As, for instance, the UNHCR regularly points out, the concept does an important job all things considered, and there is no urgent need to redefine or replace it. One important reason is that national and international law, as well as international organisations, have over time created ways to deal with the shortcomings of the concept, the most important step being to introduce a concept of "temporary protection" or "subsidiary protection", intended to solve the most pressing problems created by the Geneva Convention's narrow definition of a refugee. The mere fact that there is currently a lively debate about possible reforms of the concept is not evidence that the concept is in crisis. It is merely part of the academic routine.

c) *A Crisis of Refugee Care?*

If, then, we search for an understanding of the concept of the European Refugee Crisis that has the admission of refugees at its centre but that

includes what is missing from a) and b) – namely, a clear link to Europe – we might see the Crisis as a crisis of refugee care in Europe – the institutional counterpart to the ongoing crises of the refugees mentioned in a). The Crisis is now perceived as a refugee crisis in the sense that refugees are the sufferers of a crisis in a particular sector of society: namely, the sector of refugee care. Indeed, the Crisis undoubtedly involved a crisis of public facilities provided to refugees in many European states. Most prominently, public administrations in Italy, Hungary, Greece and Germany were no longer able to offer adequate accommodation or sustenance or to process asylum applications within a reasonable period of time. Representing this crisis of public institutions charged with caring for refugees are the images of thousands of people sleeping in tents while awaiting the chance to apply for asylum and hundreds of people standing in a queue in front of small administrative buildings at five o'clock in the morning. It can be reasonably argued that caring for refugees has lost its routine in Europe.

Viewing the Refugee Crisis as a crisis of caring for refugees certainly fits the conceptual conditions and is not contrary to empirical data. However, empirical data reveal more problems related to refugee protection – why should we single out the problem of caring? Moreover, this view is inconsistent with the common meaning of the term. The facts mentioned are certainly important *facets* of the Crisis, but if we follow the common meaning, the Crisis involved many more elements than the failure to care for refugees. In particular, according to the common meaning, the Crisis had negative effects not only for refugees but also for European societies.

The fact that the Crisis involved more elements would not constitute a problem for the present understanding of the term, if these further elements could be explained by the crisis of refugee care. In that case, the perception would rightly resonate with the core of the Crisis. It is, however, implausible that the failure of the caring institutions could explain the negative effects on society. Therefore, we should keep in mind that the Crisis involves a crisis of refugee care but search for a broader approach.

d)   *A Crisis of the Dublin System?*

Instead of focusing on the care of refugees, many authors have argued that we should view the European Refugee Crisis as a crisis of the European rules for distributing the burden of protecting refugees among states. According to this view, the Crisis was a "refugee" crisis insofar as what was in crisis was the distribution of refugees. I will call this understanding of the Crisis "a crisis of the Dublin System". Some authors use different concepts – concepts that might be intended to cover a broader object than the mere distribution of burdens in Europe. Roos[12] talks about the Refugee Crisis as a crisis of the European border regime; Niemann and Zaun[13] call

it "a crisis of the CEAS" (Common European Asylum System); Nancheva/ Agarin[14] and Bauböck[15] talk about a crisis of European integration. It is not my aim to reconstruct their positions here. What is striking, however, is that they all identify the decisive element of the crisis as being the problem of the distribution of burdens and, thus, the lack of solidarity between European states. For the sake of argument, I assume that they understand the Refugee Crisis as a crisis of the Dublin System.

The narrative told by proponents of this view is as follows. The Dublin System assigns the responsibility for administering asylum applications, as well as for granting protection, to the state where the refugee first enters the European Union (with a few exceptions). This leads to an extremely unbalanced system of burden sharing. For some time, it was possible to justify the disproportionate burden for states with an external border by pointing to the fact that all had at some time accepted the Dublin rules and thus consented, in return for some other goods gained. However, this justification gradually lost its power, and states such as Italy, Greece and Spain began to call for fairness with regard to the system of burden sharing. Their voices were not heard, but, as the numbers of refugees increased, the unfairness of the system became increasingly obvious. At the same time, more and more refugees succeeded in circumventing the assignment of the Dublin regulation. When the numbers suddenly shot up in summer 2015, Germany decided not to apply the usual Dublin rules of allocation for Syrian refugees, and many other states stopped registering incoming refugees. In effect, the Dublin System completely collapsed. No organised distribution between states took place, and some states were faced with a very high number of asylum applications. Instead of searching for a common solution, some states reacted selfishly by closing their borders.

Again, I believe that while the understanding of the Crisis as a crisis of the Dublin System contains important truths, it does not tell the whole story. First of all, it should be mentioned that this scenario fits the conception of a crisis outlined in Section 1 very well. Some established practices became less acceptable (to refugees and to states), obviously stopped functioning and forced states into a situation in which they were uncertain about how to manage the problem. Furthermore, the collapse of the Dublin System formed a kind of turning point, insofar as it suddenly seemed possible to replace the Dublin System with a better way of assigning each refugee a responsible state and distributing the burden fairly between states.

To understand the Crisis as a crisis of the Dublin System again fails due to our common meaning of the term, which sees the Crisis as involving more elements than the breakdown of the Dublin System. While some of these elements are mentioned in 2c), the high number of incomers who are to be integrated is also part of the common meaning, irrespective of the problem of burden sharing.

Advocates of this understanding appear to believe that the crisis of the Dublin System is, in fact, the core of the Crisis because it explains all its further elements: if only Europe had had a better system of distribution, there would have been no crisis. If this were true, we could indeed reconcile this understanding with the common meaning as we could view further elements as mere appendages. However, I consider this belief to be misleading. Imagine that Europe really had had a system of fair distribution in 2015. Many things would certainly have taken a different path. There would have been less of a need to close borders between member states, for example, and no state would have had a strong incentive not to register incoming refugees. But I consider it naïve to believe that European societies would, in that case, have avoided experiencing a crisis.

One reason for this is that a system which finds acceptance among all European states is not necessarily accepted by refugees. It is conceivable that large numbers of refugees would have tried to circumvent the rules of most other systems of fair burden sharing. A second reason is the fact that it would have been impossible to manage the distribution of refugees without serious problems. A system of burden sharing that works well to distribute 30,000 refugees per month might be overloaded if that figure suddenly rises to 100,000. Consequently, there might have been disastrous situations in the reception centres and hotspots in that counterfactual scenario too. A third reason is that, for most host countries, the numbers of refugees that they would have to accept as part of fair distribution would have been higher than the numbers that these states (or significant proportions of the populations of these states) deemed acceptable at the time. In a system of fair distribution, Germany, for example, would have had to admit in 2015 many more than the 200,000 refugees that many in the ruling Conservative party defined as the maximum number acceptable per year. Not to mention East European states that would have had to admit far more refugees than they actually did or were willing to. Consequently, we can expect that these states would have observed that the established routine of admitting a low number of refugees had been disturbed.

e)   *A Crisis of European Societies?*

Let us, then, seek a broader understanding of the Crisis. Perhaps those who protested loudly against the admission of large numbers of refugees had a much broader idea of crisis in mind. They thought about a crisis of European societies and understood the "refugee crisis" as a social crisis *caused* by refugees.

Needless to say, it seems unfair to frame a crisis that primarily impacts refugees purely as a crisis for the host societies, but one nonetheless caused by refugees. Since I am investigating only whether that understanding

could be conceptually appropriate, I do not consider this problem further here. Is it plausible to understand the Refugee Crisis as a crisis of European society or of several European societies in general? Did the arrival of hundreds of thousands of refugees fundamentally question how we have been accustomed to living, such that it is justified to talk about a social crisis, one that concerns society as a whole?

It is worth mentioning that the understanding in question is consistent with the common meaning of the term: how we are used to talking about the Crisis admits that we are talking about a crisis that affects society as a whole. However, I do not think that the empirical data available to us allow for an interpretation according to which society as a whole has lost its routine. The arrival of many refugees certainly had noticeable effects on society. Several hundred thousand people began engaging in volunteer projects to support refugees; thousands of jobs were created in the social sector; the situation for low-skilled workers has deteriorated in many European countries; the number of homeless people has increased; political conflicts have intensified; criminal acts have been committed by both refugees and those on the political right. However, none of these changes justifies the reference to a social crisis in general. The large majority of people have continued to lead their lives as they did before the crisis. The crisis has not had a fundamental impact on unemployment, national debts, economic growth, crime rates (with a few exceptions when it comes to certain types of criminal acts), the acceptance of public norms, the appearances of cities, and European ways of living.

If there is something that could plausibly be seen as a reason to view the Refugee Crisis as a social crisis, it is the perception that social life could possibly be harmed in the future. Although the changes that have occurred in societies are not dramatic, many people feared that dramatic changes could occur in the future. These fears were so fundamental that they felt something had been irreparably damaged. I will bear this in mind when I formulate my own proposal as to what the Crisis comprises. However, since most sections of society have maintained their routines, I reject the understanding of the Crisis as a crisis of European societies because that understanding does not fit the basic facts regarding the events in and since 2015.

1.4   A Crisis of the European Asylum System

I will now introduce what I believe is an appropriate (not too narrow and not too broad) understanding of the European Refugee Crisis. I propose that the European Refugee Crisis be viewed as a crisis of the European asylum system.[16] Understood in this way, the Crisis is a "refugee crisis" in the sense that it occurs in the field of society concerned with admitting

refugees. This is perhaps similar to a financial crisis, which is not a crisis "of" finances or caused by finances, but a crisis occurring in the financial sector. I perceive the European asylum system as the conglomerate of institutions and norms that manage the entrance and distribution of refugees, review their claims and attribute them legal status, and provide accommodation during the asylum process. Hence, the European asylum system is not identical to the juridical term of the Common European Asylum System (CEAS), although the CEAS is one of its most important components.

The asylum system has several functions for European societies and serves several social goods. First of all, it should grant the right to asylum to those entitled to that right. Secondly, societies consider it necessary to keep the number of incoming refugees at a low level. For that reason, the asylum system is designed to grant asylum *only* to those who are entitled to it and to restrict the number of those who reach European territory to a moderate level. We could call this the "control of numbers function". Third, the system has the function of distributing responsibility for refugees among the member states and among regions within each state according to fixed norms. Fourth, the system has the function of granting protection to refugees during the process of review and, if necessary, beyond. This includes housing, nutrition, health, and physical security. Taken together, these functions serve social goods such as security, stability, peace and perhaps cultural continuity or continued cultural identity.

It can be said that during the years (and maybe decades) before the Crisis, the European asylum system worked according to an established routine. For years, there had been a stable way of dealing with global forced migration that included a limited number of admissions to Europe, a financial contribution to the efforts of non-European states, and multiple methods of border control aimed at keeping the numbers of refugees low. There had occasionally been problems in how some of the functions of the system operated: for instance, when refugee hostels were burned down, when the number of refugees entering certain regions increased, or when the Dublin System of distributing responsibility was questioned by states or circumvented by refugees. There have also always been political attacks on border policies preventing refugees from reaching EU territory, as well as on deportation practices. Despite these problems and turbulences, it can be said that the system "worked".

However, the system was fundamentally disturbed in the European Refugee Crisis in terms of all its functions. As a result of the Syrian civil war, the situation in refugee camps in Turkey, the new strategies adopted by smugglers, and the decisions made by the Turkish government, the number of arrivals to Europe suddenly and unexpectedly increased, and the measures of European governments to prevent persons from entering failed. This means that control of numbers, a basic function of the asylum system, was

lost, triggering anxieties about the future of European societies and leading to a strengthening of right-wing populism in most European countries.[17] As already mentioned, the Dublin System of distribution, already weakened in the preceding years, broke down – a second basic function of the asylum system stopped working. Furthermore, not all those who entered found protection during the review process, and, of those who did, most found protection only after a long transit through European states. The states of first entry did not register incomers or offer adequate accommodation. Administration was overwhelmed in many states, and asylum reviews took too long and were handled without diligence. Thus, the function of the asylum system of providing protection also remained partially unfulfilled.

Importantly, the Crisis was or is also a turning point with regard to the functions disturbed. For each function, there were and are several new routines that could possibly be chosen or several new possible strategies that could well become new routines. For instance, one possible response to the failure of the control of numbers function is to install new border regimes that reduce the number of incomers to a low level. This is what many have seen as "the" solution to the Crisis in the last few years (although it seems nearly impossible to reconcile a high level of control with the requirements of international law). However, reducing the number of incomers is far from being the only possible solution. Another response would be to search for control at a higher level of numbers, which means increasing the expected numbers of those who can find asylum in Europe without giving up the idea of control altogether. A third strategy would be to become used to having little control over numbers – this is what actually happened in 2022 in response to the arrival of Ukrainian refugees, albeit limited to refugees from this particular country. A solution to the crisis does not necessarily have to restore the old functions and tasks through new measures; in principle, it is possible to redefine the functions and tasks considered essential for societies (at least to some extent).

Understanding the Crisis as a crisis of the European asylum system covers, in accordance with uncontroversial empirical data, all the features that I have found to be relevant elements of the Crisis in Section 2. The concept of the asylum system explains what these features have in common: they are all part of the response of European states to the global need for asylum.[18] At the same time, this understanding fits the common meaning of the term "European Refugee Crisis". What we mean when we talk about the European Refugee Crisis in everyday life is certainly compatible with all the features of the understanding I propose.[19]

If we assume the term is understood in that sense, can we already determine when the Refugee Crisis ended or ends? There will be no simple answer. In many respects, it seems possible to talk about a new routine that was established after 2016. Until Russia's invasion of Ukraine,

the number of refugees reaching Europe was under control again, largely due to the EU-Turkey deal and to agreements with other third-country states. As shown by the events of February 2020, when Erdogan encouraged refugees to enter the European Union, the new routine, if it is one, is still fragile. In most European countries, the administration of asylum applications and the care of refugees are sufficiently developed today to manage those who come in. Some countries (especially Greece) are exceptions in that respect, but this is mainly due to the aspect of the Crisis that has not yet been solved in a sustainable manner: the distribution of refugees among European states. The absence of an accepted and effective system of distribution also affects sea rescue: every successful rescue mission, most performed by private rescue boats, provokes new debates on which state should take responsibility for those rescued. In that respect, we are still in a situation of crisis. The future will show whether we will one day view the arrival of Ukrainian refugees as a later part of the European Refugee Crisis or as the beginning of some new era of Europe's asylum system.

1.5   The European Refugee Crisis and Cosmopolitan Norms

Understanding the Crisis as a crisis of the European asylum system allows us to draw some conclusions regarding the role of moral norms. The former routine of the asylum system, as well as its crisis and any new routine, is subject to universal norms: there are obligations towards refugees (from international law, as well as those of a moral nature) and obligations between states (until today, more moral than legal). However, the Crisis should not be considered a crisis of these moral and legal norms. It is, for instance, not the case that a certain moral conviction was widely shared during the old routine and that the crisis consisted in disputing this moral conviction. In contrast, the morals of the old routine had already been regularly attacked (by both sides: those who favoured easier admissions and those who favoured closed borders), with the same attacks also occurring today.[20]

However, the Crisis certainly placed these moral issues on the agenda. In light of the daily news about refugees dying in the Mediterranean, being incarcerated in Libya, or living without shelter in Italy, the voices calling for refugees to have access to protection became louder, these voices alluding to cosmopolitan norms such as human dignity and international obligations.[21] At the same time, anti-immigrant fears provoked discussions about the maximum number of refugees that could be admitted, these discussions reformulating communitarian arguments of cultural identity and national self-determination. What is also on the table today are arguments over how to distribute burdens fairly among European states.

But the Crisis did not consist in these normative debates, nor is a solution to these normative questions a prerequisite to finding a solution to the Crisis. As I said in the previous section, the Crisis can be seen in many respects today as having been overcome. The normative questions behind these solutions, however, have not been answered sufficiently. Reaching a position where the asylum system "works" again and has found a new routine is fully compatible with the violation of moral standards by that system. Today, as in the decades before the Crisis, Europe finds itself torn between cosmopolitan norms and values that primarily demand more protection for refugees on the one hand and the claims of European societies, which are mostly aimed at reducing immigration to a low level, on the other.

To avoid misunderstanding, I should emphasise that I do not believe that moral norms do not apply since a solution to the Crisis is independent of solving the moral problems at stake. Such a view sometimes occurs in the debate: some writers believe that politics should be free of moral considerations because morality impedes pragmatic political solutions. I do not share such a view (which, in my view, is based on a misunderstanding of what morality is). On the contrary, moral norms demand that we search for solutions to the Crisis that do not violate the moral rights of millions of people or prevent millions of people from being able to make use of their rights. Moral norms did so in the past, and they do so today, regardless of whether asylum policies were on the political agenda or not.

Instead, my point is merely conceptual. When talking about the European Refugee Crisis, we do not talk about a moral dispute, and – much more importantly – when talking about a solution or an end to the Crisis, we do not necessarily talk about the solution or the answer to a moral problem. As a turning point that made new directions possible, the Crisis was and is an opportunity for making progress towards a morally better asylum system. There are limited hopes, however, that the emerging routine that might be described at some point in the future as the solution to the Crisis will be a morally better routine than the previous one.

1.6   Conclusion

My analysis of the term "European Refugee Crisis" has revealed that there are several understandings of the term, each identifying a different object in crisis. After criticising several understandings that are proposed in the literature or in public debate, I argued that the best way to understand the Crisis is to view it as a crisis of the European asylum system. Understood this way, the Crisis encompasses several aspects that all belong to the several functions of the European asylum system. I have argued that the Crisis causes moral issues to be placed on the agenda, but the Crisis does not

consist in the discussions on these issues, nor does a solution to the Crisis presuppose any solution to the moral issues at stake. However, the Crisis has offered an opportunity to depart from long-established policies of the past and to reconcile the European asylum system with moral norms – framing the years since 2015 as a "crisis" emphasises the potential of the present to shape the future.

One might conclude from my argument that it would be better to replace the term "European Refugee Crisis" with the term "Crisis of the European Asylum System". In principle, I would endorse that conclusion since the latter term is much more precise and would be immune to the major concerns that beset the term "refugee crisis".[22] However, given the prevalence of the former term in the media and in academic debate, this demand seems unrealistic, at least for the moment. Moreover, I am not convinced that the term "European Refugee Crisis" is so problematic that we should avoid it at any cost. The term *can* be understood as a crisis of the European asylum system, and authors might search for ways to avoid misunderstandings through a sensible wording when using the term.

In particular, when using the term "European Refugee Crisis" or "so-called European Refugee Crisis", my arguments suggest that, in its context, we should

- Avoid the impression that the refugees are the cause of the crisis. Instead, an important property of the crisis of the asylum system is that refugees are not offered adequate protection.
- Abstain from using the concept to justify the violation of human rights by border policies. Although the Crisis threatens certain social goods of the host states, it does not threaten European societies as a whole, nor does it legitimise emergency rules.
- Be aware that ending the Crisis should not be considered the highest political goal or the best possible political success as is often implicitly stated in public debate. Instead, the difficult political task in our times is to end the Crisis in ways that are compatible with cosmopolitan moral norms.[23]

Notes

1 See, for example, Sager 2021. This criticism is also behind statements such as: "It certainly does not seem to be a 'refugee' crisis, because the people fleeing armed conflicts and persecution are not the problem" (Goździak/Main 2020, 1).
2. It is for that reason that Thielemann 2018 talks about the "Syrian refugee crisis" when referring to the events of 2015.
3. Sager 2018; Goździak/Main 2020.
4. In the Anglophone world, the term "European Migration Crisis" might even be more common than "European Refugee Crisis". I will not address that term

here, but I believe that many of the points I will make regarding the term "Refugee Crisis" could similarly be made regarding the term "Migration Crisis". On the latter term, see Sager 2018 and New Keywords Collective 2016, 16.

5. I will use "Crisis", with capital "C", as the short version of "European Refugee Crisis".

6. My conceptual analysis is intended to be in line with the common meaning of the term as well as with most academic approaches; see, for example, the conceptual conditions mentioned in Seeger/Sellnow/Ulmer 1998 and in Habermas 1976.

7. For the parallel existence of crisis and routine in the case of the European Refugee Crisis, see Jeandesboz/Pallister-Wilkins 2016.

8. Of course, the European Refugee Crisis could nevertheless be seen as embedded in a global migration crisis or any other global crisis; see Niederberger's contribution in this volume.

9. Schulze Wessel 2017, 63–64.

10. Schulze Wessel 2017, 62–63.

11. Shacknove published his well-known critique of the Geneva Convention's definition of a refugee in 1985.

12. Roos 2018.

13. Niemann/Zaun 2018, 3.

14. Nancheva/Agarin 2018, 8.

15. Bauböck 2018.

16. Of course, I cannot claim to be the first to understand the concept in this manner. Many writers may see a direct parallel between their own position and mine or will find that my view makes explicit what they have already said implicitly.

17. Conceptually, it is likely adequate to understand the strengthening of right-wing parties as a consequence, and not as a component, of the Refugee Crisis. In turn, the existence of populist rhetoric certainly affected how people perceived the Crisis; see Lucassen 2017.

18. Özmen 2015 claims that there is no particular field of politics whose crisis would constitute the core of the European Refugee Crisis. I believe this to be fundamentally misleading, and I hope that I have provided enough evidence here to substantiate my belief.

19. Here, a note on Schulze Wessel's (2017, 64) third proposal to understand the European Refugee Crisis is necessary. She proposes that the Crisis should be seen as a Crisis of European refugee *policy*. As I see it, that proposal describes the area to which the Crisis relates in the same way that I do here. However, I believe it is misleading to view the Crisis as a crisis of *policy* or *strategy*. The Crisis was surely not just a crisis of how to deal with things politically but involved institutional breakdown and individual suffering. It might make sense to say that the failure of European refugee policy at least partly *caused* the Crisis. But it is not convincing to claim that the Crisis *consisted in* that failure.

20. Disagreement on norms and values certainly *contributed* to the emergence and the dimension of the Crisis, but my arguments show that we cannot view the Crisis as a crisis *of* values, as, for example, claim van Eijken/Safradin/Senden 2018, 28.

21. I do have my own position on these matters, but this is not the subject of discussion here; see Hoesch 2016 and 2018. See also the contributions by Düwell and Philips in this volume.

22. It should be added from the ethical hermeneutics perspective that the refugees themselves should be involved in debates on how to name and frame the situation in the period from 2015.

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2 Europe's Migration Policy Between a Global and Local Legitimation Crisis

Andreas Niederberger

2.1 Introduction

In its press release on the new EU Pact on Migration and Asylum in the autumn of 2020, the EU Commission states that

> [T]he current system no longer works. And for the past five years, the EU has not been able to fix it. The EU must overcome the current stalemate and rise up to the task. With the new Pact on Migration and Asylum, the Commission proposes common European solutions to a European challenge. The EU must move away from ad-hoc solutions and put in place ***a predictable and reliable migration management system.***[1]

The Commission thus acknowledges that the previously established system, including the Dublin rules, is no longer effective for the field of external border policy, the protection of refugees and their integration into European societies and that Europe must develop an alternative system. The EU, which is responsible for such European solutions, has so far not been able to adequately take up the challenge. This is what the new Pact is supposed to deliver. More than two years after the presentation of the Pact, it is still unclear whether it really is the basis for a "predictable and reliable migration management system". There have been legislative efforts to translate parts of the Pact into European regulations, but these efforts have so far mainly made existing differences even more visible.[2] However, in light of the ongoing dire situation faced by refugees on Greek islands such as Lesbos, reports of refugee mistreatment in and at the borders of various EU and other European countries and the blackmail in the negotiations on the future EU budget in late 2020, it seems unlikely that there will be more than a minimal convergence in intensified attempts to further close off Europe's borders. The largest margin for consensus exists with regard to agreements with third countries outside of Europe, which are supposed to prevent refugees from coming to Europe and, at the same time,

should be motivated by the compensation payments to treat the refugees "humanely". Despite the pact and the debates it has sparked, the Commission, or more precisely the EU as a whole, continues to fail to address a problem that affects all of Europe. It is therefore certainly not too dramatic to speak of a crisis of the EU in the field of refugee and migration policy.[3] The instance tasked with finding a solution fails to do so while the problem persists alongside the increasing urgency to address it.[4] This situation has not changed with the way refugees from Ukraine were received in the spring of 2022 and the activation of the Temporary Protection ("mass influx") Directive, which many had already called for in 2015. In this case, there was an uncomplicated and mostly unconditional readiness across Europe to accept refugees fleeing the war. But both the EU and its member states explicitly understood this admission as an exception that does not represent a new paradigm for EU refugee and migration policy. Rather, we should see it as part of the support provided to Ukraine in defending itself against the Russian aggression. It is even likely that in the future, some states will cite the "burden" of Ukrainian refugees as another factor in the argument about how to proceed with other refugees and migrants. As good as the policy was in the case of refugees from Ukraine, it is unclear whether it will not ultimately aggravate the crisis of the EU in the field of refugee and migration policy. This potential development becomes particularly clear if we take into account other war-related phenomena, such as the inflation-related loss of income in Europe, the expected waves of refugees from the Global South due to food shortages or the increasing focus on security policy and related military spending.

Thus, understood simply in this way, the crisis is first and foremost the EU's ongoing failure to find and implement a solution in the field of refugee and migration policy. Irregular migrants continue to arrive in the EU or at its borders, and there is no shared understanding among member states as to how they ought to receive the migrants, determine their status and distribute them among the member states. Some, therefore, interpret this crisis to indicate that no plausible proposal has yet been made as to how to combine the relevant factors in this area: European and, in this case, also international law; the interests and beliefs of the different European populations; and the needs and interests of the refugees, which cannot be dismissed. In what follows, I will argue, by contrast, that this understanding of the crisis as a lack of a material solution to a problem that takes all the previously mentioned factors into account misses the mark – and, consequently, that proposals for material solutions likewise do not address the core of the crisis. The EU's failure results from the fact that the EU is denied the authority[5] to find and/or implement a solution, not from the shortage of good proposals for better migration and refugee policies. At least in this policy area, there is a lack of willingness to apply supposedly

established procedures and standards for the development and implementation of European solutions: i.e. the working methods of the EU. The case of refugee policy exposes a more general dispute about what the EU is entitled and obliged to do.

But what does this mean? Does the crisis of authority or legitimacy of the EU possibly stand in the way of an adequate management of the refugee issue? Should we therefore look for a way to respond to the refugee issue that moves beyond the established European framework? In principle, one could imagine proposals on refugee and migration policy that may claim to address relevant dimensions of the migration issue (compatibility with the European and international legal framework, democratic legitimation at all levels in Europe, actual solution of existing problems) without the EU's institutional and procedural framework. And, indeed, some proposals on how to deal with refugees make only passing reference to the EU.[6] Yet one may ask whether the implementation of such "deals" will result in more than a temporary solution to the "refugee and migration issue". And this would not only be because the "deals" no longer suit the changes in migration patterns in the medium term, which is a challenge in itself. Indeed, the refugee and migration issue is not only about the well-being of refugees or European populations; it is also about the more fundamental question of who ultimately controls access to and the shaping of common spaces of action. For this reason, it is no coincidence that the EU's crisis of legitimacy and authority surfaces particularly in its refugee policy. After all, what is directly at stake here, on the part of both the existing populations and the refugees, is the question of who can and may decide, who now and in the future has a say in deciding on the shared space, and who thus exercises control over it. Deals relating to refugees and migration not only fail to directly address this control issue; they even exacerbate the control problem for many. Whatever deals or similar solutions to the refugee question are offered, they are unlikely to counter the widespread impression of a loss of control. But if these deals and solutions are found beyond the very possibilities that exist to control the common sphere of action, then they are likely to reinforce not only the *impression* of a loss of control but also the *actual* loss. The EU-Turkey deal may result in fewer refugees arriving in Europe and in some refugees finding conditions in Turkey under which they can live a decent life. But the form of the deal, beyond existing political structures and rules of international law, makes European populations and refugees even more clearly mere objects of governance than they were before. This chapter therefore argues that if the real question is that of the control of the common sphere of action, a solution to the crisis of European refugee and migration policy is hardly conceivable without a solution to the crisis of authority and thus also to the EU's crisis of legitimacy. The EU, with its far-reaching powers and capacities, did not first raise the issue

of control. Rather, the EU exists because it promised a legitimate solution to the question of controlling the transnational European realm. It came into being because after World War II, at the latest, Europeans realised that unilateral attempts by individual states or their alliances to control the sphere of action would ultimately end in violence and loss of control by all. As long as there is no institutional and procedural alternative to the EU, the rejection of its authority is tantamount to the rejection of this insight, shared control and thus also of the normative preconditions for an adequate solution regarding refuges and migration. Solving the issues by relying on mere power or even force cannot be adequate.

This brief and, in many respects, certainly too cursory introduction served the purpose of clarifying how the crisis of the EU in the field of refugee and migration policy is to be adequately understood and, accordingly, what an examination of how we could overcome this crisis must focus on. We are not just lacking a suitable proposal for this policy for the dispute is instead about whether the EU has the authority to implement such a proposal. However, considerations of deals that bypass the EU also fail to recognise that it is precisely the question of the EU's authority that is at stake or, more generally, the question of who can exercise control over the public realm in the first place, including the question of who decides on immigration. Hopefully, this has provided some initial plausibility as to why this chapter, unlike other approaches in the field and in this book, does not directly ask for foundations or a normative perspective for better refugee and migration law and policy or at least for better protection of those arriving in Europe. Nevertheless, in what follows, I will not simply assume that the issue is not the competing interests of the European populations and refugees as the preceding paragraphs might not yet convince some who consider such a tension between interests in sovereignty or exclusion and interests in protection or admission to be the central problem. Therefore, I will first show why the crisis of European refugee and migration policy is more than a tricky coordination problem and why the EU's inability to develop a convincing refugee and migration policy points to a deeper transnational crisis of legitimacy. The attempt to focus on solving the refugee and migration crisis thus ignores the real problem. If one takes a closer normative look at the different perspectives on the crisis, they all point to transnational legitimation structures, such as the EU purports to embody. Accordingly, I explain why a convincing solution is not possible without the EU as a mediator. But even if it is indeed necessary to create conditions for transnational legitimation to solve the problem of flight and migration, one can understand the task at hand very differently. Therefore, in the second step, I examine the nature of the EU's legitimation crisis in more detail, identify two deficits, and consider two strategies for (re)establishing the EU as a legitimate transnational entity. These considerations suggest that

strategies addressing the EU's deficits in successive steps are not convincing because they exacerbate the other deficit. Against this background, in the third and last step of the argumentation, I propose a principle that can serve as a guideline for proceeding with the establishment of transnational legitimation structures, at least in Europe, and thus also show a way to a convincing solution for the refugee and migration question.

2.2   Understanding the European Refugee and Migration Crisis and Possible Solutions

In the introduction, I pointed out that different actors describe and experience the European refugee and migration crisis differently. For some, a proposal is lacking on how to deal with unwanted refugees and migrants coming to Europe that reflects the different views in EU member states on whether and what form of immigration to Europe is desirable. Others see the refugee and migration crisis as a lack of willingness on the part of at least some EU member states to fulfil their obligations under international, European and, in some cases, national constitutional law. A third group refers to the suffering and desolate situation of refugees in protracted situations in refugee camps but also to the difficulties refugees have in reaching places where they would like to live. There is no shared diagnosis of the crisis. Yet at the same time, it is difficult to respond to the crises diagnosed in each case because, from the perspective of the other diagnoses, such a response would just exacerbate the crises they have diagnosed. For those who point out that there is a limited willingness in many parts of Europe to accept refugees, it would seem reasonable to downplay or even deny legal obligations and to accept the suffering of refugees as part of a deterrent to future irregular immigration. Those who, on the other hand, mostly see a crisis of international or European law and its application, call for xenophobic sensitivities to be disregarded while also emphasising that remedying the suffering of refugees should not be played off against their legal rights. Finally, those who focus on the vulnerability of refugees stress that their suffering is so much greater than that of persons in the destination countries facing disruption to their established ways of life, and so much more fundamental than what legal claims are supposed to guarantee, that the suffering must be remedied and, if necessary, even at the expense of existing populations and legal rights or obligations.

This chapter approaches its questions from a philosophical rather than a political or political science perspective. It seeks the normatively correct answer to the crisis of European refugee and migration policy and not only or primarily what is politically feasible at the moment.[7] But if the normatively correct answer is at stake, why should the fact that the diagnoses disagree in determining the crisis or that the putative solutions

reinforce the other identified crises pose a particular challenge? After all, there are normative theories that argue for the correctness or primacy of one of the crisis diagnoses. With these theories, one could easily argue for the primacy of popular sovereignty, for that of international humanitarian or European law and the associated legal status for refugees or for the primacy of preventing suffering. However, such "easy" normative approaches ignore the fact that we will not overcome the given crisis by normative clarification and argument alone. This is not to raise the issue of feasibility or implementation merely in other words. Rather, the point is that the competing diagnoses of what the crisis is about reflect the still-unresolved "academic" dispute between different normative positions. And since we find a normative core in all three crisis diagnoses, arguing for one diagnosis and its normative core would be little more than taking sides in the existing political and normative conflict. In philosophy, theories of more or less radical democracy, which are often anti-cosmopolitan,[8] neo-Kantian theories of global justice focusing on human rights and transnational principles of justice,[9] and theories of global aid and poverty alleviation focused on well-being[10] have been largely irreconcilable over the past three decades. Repeating one of the positions in the face of the crisis at stake here will not only be politically ineffective, but it will also fail to develop any new argumentative strength within normative theory. Thus, if we do not want to give up the claim that our proposal can be a step on the way to overcoming the crisis, we must look for a normative solution that can enter into dialogue with what is normatively relevant in all three crisis diagnoses.

At this stage, it might seem logical to cut short such a dialogue and seek a normatively convincing pragmatic solution outside the usual schemes to satisfy all three diagnoses. Would it not be possible to find a way of dealing with or distributing refugees and other irregular migrants that combines different degrees of readiness to host them, legal safeguards and a reduction in suffering? In the introduction, I already outlined some of the difficulties encountered by "deals" that some see as a political way out of the crisis. A current philosophical debate addresses, with a more normative focus, the question of whether we can find appropriate principles for the allocation of refugees under the given conditions.[11] The aim is to combine the capabilities and interests of hosts and refugees and, in this way, ensure that what is legally required is, in fact, fulfilled, even if not by those who are primarily legally obligated to do so. While the principles proposed in this debate focus on what is feasible under current circumstances, they also aim to cover what is normatively indispensable. In doing so, they do not relate to the normative cores of the three aforementioned crisis diagnoses as such but reinterpret them as interests or substantial expectations of a solution. Those who claim to be allowed to decide against further refugee admissions are understood as not wanting to take in any more refugees.

Those who argue for the application of European and international law are understood to want refugees to be treated humanely or in some other appropriate way. The supposedly pragmatic solution, which is intended to go beyond the dispute between normative approaches, thus avoids taking a stand on normative claims apart from the reduction of suffering or the minimal protection of refugees, which has always been conceived in consequentialist terms anyway.[12]

Does this reduction of principled demands to specific interests pose a problem? Not necessarily. If we could assume that the refugee and migration issue is temporary and we could answer it with this solution, then it would obviously not be problematic. But we know this is not the case. All indications are that the number of refugees and irregular migrants reaching Europe will increase rather than decrease in the future. Even that would not necessarily make the solution problematic if it were a step towards a permanent, normatively convincing solution. But this is far from evident. In both the political and the practical sense, the proposed principles would likely only work for a certain period, if at all. However, they would – and this would be extremely problematic – stand precisely for a consequentialist approach to the refugee and migration issue and thus assign primacy to a normative programme with a specific characteristic (consequentialism) to which other programmes are opposed.[13] Should the temporary acceptance of consequentialist principles of refugee distribution or allocation be seen as an expression of a stable normative orientation, then we can assume that support would soon dwindle. The reason for this is that behind the crisis diagnoses, there are not only more or less contingent normatively relevant interests but also different, more general normative perspectives. The respective proponents of these perspectives are not simply concerned with how particular issues are materially solved. They are also crucially concerned with the way in which the solution is found – and this means, most importantly, that the requested normative principle is actually brought to bear and not merely contingently fulfilled. This explains the link mentioned in the introduction between the refugee issue and the question of who controls the shaping of the common sphere of action since the question of who and how they can apply their normative goals or perspectives is significant. And while the specific difficulties of European refugee and migration policy are obviously important, it should not be ignored that other European controversies are also at least co-negotiated via the dispute over this policy. Refugee and migration policy becomes a proxy for other fields, and solutions to the "refugee question" thus become also relevant for supposedly quite different issues.[14]

Thus, there will be no mid- or long-term solution in refugee and migration policy that does not seriously engage with the normative claims that are currently being put forward in this field. In considering such a serious

commitment, we can immediately see that it is obviously impossible to simply produce an overarching normative conception that integrates the three distinct perspectives in terms of their normative cores. However, we may be able to understand why there is a crisis in the refugee and migration field precisely because of the different normative perspectives: that is, why in this field the differences lead to opposing and hardly reconcilable attitudes.

In globalisation research, many have noted that globalisation consists in an intensification and often facilitation of communication and financial or commodity flows across state borders but that no similar openness to persons accompanies this greater permeability or even irrelevance of borders.[15] Why was it possible and even advisable to make borders irrelevant in many respects for communication, money and goods but, at the same time, to retain the importance of borders for persons or even to tighten them in some parts of the world? It should first be noted, as this will become important further on, that the opening of borders for finances and goods was also never unanimously welcomed.[16] However, an important reason behind the difference when it comes to the movement of people across borders is that migration, or freedom of movement across borders, raises different normative issues than communication or the transfer of money or goods across borders. And even if communication, money or commodities already raise these normative questions, migration brings them into focus differently. Normative questions potentially arise in all contexts. What person should I be? How should I deal with certain objects, plants or animals? Which decisions are better or worse? We often ask such questions in the first-person perspective. Sometimes, however, we are looking for more than just the answer to what "I" or "we" should do.[17] The questions then aim to clarify how people should generally act: that is, which principles they should be following in a given context. The answers thus also serve to clarify the relationships between people in this context and to structure their interactions. When asked whether property should exist, the affirmative answer usually involves allowing owners to take certain actions when others steal or damage their property. To the extent that I or we no longer just determine what I or we should do, but duties of others or claims against them come into play, what we normatively look for takes on a different function. To fulfil this function of regulating the common realm or actions by and between different actors, the answers to the questions must be able to claim intersubjective validity.

Some normative theories emphasise that intersubjective validity is relevant even to normative questions that concern the relations of people to themselves, to things, plants, and animals, or to their choices. At the moment, though, when the answer to normative questions has to assume that this answer might be relevant not only for the questioner but also for

others who might also ask themselves normative questions, the claim to intersubjective validity becomes unavoidable.[18] In the globalisation discussion, some have, in this respect, pointed out that eliminating borders for communications, money and goods creates shared spheres of action, which also have to be determined jointly. However, because people remained largely organised into states and there was no world state in sight, these proposals could be ignored by those who took advantage of the discrepancy between economic opportunity and the lack of overarching political decision-making capacity.[19] The focus on cross-border flows of communications, goods and money has allowed the Global North, in collaboration with elites from emerging economies and the Global South, to benefit from or even abuse cross-border investments and production chains without being held accountable and without an equitable distribution of benefits and disadvantages. Regulation of this globalisation has developed only to the extent that the various beneficiaries needed it in order to control their competition with each other or when they had to make concessions for access to markets.

Migration changes this situation, even if there is no world state or some other transnational decision-making procedure. Migrants explicitly or implicitly declare that they are no longer willing to be mere objects of others' decisions, and the failure of one-sided responses can no longer be denied, whether they are meant to be normatively correct or not. The confrontation of different claims and normative perspectives becomes inevitable, and the decision regarding their respective validity no longer depends on the reach of certain states or organisations and their ability to make themselves heard by others. To state that from a "European", "German" or "Polish" point of view, people have no right to global freedom of movement may have the consequence that people in Europe, Germany or Poland see themselves as entitled to turn away migrants. They must realise, however, that this supposed "right" to turn them away is not recognised by migrants. Migrants do not acknowledge the obligation not to come to Europe or to wait for invitations and consent from European societies. The normative justification of one's presumable right to turn away migrants thus does not establish a shared normative space. At best it remains an appeal to establish such a space with the corresponding right to turn migrants away, but usually, it is little more than an unconvincing defence of the use of coercion and violence against refugees and migrants.

In the context of previous globalisation, however, this is not simply another situation in which former beneficiaries of globalisation must now negotiate with migrants, as was the case when they negotiated access to certain markets. Rather, many in Europe perceive the refugee and migration issue as yet another area in which *they* have no say and are simply subjected to yet another alleged necessity. After all, globalisation has not

had serious effects just in emerging economies and the Global South by perpetuating dependencies and asymmetries. In Europe, too, it has given many the impression that they are being subjected to a logic of domination that deprives those who are worse off as a result of globalisation of their options for participation in decision-making. This and the opposition to it became particularly visible in the 2005 referenda on a proposal for a European constitution in France and the Netherlands and in the continued rejection of the TTIP free trade agreement with the USA since 2013.

This complex situation of advanced globalisation has led to the crisis of European refugee and migration policy being viewed from different angles and with very different normative concerns, which all have their validity and cannot be easily reconciled. At the same time, migration creates a common normative space so that the different angles cannot simply persist side by side. From the perspective of the real situation of the refugees or the conditions in the Global South, it is permissible to seek to significantly improve one's own situation through migration. If compliance with supposed obligations not to cross borders without permission entails the acceptance of serious global inequalities and the impossibility of having one's voice heard in essential decisions to which one is subjected, then one cannot assume that such obligations exist and are recognised.[20] From the perspective of European populations or parts of these populations that have the impression of being subjected to a logic of globalisation and profit interests or values of a transnational elite, it is permissible to oppose migration. This is because they understand it as another area in which they have (supposedly) no choices and in which people arrive who may be competing with them for the same jobs and social benefits. And from the perspective of those who have always regarded the identification and safeguarding of rights and the rule of law as a hallmark of liberal political conditions, it is permissible and necessary in the emerging conflict situation to point out which legal claims exist minimally on the part of the refugees or how rights and obligations are distributed more fundamentally in the given conflict situation. In their case, this takes place against the background of globalisation processes which, on the one hand, have created new laws and new rights in transnational spaces, but on the other have also allowed powerful actors to evade the application of law or, on the whole, have made the force of law more contingent.

The various diagnoses of crisis do indeed reveal normative deficits or challenges, but embedding them in the development of globalisation explains why we will not be able to find simple solutions to these deficits. It cannot simply be right – because it will not be accepted – to redress one's own domination by claiming the permission to dominate others. Seen in this light, the different diagnoses can be understood as a dispute about who can control or decide what: i.e. who has the normative authority for

which decision. Contrary to the widespread assumption that the crisis is primarily about different interests or even different normative principles, we can note that there is, in fact, a common diagnosis based on one and the same general normative principle: the shared general principle in the tension between the different perspectives is that the respective other has no authority to legitimately decide how to proceed on the refugee and migration issue. All of them assume that they should be in the position to determine which principle should apply to their shared sphere of action. And – knowing that the others would bring other principles to bear – they can all assume this only because, on a more fundamental level, they assume that the respective other does not have the right to decide which principle should apply. It is in this negative principle that they agree. However, they draw conclusions from this shared principle for their own rights or permissions, which are obviously not suited for making a generally legitimate decision.[21] And this is precisely how we can explain both why the European Union is denied authority – it is accused from all sides of being the instrument of others who use it to exercise domination – but also why the real problem is this contestation of its authority: without an entity that might be able to establish and shape the common normative space with legitimate authority, we must state for all normative perspectives that they can also be used to justify domination. For if it were possible for some to subject others to a normative perspective that they reject from another normative perspective, the normative claim of the former would conceal the fact that they actually dominate the latter. The different perspectives are therefore not suitable as a basis for regulating the common normative space. Proponents of democratic popular sovereignty must see and recognise that European populations, migrants, and even broader populations in most parts of the world share a common sphere of action. Therefore, the self that might govern this space must be more inclusive or differently structured than the established (democratic) peoples.[22] Refugees and migrants must acknowledge that their warranted resistance to a world order that perpetuates or even exacerbates inequality does not itself create "positive" rights to participate in complex forms of social cooperation.[23] Proponents of more or less basic rights and corresponding duties must recognise that rights, duties, and the legal systems that enforce them do not come naturally but require political and social structures to sustain them.[24] It is clear, of course, that one's own being dominated suggests, above all, one's own empowerment: that is, one's being endowed with the ability to assert one's interests and claims against those who dominate. In the face of competing correct insights from different groups into being dominated, however, the first step must be general submission to common procedures and structures that prevent resistance to domination from becoming domination itself.

Bypassing the EU in its current crisis of authority and legitimacy to find a pragmatic solution to the current refugee and migration problem fails to recognise both the reasons for the challenges in this area and that the EU is more than a contingent instrument of international coordination. The reasons do not simply lie in different interests in or attitudes towards migration. Rather, they go back to globalised spaces of action and attempts to (re)gain control over one's own life and the activities (of others) in these spaces, to which one is otherwise merely subject. In the values and norms the EU professes to incorporate, it claims, first, to establish procedures in a complex and multi-level democratic structure in which all who are subjected to decisions can participate in decision-making; second, to be integrated into a globally legitimate, if not outright just structure; and third, to guarantee a continuous rule of law across contexts and levels. With these claims, it not only takes up the normative cores of the previously distinguished perspectives but also aims to ensure that the potentially dominating effects of each are avoided by linking the three dimensions without reducing them to one. As long as there is no alternative to the EU, it should be reminded of its claims or potential, and a solution to the migration and refugee issue should be sought from there,[25] not beyond it. The EU's crisis of authority and legitimacy is thus the real problem to be addressed.

2.3   Two Deficits of the EU and Their Implications for Its Reinvention

The last plea for relating any solution to the EU's claim and potential should not be understood as a call to simply affirm the EU as it has existed and operated in recent years. The EU has clearly not lived up to this claim itself. It has played off the various dimensions of its claims against each other and, precisely by doing so, has helped unleash the dominating effects that have led to the gridlock on the refugee and migration issue. The search for a solution via the EU must therefore start with the EU's shortcomings and problems and should not simply ideologically gloss over its functioning.[26] The two most serious flaws of the EU in this regard are its *democratic deficit* and its *global role*. In both respects, there is a wide gap between its claims and its reality, and what renders the flaws even more problematic is that the EU makes it seem as if the gap is necessary to do justice to the other dimensions of its claims.

The debate about the EU's democratic deficit is already several decades old. It arose in the early 1990s in the context of the transition from the European Communities to the European Union and the establishment of the single market. This transition considerably expanded and deepened the competences of the European institutions. In view of this and the fact that the opportunities for political participation in the EU obviously did not extend as far as in many member states, some diagnosed the EU as not

being sufficiently democratic and thus also facing a problem of legitimacy. This diagnosis was followed by the obvious proposal to constitutionalise and democratise the EU: i.e. to turn it more into a federal state or at least a strong confederation.[27] However, some also argued that the competences of the EU should be more closely tied to the member state parliaments and governments, which would clearly mark the character of the EU as an international organisation.[28] More importantly for the discussion in democratic theory, though, the deficit diagnosis led some to question the tight link between democracy and the institutions or procedures as they had developed in the nation states since the end of the 18th century. They disputed that we should conceive of democracy in terms of general participation in processes of opinion formation, whether in the public sphere, in political organisations, in parliaments, or in elections and referenda. In their view, democracy consists above all in the claim that the rules and measures that become binding are in the interests of those who are affected by them. Democracy is therefore measured by its output instead of its input to a political system.[29] For the European Union's output now, the proponents of the output approach to legitimacy argue that in its complex mediation between the member states and relevant interest groups, it regularly produces decisions that reconcile the various interests and concerns of European citizens much better than most member states are able to.

This controversy clearly echoes a question that we have already encountered with regard to the supposedly pragmatic proposals on the refugee issue: namely, whether there is an intrinsic value to the reasons and procedures that lead to certain decisions. However, I do not want to consider this controversy between input- and output-conceptions of democracy further here. Since the mid-2000s at the latest, it has become increasingly clear that the democratic deficit of the EU is primarily seen as a deficit in the controllability of European politics or a tendency to depoliticise issues, hand them over to experts and thus remove them from the set of possible decisions.[30] The proposal for a European constitution was intended to bring the EU more closely into line with the federal state model, and one might have expected that a more comprehensive European political sphere would have emerged as a result. At the same time, though, there was an attempt to incorporate a neo-liberal economic policy agenda into the constitution. Consequently, economic policy would have been and would remain largely removed from political decision-making even in the event of any further possible democratisation. The democratic deficit of the EU is thus a deficit of the possibility to make political decisions and, in particular, of the possibility for many to bring themselves and their views to bear on whether and how something is decided. Even if the EU may "objectively" serve the common good (measured perhaps by the criterion of the interests that Europeans actually have or should have), it is perceived as a political entity

that simply imposes decisions on populations or member states: that is, it dominates them. In the end, it is irrelevant whether this domination serves the goals of a pan-European transnational elite – i.e. possibly also their own governments – or whether some member states use the EU to subjugate others to their own ends. Democracy consists not only in a mirroring or representation of the people in political decisions; it is also essentially about preventing some from dominating others by subjecting the latter to their decisions, however good they may be. Control over others, over political procedures and institutions and over political decisions is thus a core feature of democracy – and it is precisely in this respect that the EU is to be understood as deficient.[31] The EU's supposed advantage of being able to identify a wide range of interests in complex multi-level procedures and to take these interests into account in its decisions ultimately makes it difficult, at least for many, to control decisions and to hold decision-makers accountable. It is not clear whom to approach and how to act to bring about or prevent a particular decision. Time and again, the European Council overrides majorities in the European Parliament, but even inconvenient governments of member states are often unable to bring their concerns to bear in the European bodies.[32] For many, the EU thus appears to be more of a structure for warding off or dissipating democratic control than for strengthening it. Perhaps democracy needs to be redefined, but the redefinition must not result in rendering control and accountability, as core elements of democracy, impossible.

While there is, as stated, an extensive debate around the democratic deficit of the European Union, there is no similarly significant debate about Europe's role in the world. Europe has, at least for the inner European discussion, successfully managed to hide its own role behind the scandalisation of the behaviour of the old and new world powers: USA, Russia and China. Europe often portrays itself as largely irrelevant globally, especially since the European Union does not speak with one voice on many global issues, and there are more than a few books that have called for a more important geopolitical role for Europe in recent years.[33] These calls have already increased and will surely increase even more in light of Russia's war against Ukraine. This obscures the fact that the European Union and many of its member states are, of course, important global players.[34] Economically, Europe is clearly a heavyweight, but in many other areas, too, Europe asserts political, cultural and even military power. Through the WTO and its own economic and trade policies, Europe reinforces lasting global inequalities and dependencies. Through economic, political and military support, its conditionality, or more or less direct interventions, many different conflicts are influenced, exacerbated or even initiated in favour of Europe or individual European states. The "refugee prevention" policy in Africa particularly shows how little Europe cares about the conditions in

Africa itself and how strongly Europe tries to maintain or even expand the control in its "sphere of influence" to pursue its own interests.

Much like the democratic deficit, the greatest difficulty in dealing with Europe's global role lies in its diffuseness. Unlike the old and new world powers, which can be understood as unitary actors, it is much more difficult to apply such a view to Europe.[35] The USA can be blamed for the current situation in the Near and Middle East with the Iraq War and subsequent occupation policy. At the same time, because some states opposed the Iraq War, the fact that European states were also involved is mostly overlooked. For those exposed to the global role of the EU and its member states, however, the difficulty of clearly identifying responsible parties does not alter the devastating effects. One can therefore agree with the call for a greater geopolitical role for the EU, although this has a different meaning than the definition typically associated with it. The EU must become an identifiable actor but not to assert "European values" even more forcefully in the world. Instead, by accepting its role of a global actor, the EU should become addressable and accountable for its actions in the world. It must also monitor its member states, if they do not act in concert with Europe, with regard to what they do outside Europe and, if necessary, hold them likewise accountable. Becoming a geopolitical actor and asserting European values therefore means, above all, creating accountability and, through it, enabling political and legal control and more legitimate forms of global governance.

In the previous section of this chapter, I argued that we can only bring together the various diagnoses of crisis and their associated demands in a transnational structure such as the EU, which combines democracy, the rule of law and global legitimacy. Otherwise, justified criticism may lead to the justification of new domination. In view of the two deficits of the EU we have highlighted, it becomes clear why the EU has so far not only failed to function as this necessary structure but has itself also contributed to exacerbating the diagnosed crises. Because the EU is denied (democratic) legitimacy and is perceived as a mere instrument to enforce certain interests, it cannot offer procedures and institutions with which the intra-European debate on the appropriate handling of refugees and migrants can be settled. The EU and its member states are not perceived as a constituent part of a legitimate global world order, nor does the EU indicate much effort to make it such a constituent part. There is therefore no reason non-Europeans should recognise Europe's supposed or real interest in being less of a target for irregular migration. The two deficits are indeed related. They both stem from the fact that the EU often fails to increase and improve the control and accountability of decision-makers and rulers. On the contrary, it creates opportunities to exercise domination by concealing possibilities of control and accountability. The EU thus might have capacities

with which transnational problems such as the refugee and migration issue could be solved – but with its lack of legitimacy, it above all encounters resistance from parts of the European populations as well as from refugees.

In the discussion of the various crisis diagnoses, I stated before that there is no simple comprehensive solution to the migration policy stalemate. If it now transpires that the EU is not immediately available as a structure for discussing and deciding on diagnoses and claims, but we cannot do without such a structure, the question is how we should change the EU to provide such a structure. To avoid making the reform agenda implausibly comprehensive, it may seem reasonable for us to address one of the two deficits first. One might want to start at the foundation of the EU – i.e. in its member states – or with the European populations. So, should the EU first become internally more democratic: i.e. give European citizens more control over European policies and create greater accountability to them? There is, of course, much to be said for increasing these opportunities for control and accountability. This would make it much easier to address many of the other European crises, in particular the chronic financial crisis and the associated dismantling of European social security systems through unacceptable and unsustainable austerity measures. At the same time, the possibly opposed effects of more opportunities for control and accountability for the European financial crisis and for the crisis of refugee and migration policy are also the greatest obstacle to the primacy of inner-European democratisation. One could understand the primacy of inner-European democratisation as an expression of a "Europe first" strategy: i.e. one might assume that democratisation goes hand in hand with the commitment to give priority to European interests over "cosmopolitan" concerns. But this cannot be the reason for democratisation. The reason for democratisation is that no one should simply be subjected to the rule of others. Therefore, there must be possibilities to control the exercise of government and to hold those ruling accountable for it. The basic idea of democratisation is therefore not one of empowerment but of *disempowerment*: those who have been able to exercise rule without control and accountability are subjected to control and accountability. Of course, this also empowers people, actors or interests to finally be able to assert themselves in the exercise of government, but it does not mean that the content of how government is exercised has already been decided. Rather, democracy means precisely that all those who are subjected to the rule jointly decide how it is to be exercised and with what goals.

We should therefore not ignore the fact that democracy is used by current populist movements to justify global relations of domination. That democracy should express the will of those who are subjected to its decisions means negatively that no one may simply be subjected to the will of others. But the self-constitution into a democratic people does not exclude

the fact that others are subjected to its decisions. The negative meaning thus does not simply correspond to the positive meaning that a specific people must be able to decide without regard for others. Who must be able to decide depends much more on the scope of particular decisions and the ability to control them rather than on the self-constitution or self-perception of a group as a people.[36] The normative call for a democratisation of the EU is only acceptable if we understand it in such a way that it rejects undemocratic decision-making as a form of domination. It becomes implausible when we understand it as an expression of the right of some, or even many, to have their interests reflected in decisions. The right not to be dominated does not directly imply the claim that some of one's own interests must be brought to bear in governance.

However, this also rules out the possibility of the EU first becoming a better global player, for example, by asserting the primacy of the interests of refugees and migrants over those of the European populations. Given the strong asymmetries between the EU or its member states and refugees, there may well be good reasons to prioritise the interests of migrants. But these good reasons alone are not enough to make the EU a legitimate transnational actor. It would further forfeit its legitimacy through such measures if it could only enforce the measures by denying European citizens control and accountability – what we would have to assume under the current circumstances with political majorities in many member states in favour of stronger measures against refugees. Therefore, such a strategy of primacy is also out of the question if the EU is to become an important instance of a globally legitimate order.

2.4   How to Achieve a More Legitimate EU Capable of Solving the Crisis of Refugee and Migration Policy

We have seen that there can only be a solution to the crisis in European migration and refugee policy if – unless there is an alternative to the EU, which does not appear to be the case – we overcome the EU's legitimacy problem. The EU's legitimacy problem comprises two main dimensions: its democratic deficit and its global role. Since both dimensions of the legitimacy problem are related, a strategy aimed at addressing one of the dimensions first would not be very promising. How can the EU be sustained or re-conceived as a transnational capacity for action and governance that can claim legitimacy for itself so that a solution for migration and refugee policy can subsequently be found within this structure?

If it is true that the EU's legitimacy problem hinges primarily on the two aforementioned deficits and their interconnectedness, then it must first respond to the causes of the deficits. The deficits indicate that it is dominating in nature and illegitimate and also perceived as such because

it represents an immense capacity for action, governance, and intervention that cannot sufficiently be controlled by those who are subjected to this capacity and that those who exercise the capacity are not sufficiently held to account. Thus, to establish its legitimacy, the EU must demonstrate why it is allowed to exist as the capacity in question in the first place. This argument is not, and cannot be, directly about the interests that are satisfied with the capacity or the material problems it solves because such solutions do not provide an answer to the control and accountability issue. Normative theorists cannot simply derive normative claims from interests, human dignity, moral rights etc. and pretend that this implies the legitimacy of a state, the EU or any other institution or actor when securing or implementing these claims. We cannot normatively neglect the potentials of power and domination that come with a governance structure like the EU or explain and justify them in terms of the need to realise certain normative or non-normative interests or claims. The existence of the capacity to govern constitutes in itself the primary normative problem, such that it must first be explained again and justified why there should be a shared interest in the EU as the general capacity to govern.

In the first section of this chapter, I showed that the various normative perspectives on the refugee and migration crisis, despite their major differences and perhaps even contradictions, converge in the call for a structure in which all can decide on the common sphere of action. Such a structure is the precondition for ensuring that the proponents of the respective perspectives are not simply subjected to the decisions of others and can voice their own perspectives. If the EU wants to use norms to structure the common space, instead of dominating others, then all must realise that a common sphere of action can only be structured in this way if all those subject to the norms accept this structuring. That is not to say that all must accept the respective norms, but there must be a shared understanding that structuring the sphere using norms is better than structuring the realm only by power. We can only expect such a shared understanding if everyone recognises that some of their important concerns are being addressed in the content of the norms or in the procedures that define the norms. This precludes the existence of a realm structured by norms, in which some simply impose their favoured norms on others. But this does not imply – and this has already been rejected before – that everyone must see their specific interests reflected in decisions or norms. For many political contexts, it is sufficient that it is possible and not generally ruled out that one's own interests also determine decisions and that decisions can, above all, also be revised if the constellation of interests changes or new insights speak against earlier decisions. To this end, some also believe it is necessary to ensure that majorities cannot make certain decisions or that there are mechanisms to check

whether majorities have been reached in a lawful manner: for example, in the form of judicial review.

In the current situation, the shared sphere of action extends beyond the nation state, not least because many economic, fiscal or environmental decisions elsewhere have an impact on the opportunities in and of a nation state, and also because some people do not accept the borders of nation states and enter their territory without their authorisation. If it is also true for this situation that the structuring of the realm by norms is better than a structuring by power, then we must find something that could incorporate a shared understanding of the structuring by norms. And this is exactly the essential reason the EU exists and why it is also indispensable, at least within Europe and at least as a first step to a globally legitimate order. Without it, the possibilities for the common structuring of the shared sphere of action would be small, or they would be strongly pre-determined by the distribution of power.

One can thus make a strong case for the EU and its necessity and at the same time see in this a European value that is certainly in tension with values elsewhere in the world and, of course, with some merely supposedly European values too:[37] empowerment of all who are subjected to the norms through control over the norms and those who set and enforce them. This reason only applies, of course, if the EU actually gives those who would be inferior in the power constellation a greater stake in shaping the shared sphere of action. The reason disappears or even becomes a reason for the kind of resistance we observe in the field of migration policy when the EU consolidates or even strengthens a given power constellation. The EU would therefore have to prove in the first place that and how it makes the hitherto powerless stronger – the previously mentioned empowerment through disempowerment of the powerful. Within Europe, it is quite clear what this means: it must show that it is able to counter the economic imbalance between Northern and Southern or Eastern Europe so that the joint development of European policy becomes a counterweight against mere economic power. The monetary policy of the ECB and the Eurogroup over the last 15 years is clearly heading in exactly the opposite direction. But the EU would also have to find ways to implement the same on a global scale: i.e. to make itself indictable and contestable, especially vis-à-vis the Global South. In view of dictatorships, corruption and all the other problems that characterise the Global South, this is not an easy demand. But Europe's deprovincialisation and self-criticism in this respect would already be an important step in signalling its willingness to establish more legitimate global conditions.

The double move of the EU to make itself an authority for internal and external control of the powerful and holding them accountable may sound overly ideal and unrealistic in view of our situation. However, given the

crisis we are currently facing, this move is the only thing we can aim for at present because the crisis, as shown earlier, is ultimately a crisis of public normativity and authority itself. After all, the EU's legitimacy crisis is driven by the various parties' diagnosis that others use normative justifications to dominate them. In such a situation, seeking coalitions of those willing to follow one's normative programme and then using the combined power to impose said normative programme cannot be an option. It undermines the meaning of normativity, which lies precisely in doing something because it is commanded or permissible from a general (not to say objective or intersubjective) point of view and, in this way, subjecting oneself in principle to the norms and perhaps even to the control of others. In the mere imposition of one's own normative programme, one denies normative authority to others and thus abandons the aim of not structuring the shared sphere of action through power alone.

The phenomenon of irregular migration and how it is dealt with reveals so much because it is here that the absence of shared normativity and the different strategies to handle this absence become so clearly visible. Against the backdrop of an EU striving to become a more legitimate actor, a better European migration and refugee policy will first have to acknowledge that current migration to Europe is a direct result of global inequalities and injustices for which Europe is at least partly responsible. Europe should stop its self-deception and admit that the attempt to build legitimacy at home and thereby create additional normative powers for geopolitics has failed. The unilateral closing of European borders undermines any claim of the EU to be or to become part of a globally legitimate structure. This does not mean that borders must always be open to everyone. The EU does not have to become an actor that ensures that borders are open and that migrants can live their lives wherever they want to live them. In this respect, the acknowledgement mentioned before is not a prioritisation of overcoming the second European deficit over the first democratic deficit. But the EU can and must, from the outset, link the empowerment of Europeans, who have so far been unable to control European politics, to the fact that this empowerment, which is actually a disempowerment of others, can only work if all Europeans accept more fundamentally that they can only normatively structure common spheres of action by rejecting mere power and domination.

If the EU succeeds in combining disempowerment and empowerment in the aforementioned way, then it can justify itself as a transnational capacity for action and exercise governance that can claim legitimacy. This will not be easy, of course, because the first step will be the frustration of expectations: precisely because you have a certain normative goal, you must first be willing to subject yourself to a structure which may result in you not achieving your goal. The success of this first step will

not then be as unrealistic as it might seem at first, when those who subject themselves discover that in the joint subjecting, they actually acquire capacities for control and steering. And if it is clear to all those involved that they only have these capacities as part of their joint exercise, then this also sets the stage for moving beyond the stand-off of irreconcilable claims in the area of refugees and migration and for ending the crisis in this area. Even then, there will be no simple solution to the issues that arise when it comes to refugees and migration to Europe. Perceptions of what is unjust or legitimate, and consequently what does or does not justify claims by migrants or parts of European populations, will continue to diverge widely. However, we could assume that then some key points of conflict stemming from domination or from injustices within and outside Europe will become more of a focus and will actually be addressed. Given the advance of power and interest politics that we are witnessing in many places, it would certainly be no small feat to have a forum and a powerful institutional structure in the EU that could counter this with inclusion, consultation, and democratic decision-making.

Notes

1. <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1706> [July 27, 2022] (emphasis in the original).
2. Cf.   <https://eu.boell.org/en/2021/07/28/and-yet-it-moves-monitoring-debate-new-eu-pact-migration-and-asylum?dimension1=anna2021> [July 27, 2022].
3. Cf. for a broad discussion of the different areas and dimensions in which one can speak of a crisis of the EU Riddervold/Trondal/Newsome 2021.
4. I use the term "crisis" in this article in a broad sense to mean that there was an established way of dealing with problems of a certain kind – i.e. a routine – but that this way is no longer effective. The mere suspension of a routine, however, does not yet constitute a crisis. Such suspension only becomes a crisis when it is accompanied by the fact that problems are not (or no longer) being dealt with but continue to exist and need to be dealt with. Cf. Matthias Hoesch's chapter in this volume for a more precise discussion of the concept of crisis and its applicability to the European refugee and migration situation of recent years.
5. "Authority" is understood here and in the following as the capacity of persons, institutions or structures of persons and/or institutions to configure spheres of action and to direct and control action within them. Authority thus also allows, above all, the determination of who has which obligations and rights in conflicts and the resolution of such conflicts conclusively. But authority consists not merely in coercive power. The capacity to configure spheres of action depends at least in part on the fact that a sufficient number of those who move in these spheres ascribe to the authoritative person or instance the right to legitimately dispose of or exercise the capacity. Authority thus exists in and through the belief of a sufficient number of people that someone or an entity is justified in exercising authority. This belief must itself have effects on the duties under which the bearers of the beliefs see themselves vis-à-vis the person or instance exercising authority. Cf. Larmore 2020, 41–47 on this distinction between authority and legitimacy.

6. This applies, for example, to the 2016 EU-Turkey deal, in which it is not clear whether and how it is compatible with existing EU law and how key bodies, such as the European Parliament or the European Court of Justice, may react to the deal and its implementation. Cf. Carrera/den Hertog/Stefan 2019.

7. Cf. in this sense, by contrast, Hadj Abdou 2021.

8. Cf., for instance, Mouffe 2013.

9. Cf. the overview in Blake/Smith 2020.

10. Cf., for instance, Singer 2002.

11. Cf. Owen 2016; Hoesch 2018.

12. Cf. the rationale for the non-refoulement principle as an expression of the shared responsibility to provide at least minimal protection to refugees, in Owen 2020, 68–70.

13. Of course, this also applies to the development of the previously mentioned and supposedly mutually beneficial deals, as Gerald Knaus, among others, promotes them as a normatively justifiable solution to the refugee question. Cf. most recently Knaus 2020.

14. It is worth noting here that the refusal of some EU member states to show solidarity with other states during the European financial crisis, forcing them into austerity programs with devastating consequences for social security systems and future democratic decision-making, became a paradigmatic case for a new type of interaction between states in the EU. This paradigm then had problematic consequences in the 2015 refugee situation, especially for the willingness to work for common European solutions.

15. Cf. Sassen 2007, 217–218.

16. Cf. Held/McGrew 2002.

17. Normative questions in the first-person singular certainly differ from those in the first-person plural. In both cases, however, an identity of the entity asking the question is presupposed, and this distinguishes normative questions in the first person from those that we will focus on in the following. There, it is a matter of determining what second or third persons or entities should do or can be obligated to do without already presupposing an identity: e.g. a collective one. The question whether "we Germans" should supply weapons to Ukraine can also lead to obligations to do so or to refrain from doing so, but the obligations depend on the binding nature of the "we Germans". In contrast, the determination of obligations regarding whether or under what circumstances third parties should or may supply arms to parties in a belligerent conflict is based on generally existing obligations. Collective identities may well be brought into play in this context, but they would not directly establish any obligations. They would entail special obligations in a generally recognisable way if they were to be relevant to the general obligations (and one can, of course, doubt with good reasons that there is such a generally recognisable way of indirect justification).

18. Here, it is important to understand that "intersubjective validity" is not to be confused with "objective validity". One can very well and rightly argue that every normative perspective claims "objective validity" for its statements. However, "objective validity" need not be and is not always interpreted in such a way that it consists in an insight shared by all. "Objective validity" can also be determined by something else that brings about normative rightness or goodness. In the previous passage, on the other hand, it is argued that "intersubjective validity" in the sense of the agreement of others to normative statements is necessary when norms are to be used to structure social life, to serve as a kind of public reason. In such situations, assumed "objective validity" is insufficient for "intersubjective validity".

19. Cf. for analyses of the problems left unaddressed because of the inability of many to engage in decisions about transnationally applicable rules, for instance, Wenar 2016.
20. Cf. on such a justification of a "right to migration" based on global injustices Blunt 2020, 101–120.
21. And this does not even take into account that the respective others who are accused of dominating are not identical to the other accusers. The "Global North" as such does not exist any more than an all-encompassing subjected and exploited "Global South" does.
22. Cf. Niederberger 2013.
23. Cf. Niederberger 2021.
24. Cf. Niederberger 2017.
25. Of course, the EU itself is not the solution for refugees and migration. It does not integrate the normative cores of the three perspectives in the sense of a merging of the three perspectives into a single one, as rejected earlier. Rather, it provides an arena in which a solution can be negotiated without that solution contradicting the normative cores of the three perspectives. The solution, however, would not have to be one that corresponds to the three perspectives in all respects relevant to them.
26. Cf. in this sense also Habermas 2015.
27. Cf. Weiler 1999 and, as an overview of the debate since the 1990s, Fossum 2016.
28. Cf., for instance, Grimm 1995 or Bellamy 2016.
29. Cf., most prominently, Moravscik 2002; Majone 2005.
30. The difference between the more recent conflicts and the input perspective in the controversy presented before is that the input approaches were primarily concerned with the "positive" opportunities of participating in policymaking. What has become apparent in the conflicts of the last two decades is the rather negative resistance to determination by others, which only some populist positions directly associate with the idea of a positive determination of politics by the presumably unified "people itself".
31. Cf. also the related diagnoses of "Politics against Policy" in Schmidt 2020, 259–290 or of a "Cycle of Authoritarianism" in Kreuder-Sonnen 2018.
32. Cf. on these difficulties even of member state governments to find the right contact person or instance within the European structure for their concerns, the report on the Greek government's attempt to renegotiate the financial agreements in the spring of 2015 in Varoufakis 2017.
33. Cf., for instance Fischer 2018 or van Middelaar 2021.
34. Cf. the numbers comparing the EU with the US, Russia and China in Moravscik 2017.
35. Cf. the attempts to do so in Hill/Smith/Vanhoonacker 2017.
36. Cf. for further discussion of these questions in democratic theory, among others, Benhabib 2004; Bohman 2007; Abizadeh 2008 and Niederberger 2013.
37. Cf. the early attempt in the discussion on Europe to think of Europe in terms of giving up claims to sovereignty and acknowledging the diversity in Europe and especially the non-European world in Derrida 1992.

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Part 2

Making Sense of "European Values"

3 Young and Ambivalent

A New Look at the Recent Rise of European Values, Their History, Precursors and Critics

Wim Weymans

3.1 Introduction

In today's European political discourse, "European values" are often invoked by both defenders of the European project and its detractors. The various institutions that represent the European Union (EU) refer to values to defend and legitimise their policies while their opponents likewise invoke these values (albeit often interpreted differently) to criticise these very same policies. Liberal defenders of the European project today often portray it as the embodiment of secular (European) values such as dignity, human rights and democracy and suggest that this project finds its roots in the defence of these values. Yet a quick look at the actual origins of the EU allows us to see that these values were not prevalent in the early days and that their explicit use is thus more recent than what some EU officials would have us believe. Moreover, if they were used at all in the post-war years, it was in a conservative Christian meaning that differs from both its current liberal and illiberal uses. Liberal European values as we know and use them today are, it turns out, not age old but quite young.

This chapter is structured as follows. After a few methodological remarks, I will look at the Cold War use of values by a particular group of conservative politicians and the Council of Europe. Third, I will examine how, from the 1970s onwards, the European Community tried to legitimise its project by invoking a European identity and the ideal of a social Europe. Only after these notions proved less useful did the notion of "European values" gradually begin to replace them. As European institutions and politicians increasingly used the term "European values" when legitimising the European project, references to these values became mainstream, albeit with a different meaning – more abstract, less partisan and less religious – as I will explain in a fourth section. Fifth, and moving closer to the present, I will show how the current populist critique of liberal European values differs from its conservative predecessor. Sixth, I will focus on the tension between liberal values and the neoliberal policies they are often said to legitimise.

Seventh, I will examine how defenders of liberal European values and their populist critics have more in common than one would expect, since they both use values in a defensive sense to exclude people (migrants) or ideas (political debate). I will conclude this chapter by suggesting possible ways out of that predicament by calling for more debate.

3.2   A Critical Perspective on Values and Their History

Where social scientists try to examine values as objectively as possible (in the European Values Study, for example), politicians and institutions instead use values as normative tools that are meant to legitimise political projects (and delegitimise others), which implies that values are "valued" differently, depending on who invokes them. Although politicians, when legitimising their policies, arguably always – implicitly or explicitly – invoke certain values such as security, solidarity or equality, explicit references to "values" as such are somewhat less common. While British politicians, for example, increasingly speak about "British values", Irish politicians rarely refer to "Irish values". Yet in what follows, I will mainly concentrate on this explicit (and not so obvious) use of a term such as "European values". Why and when did European institutions, at some point in their history, start to *explicitly* invoke that term?

   Traditionally, this question has been addressed by institutions and scholars[1] who often assume that values are mostly a good thing and that their allegedly long history represents progress (thus concealing their potential ideological side effects or costs). Instead I will follow Nietzsche when he wrote that "we need a *critique* of moral values, *the value of these values should itself . . . be examined* – and so we need to know about the conditions and circumstances under which the values grew up, developed and changed".[2] Rather than seeing values as naturally "good" and their seemingly long history as one of inevitable progress, such a critical perspective instead questions the use of values as well as the actual origins their defenders often look away from.[3] Unlike a traditional history of values, such a critical approach emphasises change (rather than continuity), historical contingency (instead of necessity) and a focus on the wider context and on the impact that values (fail to) have (rather than on just values themselves).

   Such an approach requires a conceptual analysis to help differentiate between different definitions of the concept of "European values". But it also necessitates a historical awareness of the context and impact of values and the different functions they serve. After all, a term such as "European values" did not always have the same scope, salience or impact it has today. Moreover, there are different definitions of what "European values" mean – definitions that sometimes clash and are at times incompatible. When critically examining the political use of "European values", I will

thus not just investigate what they mean (i.e. what does "European" refer to in European values, and what is it opposed to?) but also see how, when and why – and in what contexts – the term is used. I will also look at rival concepts that they replaced while assessing the price one must pay for using one concept rather than another.

3.3   The Conservative and Christian Cold War Origins of European Values

Unlike what is often suggested by European institutions today, until the 1990s, these institutions hardly invoked values and instead kept their technocratic focus on the single market they were meant to create. In fact, "the 1951 Treaty of Paris establishing the European Coal and Steel Community . . . made no mention of 'democracy' or 'human rights', and neither would the 1957 Treaty of Rome establishing the European Economic Community".[4] If values were mentioned at all back then, they were mostly peace (think, for example, of Schuman's famous declaration of May 9, 1950)[5] or reconciliation rather than values invoked nowadays such as democracy and human rights, which were conspicuously absent in those early days.

All this is not to say that values such as the rule of law and human rights were completely absent in Europe's post-war years. They *were* explicitly invoked, not by the European Community (the EU's predecessor) but by its less consequential sister institution, the Council of Europe (1949) and the European Convention on Human Rights it helped to create (in 1950) and defend through the European Court of Human Rights since 1959 in Strasbourg.[6] It was here that the language of values and human rights was used, albeit in a very specific way, serving a particular conservative ideological agenda, attacking the left in general and communism in particular. As historians such as Samuel Moyn and Marco Duranti have recently shown, when the Cold War began in the post-war years, the European Convention on Human Rights was mainly concerned with "ideological signalling about the values on which Western European identity depended", and it "emerged thanks to Britain's commitment to the 'spiritual union' of Western Europeans against communism".[7] This discourse was indeed used by conservative British politicians such as Winston Churchill and, later, Margaret Thatcher, amongst others.

This conservative vision of values – which survives in certain conservative circles today – is characterised by the following features. First, it sees values as being embedded in a common civilisational or "spiritual" foundation that is Europe's Christian heritage. Such an invocation of a Christian heritage may not have sounded all that strange in the post-war years, given that the European continent was by no means as secularised back then as it is today.[8]

Another key feature of this discourse is that values were regarded as Europe's legacy to the world, in part through a process of colonisation and imperialism, with Churchill as their obvious defender. And while post-war Europe appeared as a peaceful endeavour that broke with a long tradition of European wars, it is worth noting that when the first European institutions emerged after the war, European nations still often brutally dominated large parts of the world through their colonies.[9] So, while the brutalities on the continent had ceased, overseas they still continued in various forms and were often committed in the name of (and legitimised by invoking) "civilisational values". As late as 1988, Thatcher unapologetically talked about Europe and its values in this colonial sense when she declared that "the story of how Europeans explored and colonised – and yes, without apology – civilised much of the world is an extraordinary tale of talent, skill and courage".[10] It was in that same sense that "spiritual" values, associated with talk about Europe's humanism and civilisation, were denounced by anticolonial thinkers such as Frantz Fanon, who stated in 1961 that "it is in the name of the Spirit, meaning the spirit of Europe, that Europe justified its crimes and legitimized the slavery in which it held four fifths of humanity".[11] Sartre agreed when he declared that "our beloved values are losing their feathers; if you take a closer look there is not one that isn't tainted with blood".[12]

Values were seen as European in that they *originated* in Europe, but at the same time, they were used by Europeans who saw it as their vocation to export these values to "the Free World". By "European", one did not mean that they were limited to Europe – other continents were welcome to adopt them too – but rather that Europe was referred to as their exclusive origin (rather than their exclusive destination). A successful example of the export of European values was the United States (US). Once more, Thatcher: "European values have helped to make the United States of America into the valiant defender of freedom which she has become".[13] European values in this Cold War narrative were therefore often seen as synonymous with American, Western or transatlantic values. Europe had the merit of being at the origin of Western values (which were therefore sometimes called European). But, thanks to the successful propagation of these values, Europe's values had now become American or Western values too.

As to the content, in this conservative narrative, European values were mainly linked with centrist values such as liberty or the rule of law rather than with left-of-centre values such as, say, solidarity or equality between men and women. The supporters of the European Convention on Human Rights were, after all, mainly "interested in using Europeanization as a way to combat domestic socialism, in an era when the popular and ideological appeal of social democratic ideals and communist ones were rising to new heights".[14] For many among them, "the objective of post-war European

unification on the basis of human rights principles was to roll back the dramatically enhanced positive role of the nation state in economic and social policy".[15] The anti-communist invocation of values and human rights was more than just about words as they were intended to have a real impact through the European Court of Human Rights that would favour conservatives at the expense of advocates of a powerful post-war welfare state. The creation of a European supreme court "was widely regarded as a mechanism for realizing what socialists described as a conservative agenda too unpopular to be enacted through democratic means".[16]

Yet even when conservative or Christian values were not explicitly invoked in the technocratic project of a European Community, it is often suggested that this community too was nevertheless implicitly influenced by Christian, and especially Catholic (rather than Protestant), values, ideas and actors. After all, the argument goes, "the founders of the European Community – Alcide De Gasperi, Konrad Adenauer, Robert Schuman – were all Christian Democrats".[17] Moreover, it is further suggested that Christian democratic parties were inspired by Jacques Maritain's personalist defence of values such as democracy and human rights. Although they did not explicitly invoke "European values", it is undeniable that post-war Christian politicians were involved in a European transnational peace project that sought to limit state power and defend democracy and rights. Yet it is important to contextualise this involvement, see it for what it was, and not confuse it with later evolutions.

From a historical perspective, this involvement was quite new. Until the Second World War, Christianity broadly subscribed to an anti-modernist world view, had been suspicious of modern democracy and individual rights and "mostly stood for values inimical to those we now associate with human rights".[18] This began to change in the mid-1930s, when Pope Pius XI realised "that totalitarian states of the left and even of the right threatened the moral community",[19] and his successor, Pope Pius XII, started invoking the language of human rights founded on human dignity during the war.[20] Around the same time, the Catholic intellectual Maritain redefined rights and democracy as a Christian legacy, albeit in a neothomist and conservative sense.[21]

After experiencing first hand the evils a totalitarian state could inflict, Christian politicians arguably also became keen on limiting state power both at a national level (Germany's new federal structure, for example) and internationally (hence their advocacy for a European Community that was in part meant to limit the power of nation states). As Müller explains, for Christian democratic politicians,

> [N]ational sovereignty . . . was something to be feared. These leaders advocated subsidiarity and a Europe united in its "Christian-humanist"

heritage (the particulars of which were not to be discussed all that much, as long as they added up to anti-communism).[22]

Centrist Christians were indeed suspicious not just of a state dominated by the totalitarian right but also of a state that furthered the interests of the left.

So if Christian politicians discovered the value of democracy in those post-war years – they were called Christian democrats after all – theirs was still a specific conservative idea of democracy that was also deeply suspicious of popular sovereignty and saw true democracy (and the European project) as a way to limit the unbridled expression of the people's will or the nation state. For them, "European integration . . . was part and parcel of [a] comprehensive attempt to constrain popular will: it added supranational constraints to national ones".[23]

Yet one should certainly not overstate the role Catholicism (or Maritain's personalist ideas) played in the origins of the European Community. It is true that the Vatican, especially under the leadership of Pope Pius XII (1939–1958), was said to favour the European construction as a third force acting as a counterweight to Washington or Moscow.[24] But the Vatican had little to no influence on the European Community.[25] And when Catholic politicians cooperated at all in these post-war years, they were mainly motivated by their shared anti-communist stance rather than by ideals of European federalism, let alone values (other than perhaps peace).[26] Moreover, many of Europe's so-called founding fathers were not particularly Catholic (e.g. Paul-Henri Spaak or Jean Monnet), although admittedly, they made occasional references to distinctly Christian values such as respect for the human person or a Christian civilisation,[27] which can be considered an illustration of the predominance of Christianity in the post-war years. Lastly, Maritain's personalist ideas in reality hardly found their way into post-war Christian democratic party programmes.[28]

Interestingly, this civilisational anti-communist defence of values was also popular in Central and Eastern Europe, where it resonated with Church leaders (e.g. Karol Wojtyła in Poland, the later Pope John Paul II) and intellectuals such as Milan Kundera. Ironically, conservatives in the West had been so successful in attacking communism that many in the West no longer saw Eastern Europe as part of European civilisation. As Kundera lamented, "[I]n the eyes of its beloved Europe, Central Europe is just a part of the Soviet empire and nothing more".[29] This prompted Church leaders and intellectuals to stress that the East belonged to Europe rather than to Russia. The newly elected Polish pope, John Paul II, declared in 1982 that the "soul of Europe remains united because, beyond its common origin, it has similar Christian and human values".[30] In a more secular vein, Kundera reminded the West that people from Central Europe too were part of European civilisation rather than of Russia.[31]

Although European values are today meant to appeal to everyone, from left to right, initially these values were thus especially invoked by a particular tradition – conservative, anti-communist, Christian and (mainly) Western European – meant to exclude others (especially communists) and protect one's own interests. This partisan appropriation of values by conservative forces probably explains in part why these values were rarely explicitly used by the European Community to define itself, at least as long as the Cold War lasted. It also explains why, until the end of the Cold War, the European Community had to look for different, less partisan concepts to legitimise its project, especially when that need for legitimacy increased from the 1970s onwards.

3.4   A "European Identity" and a "Social Europe" as New Legitimations of the European Project (Early 1970s to Late 1990s)

It is fair to say that until the 1970s, neither the European Community nor the Council of Europe and its human rights instruments amounted to much. As Moyn points out: "[B]y the mid-1970s the European Court of Human Rights had decided only seventeen cases", and it was only in the middle of the 1980s that the number "approved for court consideration skyrocketed".[32] Until then, the technocratic European Community in turn did not (yet) impact people's daily lives and therefore still by and large enjoyed the passive and indifferent "support" of the wider public (which would later be called a "permissive consensus"), and so it was not yet in need of much legitimation, let alone a discourse about values. Two shifts would slowly change that.

First, there was the enlargement of the European Community. It was no coincidence that one of the first official reflections about what Europe meant and stood for emerged in 1973 in the context of the first enlargement that welcomed Denmark, the United Kingdom, and Ireland. Back then, the foreign ministers drafted a now-famous declaration in which they mused about Europe's identity and its relationship with the wider world.[33] In order to position themselves in the world, they arguably first needed to know what they stood for. Likewise, an enlargement of the club presupposes that one has an idea of what the club represents. In 1973 the foreign ministers saw much potential in the concept of a "European identity", although they did mention in passing their "cherished values" or "common values and principles".[34] As we now know, this would later change.

The second shift was the increasing necessity to establish a connection with the wider public and the need to legitimise the European project in order to convince voters of its merits. This need slowly emerged as that public was gradually discovered and given a voice at a European level. As early as 1974, the first Eurobarometer was launched,[35] and in 1979

the first elections for the European Parliament were organised. In order to enable participation in these elections, European political parties were created, such as the Christian Democratic European People's Party in 1976. As part of its ideology, that party created the myth of the aforementioned Christian democratic "founding fathers", whose work on the European project needed to be continued.[36] Newly elected members of the European Parliament had work to do because "starting in the 1970s observations had emerged that the European integration actually prompted a 'democratic deficit' – an expression that appeared in 1979".[37] Moreover, after a long period of highly successful economic expansion, hitherto prosperous Western nation states were hit by a deep economic crisis in the mid-1970s, which meant that citizens and politicians increasingly looked to Europe for help and a way out of the crisis.

Inspired by the necessity to define Europe vis-à-vis the world and its citizens, from the mid-1980s, the newly installed European Commission – headed by its ambitious new president Jacques Delors – launched various initiatives to make Europe more visible by introducing symbols and to develop a sort of "nation building" at a European level and to refer to concepts such as European identity, culture or civilisation.[38] If values were mentioned in this context, they were part of these larger, more substantial concepts.

Apart from reviving the original ideal of a "single market" and the more cultural ideal of a European identity that had been emerging since the 1970s, the Delors Commission added a new term of its own, that of a "social Europe", which became widely used from the mid-1980s onwards. The idea was that the economic benefits of the single market were meant to be redistributed amongst all Europeans.[39] In 1988 Delors, for example, called for "a concrete and productive social dialogue at the European level"[40] as one initiative that clearly shows "the social dimension of the European construction".[41]

At first, and probably in part as a result of these policies, things looked promising for the newly relaunched European project headed by Delors. Indeed, popular support for the European Community was arguably never higher than between the mid-1980s and 1992, in large part due to the 1992 target for launching the single market.[42] Until the 1990s, both the enlargement and ideas to increase public support were seen as compatible with ideals of constructing a strong, substantive European identity and the dream of a social Europe. But in the 1990s, this slowly changed.

When it came to the enlargement after the fall of the Berlin Wall and the end of the Cold War, the European club was about to widen substantially eastward. The bigger the club became, the harder it would become to find a substantial common denominator. The concept of a substantive cultural or civilisational European identity that had still been considered useful until then now appeared less appropriate. It was arguably harder to talk about a

shared substantive identity when it involved preparing for the inclusion of more than 20 member states (from the 1990s onwards) instead of just 9 (as in 1973). For example, Europe increasingly faced the "problem of finding memory frames that could appeal to all European societies".[43]

Yet the relationship between the European Union (as it was now called) and the wider public also changed. A brief period of "euro-enthusiasm" and a "permissive consensus" was followed by a more (euro)sceptical attitude among the public and a so-called "constraining dissensus" that lives on today, whereby the European peoples no longer automatically share the more ambitious European projects and the references to a European identity that accompanied them. Even inside European institutions, bureaucrats had often been wary of talk about a substantive European identity or civilisation since that was seen as potentially divisive, which was why they preferred abstractions instead. But it was especially outside Brussels that the idea of a concrete European identity was frowned upon, particularly in the relationship with an increasingly suspicious public. As a result, "the efforts to develop state-like symbolism and imagery (like the flag, a memory and cultural policy, a citizenship) . . . met strong limits, related both to the indifference of individuals and to the resistance of member states".[44]

One can speculate as to why "the people's own nation" remained "overwhelmingly the strongest point of identity" and why, "by contrast, emotional association with a European identity was extremely weak" despite repeated efforts to create such an identity.[45] Was it because of the fact that Europe – unlike nation states (or the US), which constructed their identities more or less from scratch – had to deal with strong pre-existing national identities?[46] Or was it because a "European identity" was seen as referring to a *single* identity that can be seen as hard to reconcile with Europe's motto "united in diversity"? Just as EU institutions try to avoid speaking about "the European people" in the singular,[47] the use of a single European identity may likewise be seen as too risky.

All this may explain why in the early 1990s "the Twelve dispensed with the identity prose", thus undermining "the rhetoric about a shared past or a common civilisation".[48] It is true that attempts to construct a more substantial European identity did, in part, continue beyond the 1990s, in the form of, for example, the constitutional treaty in 2004 intended to make the EU more like a state, including its own symbols, laws and constitution.[49] Yet the rejection of this same constitutional treaty in 2005 by French and Dutch voters, which was at least in part attributed to these renewed efforts at European nation building, probably represents the provisional endpoint of serious attempts to build a cultural or substantive European identity, at least within the European institutions.

Given that for various reasons the idea of a cultural or substantial European identity was no longer seen as a suitable prospect for keeping Europe

together, politicians had to turn to alternatives, such as the aforementioned ideal held by Delors of a social Europe. In the wake of his social agenda of the 1980s, the idea(l) of a "social Europe" – or, from the 1990s onwards, that of a "European social model" – lived on and existed in part alongside the ideal of a cultural "European identity", especially in the first decade after the turn of the century, when such notions were still widely invoked.

But the notion of a "European social model" proved likewise problematic, if only because a welfare state at a European level is lacking[50] and because in reality there are multiple social models in Europe, not just one.[51] Moreover, in the 1990s, European countries reformed their welfare states, often in the name of policies that resulted from their membership in the European Union, which arguably became gradually more neoliberal, especially as a result of the constraints imposed by the creation of the monetary union in the 1990s. The references that were made to Europe's social model in the post–Cold War years thus increasingly rang hollow in a world where this social model came under pressure as a result of the rise of (transatlantic) post–Cold War neoliberal policies associated with globalisation and "third way" or "new labour" welfare state reforms represented by social democratic politicians such as Tony Blair (UK prime minister from 1997 to 2007) or Gerhard Schröder (German chancellor from 1998 to 2005), both preceded in the US by Bill Clinton (US president from 1993 to 2001). In Europe even these newly elected social democratic leaders appeared to further promote liberal policies,[52] albeit not to the same extent as in the US. As a result, references to a social Europe now increasingly risked being perceived by many voters as hollow slogans that social democratic leaders used to embellish the de facto predominance of neoliberal policies instead of credible promises (as they still did in the second part of the 1980s). In addition, the newly arrived "Central and Eastern Europeans . . . after long years under communism, were dead opposed to excessive market regulation".[53] Probably as a result of these and other factors (such as the fallout of the financial crisis of 2008), notions such as a "social Europe" and a "European social model" were used less and less after 2010, and a new term was thus called for. This is where "European values" came in.

3.5   The Rise of European Values (From the Late 1990s to the Present)

If Europeans cannot agree on a substantive European identity (let alone a common history or social model), at the very least, they can all try to share an allegiance to some minimal abstract principles such as "European values". Or, as Ian Kershaw puts it,

> Perhaps the illusive search for a European identity is in any case unnecessary as long as citizens of Europe's nation states are committed to

upholding in individual countries the common key European principles of peace, freedom, pluralist democracy and the rule of law.[54]

Apart from being minimalist and abstract, values also had the advantage that, unlike a European identity or a "European social model", which were used in the singular, values were seen as many, as a list of values, from which everyone could choose the value they liked the most.

These pluralist and abstract characteristics made these values flexible and non-demanding and thus suitable to accompany, legitimise and distract from neoliberal policies that proved in themselves insufficient to justify the European project (probably because they lacked the will and capability of delivering prosperity to everyone or simply did not live up to its promises, such as the failed "Lisbon agenda" that was launched in 2000).

Before they could become a useful tool to represent the European Union as a whole rather than just one of its more conservative ideological currents, the language of "European values" first had to be extracted from its prior "embodied" or concrete civilisational and religious-conservative Cold War use and recycled in a less particular and ideological sense. After all, in an increasingly secularised Europe, "a self-definition of Europe as actively embodying the values of western Christendom is . . . now untenable".[55] As the discourse of values thus became more universal and inclusive – and the left now also started adopting it – it became more abstract and less associated with a conservative Christian ideology. It was their pluralist, minimalistic and abstract characteristics – what remained once one stripped them of their conservative ideological civilisational legacy – that made these values so appealing.

The idea of a substantial single and common history, civilisation, culture, identity or a social Europe was thus gradually replaced by a rather vague list of democratic "values" (which proved hard to enforce). Once one looks at abstract "European values" mainly as a more suitable minimalist substitute for a "European identity" or "a social Europe" as tools to create common ground, they then appear in a different light: less as a timeless bedrock of European civilisation and more as a "second best option", a "consolation prize" after the prior failure of the more ambitious and demanding idea of a substantive European identity or of a social Europe.

The slow rise of European values happened at a point when "rival" notions such as a "European identity" or a "social Europe" were still actively used. Just as the ideal of a European identity began to appear in official documents ten years before it was deployed on a larger scale, so European values first appeared in the treaties before their use widened, and they gradually replaced other notions. Starting with the 1992 Maastricht Treaty, when the European Community renamed itself the European Union, values and principles gradually became the new minimalistic way to

legitimise that new European Union and to provide it with a new juridical sense of commonality. Values were, for example, invoked in 1993 when defining the criteria new member states had to meet before they could join the European club. In the so-called Copenhagen criteria, values such as "democracy, the rule of law, human rights and respect for and protection of minorities"[56] now replaced the ideal of "European identity" that was still prevalent 20 years earlier when talking about the first enlargement (also in Copenhagen). Values were explicitly mentioned in the 1997 Treaty of Amsterdam, which "clearly stated what those values were" and "included a provision to sanction member states that deviated from the EU's core values".[57] They also appeared in the preamble of the 2000 Charter of Fundamental Rights of the European Union,[58] which would later be incorporated into the Treaty of Lisbon in 2007. Values were also included in the aforementioned European convention that led to the constitutional treaty. In the debates on that treaty,

> [R]eaching agreement on the values and objectives of the EU was relatively easy, apart from an impassioned discussion about whether and how to recognize the EU's religious heritage. . . . In the end, the preamble merely included a reference to Europe's religious "inheritance".[59]

Although the constitutional treaty was rejected in 2005, it was mostly preserved in a less ambitious version in the Treaty of Lisbon of 2007, excluding the references to European symbols but finally enshrining European values in the famous Article 2 that starts as follows: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[60] Unlike the post-war years, when European values were still closely linked with Christianity, "Christianity" is not named in the Lisbon Treaty and served "purely as a source of inspiration for democratic political values".[61]

Apart from appearing in legal documents, European values have also been invoked since the 1990s by philosophers such as Habermas, who was pleading for a "constitutional patriotism" and later even went on to invoke a "distinctive set of 'European values'" as a "definition of the moral foundations of Europe which puts social justice at the centre of a certain set of values, and defines Europe as the Not-America".[62] Moreover the politician and intellectual Václav Havel declared that "Europe's rich and spiritual history . . . has created a body of incontestable values", adding the following rhetorical question: "is it not these values . . . which do matter first and foremost and is it not . . . these values which give direction to everything else?"[63]

Since the 2000s, the term "European values", which had until then mostly been used by a small group of legal scholars, Europhiles, and

intellectuals, was increasingly used in public debate about Europe. As a result, "the multiplication of references to 'European values' has, since the 2000s, appeared as a new narrative claiming common normative roots but in a non-committal and flexible voice".[64] This reflected a broader trend in European societies in which politicians started invoking values more widely, also at a nation state level.[65]

Values in a minimal and secular sense now appear to have become the leading legitimisation of the European project and of initiatives to further that project. If Europe now talks about, for example, programmes to promote remembrance of its past, then it is with the aim of – in the words of the European Commission – "bringing Europe closer to its citizens by promoting Europe's values and achievements, while preserving the memory of its past".[66] Also, any residual reference to the "European Model of Society", for example by Barroso, then European Commission president, were framed in terms of values as, for him, the financial crisis of 2008 was also first and foremost "a crisis of values".[67] When the European Union was awarded the Nobel Peace Prize in 2012, it described itself as "a community of values".[68] And in his project for a European renaissance, French President Emmanuel Macron emphasised that "a market is useful, but it should not detract from the need for borders that protect and values that unite".[69] Although this abstractness and plurality of values allowed Europe to unite itself in new ways, it also created new divisions.

3.6   A Populist Critique of Liberal Values (And How It Differs From Earlier Conservative Versions)

In more recent years, we can witness tensions between the new, more abstract version of European values and a populist conservative critique of these values. As European values became more abstract and more universal and were also embraced by the left, they were now challenged by opposing views on values by populist forces on the right and by governments in Central and Eastern Europe in particular. Of course, one needs to be careful not to essentialise "the West" or "Central and Eastern Europe" (as if "Western Europe" didn't have any issues with populists).[70] Moreover, when conservative groups lobby in Brussels by arguing that "policymaking ought to reflect the fact that European values have historically been Christian values",[71] they do so on behalf of the religious right in general and not just from Eastern Europe.

But at the same time, it is hard to deny that countries in Central and Eastern Europe "had some specific features common to post-communist societies".[72] The specific communist past in Central and Eastern Europe which accounts for the use of European values in the Cold War years in the West also partly explains why these values are currently used in a civilisational sense (which echoes earlier conservative versions in the West) by

some politicians in countries that had actually suffered from communist rule and Soviet imperialism. For Rupnik,

> [W]e can observe in these countries the return in a new (or wayward) form of a discourse about defending national culture and European civilization – today against Islamism coming from the South, as yesterday it has been against Sovietism coming from the East.[73]

Over the past years, Polish and Hungarian leaders in particular have increasingly portrayed themselves as the true defenders of European values and European civilisation – in a conservative Christian sense – arguing that Brussels had forgotten and betrayed these values by diluting them when it embraced liberal values instead. As the rule of law or the rights of women or sexual minorities (for example) came under pressure in countries such as Hungary or Poland,[74] many in the West saw this as a decline of the East that had become increasingly illiberal. In the East, conservative politicians retorted that they were just defending European values in their true conservative and Christian sense. In Poland, for example,

> [T]here are nationalists and conservatives, mainly of Catholic denomination, for whom Europe only makes sense when it is Catholic, or at least Christian, and for whom liberal values and the legacy of the Enlightenment mean danger and destruction for Europe and for Poland.[75]

And in Hungary, Orbán states that a (Christian) "national-cultural identity" and its values come first. For him, European values are to be derived from this national identity or values. As he explains: "We are not Europeans because we have 'common European values'[;] this is a misunderstanding. We are Europeans because we have [a] national, cultural heritage and values and we can harmonise those values in a common alliance".[76] And later he declared that "we believe Poles and Hungarians have a common path, common fight and common goal: to build and defend our homeland in the form that we want . . . Christian and with national values".[77] Elsewhere, "Orbán defends his hardline positions as not merely consistent with the EU's fundamental values, but as their true embodiment".[78] The "refugee crisis" in particular

> has made it clear that eastern Europe views the very cosmopolitan values on which the European Union is based as a threat, while for many in the West it is precisely those cosmopolitan values that are the core of the new European identity.[79]

In particular, the actions of Angela Merkel, who was accused of "the admission of migrants without limit in the name of 'European values'",[80]

were perceived by some Eastern European leaders as a betrayal of what they see as Europe's true Christian values and roots. Leaders such as Orbán have been "attacking Brussels for enabling what he called an 'invasion' of refugees that threatened to 'cast aside' the bloc's Christian culture".[81]

Although it would be tempting to stress the continuity between the post-war conservative Christian discourse on values and contemporary conservative populists,[82] I believe that on closer inspection, these discourses differ in important ways. Firstly, it is important to emphasise that many actions by Orbán – e.g. actively undermining the rule of law – contradict the original conservative definition of values. Christian democrats had indeed historically defended the very rights and the rule of law that Orbán violates, just as they defended Europe as a way to limit the popular will, unlike Orbán's populism, which instead attacks Europe by invoking an unbridled popular national will. And while values in the post-war years were embedded in a culture in which faith still mattered, today's

> populist movements and the conservative right . . . champion Europe's "Christian identity" mainly in order to counter Islam. Such groups view this identity as a matter of culture rather than faith; few populists attend mass, and . . . the large majority of today's right are religiously indifferent.[83]

(Perhaps with the exception of Poland). For these populists, "Christianity is bound up with Europe's identity, just as long as it does not interfere with their daily life, lecture them on loving their neighbour or preach to them about ethics and values".[84] It is worth underlining that the Catholic Church itself "does not, at least in principle, reject immigration; on the contrary, we know how much Pope Francis insists on welcoming immigrants".[85]

All this explains why the Christian democratic European People's Party has recently been divided over the issue of European values, especially when it was pressed to take a stance against Orbán's illiberal policies. While this quarrel (which eventually led to Orbán resigning from the party in March 2021) is often explained in strategic terms (focusing on the workings behind how the European People's Party dealt with Orbán, keeping him on board for too long for electoral motives), it also lays bare a fundamental conflict between three very different meanings of European values: the original pro-European conservative Christian version (which the European People's Party still in part defends), its post-Cold War secularised version that Western European countries in particular now use to condemn Orbán and lastly, Orbán's own populist anti-European version of values that is at odds with both.

3.7   The Liberal (Political) Rhetoric of European Values Versus
Its Neoliberal (Economic) Reality

European values are often perceived as "liberal" values, in both meanings of the word "liberal" – not just its political definition as furthering values such as freedom and democracy but also "liberal" in the economic sense, as defending "neoliberal" policies and interests, a defence that ironically often arises in the name of noble liberal (political) values such as freedom. On the left, thinkers such as Bourdieu remarked that, in the end, Europe essentially prioritises economic values such as liberty and "a whole set of unquestioned ends – maximum growth, competitiveness, productivity".[86] For him, this is a betrayal of the true (political) value of liberty because, by "drawing shamelessly on the lexicon of liberty, liberalism and deregulation", neoliberal policies "obtain the submission of citizens and governments to the economic and social forces thus 'liberated'".[87]

In this context, Eastern Europeans invoke a critique of colonialism to remind Western Europeans of the "sins" they committed in colonising not just the developing world but Eastern Europe as well. Unlike their Western counterparts, especially Central and Eastern European countries – which were part of an empire but never had an empire of their own and thus lacked postcolonial guilt – could see themselves as victims of imperialism or colonisation, first by the Union of Soviet Socialist Republics (USSR) and now by Western Europe, legitimised in the name of noble liberal (political) values. To take the case of East Germany, Garton Ash notes that "accompanying the economic largesse from west to east in Germany had been elements of what might be called colonialism in one country, with second-rate West Germans lording it over Easterners".[88] And just as European colonisation explains resentment in former colonies, likewise new member states in Central and Eastern Europe resent having to comply with the demands of the "old" member states during the asymmetrical process of accession (which was also legitimised in the name of values). As Krastev explains, "the new generation of leaders experiences the constant pressure to adopt European norms and institutions as a humiliation and build their legitimacy around the idea of a national identity in opposition to Brussels".[89] Müller adds that "critics of developments in Hungary and Poland . . . should face up to the fact that 'liberalism' has often been experienced not just as cut-throat market competition but as powerful (Western European) interests getting their way".[90] In Garton Ash's diagnosis:

> All current European populisms feed off an anger at the way in which liberalism was reduced after 1989 to one rather extreme version of a purely economic liberalism . . . but the impact of this one-dimensional liberalism was particularly acute in post-communist Europe, with its

raw advent of capitalism, sense of historic injustice and societies unused to high levels of visible inequality.[91]

When anti-communists in Central and Eastern Europe criticize Western liberals for using seemingly universal and abstract values to conceal, further and legitimise their own particularly "liberal" or "cosmopolitan" way of life (or, even worse, their own Western economic interests), these anti-communists unwittingly use Marx's critique of values against Western liberals. As Kopeček explains: "in a manner that is ironically similar to earlier Marxist criticisms, many populists . . . oppose a mystified neutrality that supposedly masks the will and interests of a domestic liberal minority elite or the Brussels diktat".[92]

The traditional Marxist accusation of hypocrisy – whereby seemingly universal values are said to mask and (thus) further particular interests – did not just come from certain populists in Central and Eastern Europe. Using moral language in politics has always been tricky. The more institutions identify themselves with moral values, the easier it becomes to accuse these institutions of hypocrisy. One could indeed contend that abstract European values are meant to distract from the de facto predominance of a neoliberal agenda that fails to distribute wealth or protect the less well off. Was it a coincidence that "solidarity" and "social justice" were not listed as official values in Article 2 of the Treaty of Lisbon? Perhaps European values, despite their "secularisation", in fact still served conservative interests similar to those present during the Cold War.

In that context, it is interesting to look at which policies and values are *really* enforced, as one could argue that it is these values that ultimately matter most. It is striking that "the well-developed system of enforcement, which conventionally undergirds policymaking in the EU, does not extend to the fundamental values".[93] Critics who see values as a mere ideological embellishment (or concealment) of neoliberal policies could contend that this is perhaps no coincidence. Indeed, if governments in Poland or Hungary violated the rule of law, at least up until 2022, hardly any effective sanctions were taken, yet when the Greek government challenged austerity policies in 2015, Europe did have both the means and the resolve to act decisively and punish those who dared to step out of line.[94]

Moreover, in the case of the use of values in politics, the European Union is accused of "double standards": preaching in the name of values (typically abroad, such as "the EU's defense of human dignity worldwide") while violating these same values (typically at home, for example through "neoliberal and austerity policies that violate the human dignity of low-income workers or the unemployed").[95] Likewise, the way Europe chooses to deal with the migration crisis (e.g. through its coast guard agency Frontex, accused of illegal pushbacks that violate human rights) obviously

presents a huge challenge for an institution that claims to defend human dignity. When it comes to democratic values, Europe in many respects still has a long way to go in order to start practising what it preaches (a fact that Brexiteers handily exploited).

3.8   Europe's Exclusivist Values Under Siege

As long as the Cold War lasted, values were used (by the Council of Europe and by conservatives) to differentiate between Christian Western Europe and its communist enemy. Once that Cold War ended, a secularised version of these values was now used to unify an enlarged Europe and to define its identity, place and mission in the world. In their new minimalist sense, values are not just a tool to speak to European citizens or to new member states (in the context of the enlargement) but to the entire world. Barroso, for example, declared that the Europe he believes in is "a Europe that puts its values at the heart of the relations with the rest of the world".[96] While Brussels still promotes values worldwide, in the past years, it has done so with less self-confidence than during the aftermath of 1989 when many in the West truly believed that the entire world would subscribe to its values at a time of ideological optimism and self-confidence exemplified by Fukuyama's end of history thesis (which used Europe as an illustration).

One reason for Europe's diminished self-confidence and optimism was that its colonial past finally started to haunt its present.[97] This means it has now become harder to unapologetically praise European values and the imperialism and colonisation they once legitimised, unless those using these values first distance themselves from their conservative self-assured colonial past and are shown to have a more universal self-critical future (and Europe still has a long way to go in terms of dealing with its darker past). So, as with their conservative predecessors, values are still meant to be promoted around the world, but this time in a more modest way, without the concrete civilisational or cultural content associated with their post-war colonial predecessors.

But it is especially today's increasingly illiberal world that explains why the self-confident, outward-looking perspective that characterised both the conservative Cold War language of values and its optimistic liberal successor at the end of the Cold War has recently come under pressure. As "liberal" enlightenment values that were once seen as conquering the world are now in retreat around the globe, in an era of authoritarian leaders such as Xi, Putin, Bolsonaro and Erdoğan, these values at times indeed appear to find a safe harbour only in the Europe from which they came. As mentioned before, in the post-war years, values were seen as European mainly because they had originated in Europe and would go on to conquer the world rather than in the sense that they were applicable only to Europe.

If these values are now seen as European, it is not so much in reference to the Europe from which they came in the past (their origins) but because of the Europe in which they may still have a future (their preservation). In other words,

> [W]here European leaders once spoke of "Western" values, increasingly they speak of European ones. . . . Limiting "universal" values to the European sphere shows a dearth of ambition but a practical admission of the EU's place in an increasingly illiberal world order dominated by America and China.[98]

Since the increased use of European values corresponds to a diminished importance for Western or transatlantic values, it may thus signal an overall decline of the appeal of liberal values.

Just as illiberal forces who now claim to be the true defenders of European values in their conservative illiberal sense are governed by the fear of losing their traditional way of life (associated by some with conservative Christian values) and just want to preserve what is left, European liberal elites are likewise fearful of losing their values in an increasingly illiberal world with the rise of populism (especially since the Trump election).[99]

This overall defensive position thus lays bare an uncanny resemblance between the European liberal discourse of values and its illiberal populist critique.[100] Although the new abstract definition of European values was supposed to be more inclusive and universal than both its conservative predecessor and its illiberal detractors, in all cases values ultimately still served the same goal: namely, to define, limit and thus exclude. In the Copenhagen criteria of 1993 and the Laeken Declaration of 2001, these were still liberal limitations since European leaders stated that "the European Union's one boundary is democracy and human rights. The Union is open to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law".[101] Yet values could also become conservative exclusivist ammunition, for example against the accession of Turkey to the EU. During the campaign in France against the failed constitution in 2005, "Chirac . . . distanced himself from Turkish accession" and "stated that Turkish traditions were 'incompatible with Europe's values'".[102] All this highlights that values, just as human rights, "have been not so much about the inclusion of the other as about policing the borders and boundaries on which threatening enemies loom".[103] In that exclusivist tradition, European values are currently often used to differentiate the EU from other parts of the world such as China or Russia and even the US.

Moreover, the migration crisis that has haunted Europe since 2015 showed that European values, despite their alleged universalism, often did not apply to the treatment of refugees who appeared at Europe's increasingly

fortified external borders. Although Macron declared in 2019 that he believes in "a Europe that protects both its values and its borders",[104] in reality, borders often trump liberal values. The debate in 2019 surrounding the new von der Leyen Commission about the protection or promotion of the European way of life showed that values can easily be interpreted in a more substantial sense that is partly akin to both its original conservative meaning in the post-war years and the current illiberal populist critique of liberal European values. The "refugee crisis" thus makes painfully clear that despite the differences between the EU's universalist liberal defence of values and its populist illiberal conservative critics, in reality, both often use values in an exclusive sense.

3.9   Democracy and the Need for Political Contestation of European Values

The critical historical approach adopted in this chapter has revealed that the current liberal use of European values by European institutions was preceded by a rather different use in conservative Cold War Christian circles. By secularising these values after the end of the Cold War, European policymakers attempted to transcend and forget these Cold War precursors. The fact that populist forces invoke values that, at first sight, come close to their original sense (albeit this time to undermine rather than to strengthen Europe or the rule of law) shows that it may perhaps be wise to acknowledge the many political meanings that such a contested term can have.

Given this tension between European liberal secular values, their more substantial conservative predecessors and their current populist critique, what, then, would be an appropriate way to talk about "European values" today? To many, the abstractness of those values implies an increased risk of confusion, as these values could now mean different things to different actors. As Duranti puts it: "EU officials . . . increasingly resort to describing Europe as a 'community of values', but they seldom provide a vivid portrait".[105] Also, Mos suggests that the fact that "the EU does not offer any definitions of its core principles" is a problem that is cunningly exploited by the religious conservative right.[106] In short, for many, European values are problematic because they are too vague and lack a clear definition (even though it is arguably this vagueness that explains, in part, their popularity).

Yet I believe that this vagueness need not in itself be a problem. After all, in nation states too, principles, norms and values are subject to debate and open to contestation. In democracies all politicians invoke the "common good", "the nation" or values such as "liberty", "equality", "solidarity" and "security", yet the majority and opposition each interpret them differently. Indeed, when used in the domain of politics, perhaps values need to

be considered not as things that can be measured and defined but instead as abstract formal principles that we can all invoke precisely because no one can ever fully grasp and define them (just as in democracies, no one can ever pretend to know what "the people" truly and ultimately want). About political values, ideals, principles and goals, one can say that "by their nature, these goals cannot fully be attained (there is no perfect peace or freedom, on earth at least), but a shared striving towards them can itself bind together a political community".[107] Following a thinker such as Claude Lefort, one could say that it is precisely this indeterminacy of these goals or values that enables democracies to be "united in diversity" while acknowledging conflict, debate and opposition as fundamental and legitimate as their indeterminacy and transcendence ensure an ongoing debate in the name of these goals or values.[108]

Seen from this perspective, the problem in today's Europe may not be that values are too vague and subject to too much debate but rather that they are still too shielded from a proper political debate at a European level. If one sees values as principles that resist any final determination and appropriation, it becomes easy to see why both European technocrats and their populist opponents misinterpret them, as both limit the options for political debate by appropriating values. For Müller, "for neither technocrats nor populists is there any need for democratic debate. In a sense, both are curiously apolitical. . . . [E]ach holds that there is only one correct policy solution and only one authentic popular will respectively".[109] Too often, both European institutions and their populist detractors claim to be the only true defenders of these values, making a democratic political debate even harder. If one instead sees values as indeterminate and thus subject to lively political debate, one can criticise both groups. Self-righteous and at times moralising liberals or eurofederalists can be criticised when they are limiting debate, pretending to be the only ones who know what these values stand for. Populists (from Orbán to Wilders) can likewise be criticised when they, in turn, claim to be the only true embodiment of these values, thus depriving others of the right to invoke them and thereby betraying them by making an independent judiciary and press, civil society and free debate impossible.

All this implies that a proper stage and culture for political debate should be created at a European level.[110] Indeed, in order to function properly, a democracy at a European level arguably does need a stage where the peoples of Europe can represent and debate their values, norms and principles[111] and one can debate what the most suitable European forum for debate could be – the European Parliament or the European Council.[112] Initiatives to stimulate political debate at a European level may also be an antidote to a moralising use of these values whereby believers in the European project in particular tend to cast aside opponents as not respecting

European values.[113] A political use of these values may instead see these values as ideals that one invokes and strives for but which no one can ever hope to fully grasp, thus guaranteeing a healthy political debate.

Notes

1. E.g. Labayle 2012, 42, 44.
2. Nietzsche 2007, 7.
3. See also Moyn 2010, 1–10.
4. Duranti 2017, 209.
5. Schuman 1950.
6. Duranti 2017, 1–2.
7. Moyn 2015, 94.
8. Duranti 2017, 403.
9. Pasture 2018.
10. Thatcher 2016, 217.
11. Fanon 2004, 237.
12. Sartre 2004, lix.
13. Thatcher 2016, 217.
14. Moyn 2015, 159.
15. Duranti 2017, 212.
16. Duranti 2017, 7.
17. Müller 2013, 141.
18. Moyn 2015, 6.
19. Moyn 2015, 15.
20. Moyn 2015, 1–3.
21. See Moyn 2015, 16, 82–83.
22. Müller 2013, 141.
23. Müller 2017, 95; see also 142.
24. Chenaux 2007, 8–9.
25. Dujardin 2016, 219.
26. Chenaux 2007, 87–88.
27. See Dujardin 2016, 214–215.
28. Chenaux 2007, 90.
29. Kundera 1984, 37.
30. John Paul II 2017, 35.
31. Kundera 1984, 33.
32. Moyn 2010, 80.
33. Council 1973.
34. Council 1973, 119.
35. Schrag-Sternberg 2013, 83.
36. Chenaux 2007, 95.
37. Vauchez 2016, 13.
38. E.g. Shore 2000 and van Middelaar 2013, 230–238.
39. Dinan 2014, 215–216.
40. Delors 1988, 5.
41. Delors 1988, 9.
42. Schrag-Sternberg 2013, 83–84; Dinan 2014, 207.
43. Littoz-Monnet 2012, 1197.
44. Foret 2020, 24.

45. Kershaw 2018, 482.
46. Van Middelaar 2013, 228.
47. Van Middelaar 2013, 289.
48. Van Middelaar 2013, 249.
49. Van Middelaar 2013, 289–290.
50. Bourdieu 2010, 136.
51. Garton Ash 2009, 79.
52. E.g. Denord/Schwartz 2009, 120.
53. Mak 2008, 821.
54. Kershaw 2018, 546.
55. Garton Ash 2009, 76.
56. Council 1993, 13.
57. Dinan 2014, 298.
58. Schrag-Sternberg 2013, 149.
59. Dinan 2014, 273
60. European Union 2016, 17.
61. Van Middelaar 2013, 249.
62. Garton Ash 2009, 79.
63. Havel 2009.
64. Foret 2020, 24
65. Charlemagne 2006.
66. Littoz-Monnet 2012, 1191.
67. Barroso 2009, 4.
68. Barroso 2012.
69. Macron 2019.
70. E.g. Charlemagne 2019 or Garton Ash 2019, 171.
71. Mos 2018, 331.
72. Garton Ash 2019, 172.
73. Rupnik 2018, 33.
74. Rupnik 2018.
75. Góra/Mach 2010, 240.
76. Orbán 2016.
77. *Daily Telegraph* 2018.
78. Mos 2020, 10.
79. Krastev 2017, 47.
80. Rupnik 2018, 33.
81. *Daily Telegraph* 2018.
82. In a longer essay on this topic, I partly stressed this continuity myself; see Weymans 2023.
83. Roy 2019, 4.
84. Roy 2019, 125.
85. Roy 2019, 105–106.
86. Bourdieu 2010, 125.
87. Bourdieu 2010, 200.
88. Garton Ash 2019, 178.
89. Krastev 2017, 58.
90. Müller 2017, 59.
91. Garton Ash 2019, 175.
92. Kopeček 2019, 75.
93. Mos 2020, 7.
94. Van Middelaar 2019, 233–234.

 95. Foret 2020, 29.
 96. Barroso 2009, 5.
 97. Müller 2013, 238; Pasture 2018.
 98. Charlemagne 2020a, 24.
 99. Krastev 2017, 27, 33–39.
100. Charlemagne 2020b, 26.
101. Council 2001, 20.
102. Schrag-Sternberg 2013, 165.
103. Moyn 2015, 24; see also Duranti 2017, 359.
104. Macron 2019.
105. Duranti 2017, 409.
106. Mos 2018, 326.
107. Garton Ash 2009, 127.
108. Weymans 2012.
109. Müller 2017, 97
110. Van Middelaar 2019, 266–267.
111. Mak 2008, 829, 834; Weymans 2020.
112. Van Middelaar 2019, 250–254.
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4 What Are "European Values"?

Philosophical Reflections on an Opaque Political Concept

Marie Göbel

4.1 Introduction[1]

For some time now, references to "European values" have figured prominently in political debates, especially when it comes to questions about the EU's refugee policy.[2] However, it is far from clear what the term is supposed to mean. Is there such a thing as European values? And if so, whose and which values? What could be a proper ground for reconstructing them? Does the term refer to actual beliefs by citizens (e.g. the shared value orientation of all Europeans), to a normative[3] commitment of European policy (as is stated in the EU Charter of Fundamental Rights) or to something else? Is the function of the phrase mainly rhetorical (serving, for example, some kind of European identity politics)? Or do European values have the potential to function as a genuine normative standard for EU refugee policy?

In political discourse, the various ways in which one might relate to European values and the relative interpretative openness of the term facilitate its cross-party popularity. For they allow political actors from the left to the (far) right to speak in the name of European values while interpreting the content and normative consequences of these values according to their particular political views and, hence, in strongly diverging ways. This is especially apparent in debates about the EU's refugee policy in which European values seem to provide reasons for opposite political claims: claims for a more restrictive and for a more open immigration policy; claims for accepting stronger duties towards refugees and claims for keeping them out; claims for protecting a European "core culture" and claims for more multiculturalism; and so on.[4] This is why one might doubt whether it is fruitful to discuss normative questions about Europe's refugee policy in terms of European values. At the same time, one might wonder whether the language of European values is without alternative when it comes to pointing out inconsistencies between the EU's (alleged) normative foundations and the reality of European refugee policy: e.g. with regard to the respect of human rights.

The central question of this chapter is whether the term "European values" can, in principle, be interpreted in a meaningful and normatively coherent fashion. The central idea is that the key to such an interpretation is to understand better in what sense European values are *values*. Accordingly, in this chapter, I will develop an analysis of the basic meaning of the term "European values"[5] that draws on distinctions between different value concepts as well as on distinctions between values and other normative concepts in philosophical reasoning. I will argue that the term "European values" implies a reference to universal moral values and to a particular European value orientation and that it is a basic precondition for a coherent interpretation of the term that it does justice to both the universal moral and the particular European dimension of European values. However, I will also argue that, from a normative perspective, it is at least dubitable whether the particular moral "values" that constitute the European values should be understood as values or rather as principles or rights, and that to present human rights as a moral value is clearly mistaken. My conclusion will be that "European values" can and should be interpreted as a normative self-commitment of European policy to a set of human rights and other universal moral ideas (principles or values). So, on the one hand, the analysis will show that it is possible to interpret the term "European values" in a plausible fashion.

I shall stress, however, that the goal of this chapter is not to vindicate usage of the term "European values", be it in everyday discourses or in particular legal or political contexts or documents (which makes a difference, of course). Rather, I assume that talk of "European values" can be problematic for a number of reasons but also that, at least for the time being, the phrase occupies a firm place in today's political vocabulary, whether one approves of it or not. Therefore, a lot would already be gained by a clearer grasp of what one can plausibly mean by "European values" and by a more reflected and careful use of the phrase accordingly. However, at the same time, the conceptual reflections in this chapter make it possible to see more clearly why references to "European values" can be normatively problematic in certain contexts. In short, it is the ambiguity of the term "value" in "European values" that implies the danger that the relevant universal moral ideas are reinterpreted as something specifically European and, relatedly, that questions about the respect of human rights are secretly replaced by questions about the protection of a European value order. The analysis might therefore also form the basis for a critique of certain (mis-) uses of the term "European values" and thus help lead questions about the normative implications of European values in the right direction.

So the bulk of this chapter is devoted to an analysis of the basic meaning of the term "European values". It is structured as follows: In a first step, I explain the main difference between two meanings of the term "value":

a value as something that people hold (empirical value concept) and as something that things have (normative value concept) (1). Based on this, I argue that the term "value" in "European values" is ambiguous in that it refers to universal moral values and to a particular European value orientation (2). In a second step, I consider more closely the relevant meaning of "European" and argue that it should be understood as a normative self-commitment of European policy (3). This leads to the preliminary proposal that "European values" should be interpreted as a set of universal moral values that Europe commits itself to (4). In a third step, I consider more closely the alleged value character of the universal moral ideas that constitute the European values. I explain why, from a normative perspective, it is crucial to distinguish between values and other normative concepts such as norms, principles and human rights (5). I then argue that for most of the so-called European values – human dignity, human rights and so on – it is at least controversial whether they should be conceived of as values in a moral sense, and in the case of human rights, this is straightforwardly mistaken. This leads me to a refined definition of "European values" (6). Finally, drawing on the concrete example of an election statement by Manfred Weber, I explain why these conceptual reflections also make it possible to see more clearly why using the language of European values can lead to normatively dubious results in certain contexts (7).

4.2   An Empirical and a Normative Value Concept

What are "European values"? Content-wise, a list of these values usually contains more or less those "values" that are listed in the European Treaties and in the EU Charter of Fundamental Rights – so, human rights, human dignity, freedom, democracy, equality, the rule of law and solidarity (and maybe others).[6] In what follows, I presuppose that one has roughly these "values" in mind when one speaks of "European values". However, the question just posed does not aim at a list of European values but at their nature, as it were. What kind of "thing" is a European value? And, more specifically, what do "value" and "European" mean here? Naturally, an answer to this question comes in three parts: I will first explain the basic difference between two meanings of the term "value". Then I will secondly consider the meaning of "European" in the given context. In a third step, I will propose a preliminary interpretation of the term "European values" that follows from these reflections.

What is a value? There is not one general answer to this question. Rather, the variety of meanings and facets of the term "value" are reflected in a rich philosophical (and sociological) tradition of thinking about values and also in conceptual distinctions between different kinds of values (intrinsic, instrumental, moral, aesthetic, absolute, relative and so on).[7] In

the present context, what matters first and foremost is a fundamental distinction between two meanings of the term "value". On the one hand, a value can be something that someone holds, which is equivalent to people actually valuing certain things. This is an empirical value concept. On the other hand, a value can be something that things have, in the sense that they are valuable or worth being valued from a moral perspective.[8] This is a normative value concept.[9] I will explain these two value concepts in turn.

As a matter of fact, people value all kinds of things. One might find it valuable to have a family, to live in a democracy or that gender equality is respected – but also, for instance, that Europe remains predominantly Christian and white or that only heterosexuals may marry. These and many other things might have a value, from somebody's perspective – in which "having a value" is equivalent to being good, worthy, desirable or valuable.[10] Two implications of these brief remarks deserve special emphasis. First, whether or not something has a value in this sense depends on somebody attributing a value to it and is thus subject-relative.[11] Among other things, this is visible from the plain fact that different things have value for different people. Respect of gender equality and having a family might have a value from my perspective while you might not care about family and gender equality. So whether or not something has a value in this subject-relative sense is related to people's actual beliefs or (individual or collective) value judgments (i.e. the belief or judgment that something is good or valuable). Secondly, it is important to note that the relevant notion of good or valuable here is not necessarily a moral one. Rather, one might value something for all kinds of reasons: e.g. one might attribute a value to having a family but not think that this value involves any moral norm to act in particular ways. In other words, the relevant belief might or might not have moral content.[12]

In everyday language, another way of saying that someone actually values something is that it *is* a value for that person, or, more specifically, that it is *one of their values*. For instance, to stick with the earlier example, instead of saying "I value gender equality", one might express the same point by saying that "Gender equality is a value (from my perspective)"[13] or "Gender equality is one of my values". This requires two important specifications. To begin with, all three statements express the belief that gender equality is valuable. However, first, while the former two statements are equivalent, people usually refer only to such things as "their values" that they consider to be particularly important or in some way fundamental for their normative outlook, either with regard to their personal lives ("my values") or their community ("our values") – one might think here of such values as family, national identity, class affiliation or certain religious, moral or political values or life principles. Values, in other words, are both rooted in and fundamental for a person's or community's identity

or self-understanding. This is why values typically come along with a high degree of emotional attachment and why this concept of a value is strongly linked with (often conservative) ideas of tradition, identity and community. Secondly, and crucially in the present context, the meaning of the term "value" (as a noun) in the second and third statement differ from one another. In the second statement – "Gender equality is a value (from my perspective)" – the term "value" essentially denotes a certain quality of gender equality (i.e. the quality of being valuable).[14] By contrast, in the third statement – "Gender equality is one of my values" – the term "value" denotes a belief or judgment (that gender equality is valuable). In other words, a value in this sense *is* a belief, judgment or normative orientation (of individuals or groups). This meaning of the term "value" is reflected in expressions like "People have different values", "We have similar values" or "These are my values", where it is clear that "value" does not denote some normative fact or quality but a belief, attitude, judgment or normative orientation. Finally, what regards the content of this belief, it is again important to see that it may or may not be moral: i.e. a value in the sense of a value orientation might or might not imply a moral judgment.

I will refer to this understanding of values as an empirical value concept: "empirical" because it refers to an empirical value orientation rather than to the quality of being valuable or more specifically to what is worth being valued in a moral sense. This is crucial: although an empirical value might, of course, have moral content in the sense explained earlier – e.g. my personal belief that gender equality is a value might imply that it morally ought to be valued or that there is a moral duty to act in accordance with gender equality – the relevant concept of a value is not situated on a normative level but on the level of subjective belief. Values in an empirical sense *are* beliefs (or judgments, attitudes or the like).

Such an empirical value concept must be distinguished from a normative value concept. To say that something has a value then means that it is valuable or worth being valued in the sense that there are reasons to act in accordance with the value. The term "value" does not then denote a belief or value orientation but a certain normative quality of things, broadly put. For instance, in one prominent view, all human beings have a special (absolute) value, human dignity, a value that inheres in human nature in some sense or supervenes on some feature of our human nature: e.g. rationality or the capacity to act morally.[15] This value of human dignity would then be moral in that it grounds a moral norm to act in accordance with human dignity, i.e. to treat one another in a particular way. Another prominent example would be the consequentialist view (or some version thereof) that all human beings do, as a matter of fact, value their own well-being – as a general anthropological condition – which, combined with the premise that it is good to have as much well-being as possible, gives rise to a moral

norm to maximise everyone's well-being. So well-being would be a moral value in this view.

How moral values should be understood when it comes to details and how, if at all, they might be justified are highly controversial questions but secondary in the present context. Here it suffices to note that values in a normative sense are conceptually different from empirical values. I will refer to this as a normative value concept in what follows.

In the context of this chapter, I will restrict my considerations about values in a normative sense to universal moral values more specifically. This requires an explanation: values in a normative sense are not equivalent to moral values; universal values are not necessarily moral values; and not all philosophers would interpret moral values as universal values.[16] The reason I focus on universal moral values simply lies in the context of this chapter: at least most of the values that constitute the "European values" – human dignity, freedom and so forth – are commonly thought of as universal moral values, and they are also explicitly referred to as universal and, indirectly, also as moral in the EU Charter of Fundamental Rights.[17] Because the normative value concept just explained will help elucidate this moral-universalist dimension of European values in the course of this chapter, I will leave other facets of this concept out of consideration.

To sum up, the term "value" may first denote a normative belief or normative orientation (value orientation), either of an individual ("my values") or of a community ("our values"). This is an empirical value concept. An empirical value can but does not necessarily have moral content. The term "value" may secondly denote the quality of being valuable, like when one says that human dignity is a value that all human beings possess. This is a normative value concept. With these considerations as a background, let us now return to the term "European values".

4.3   Implications for the Concept of European Values

How do these reflections help make sense of the term "European values"? To repeat, this question does not yet aim at the particular values that supposedly fall into this category but at the umbrella term "European values".

To begin with, the relevant value concept clearly has an empirical component in the sense explained earlier. This follows directly from the contextual label "European": European values, *insofar as* they are European (and even though they might reflect universal moral values – see later in this chapter), are by definition not global or universal but context-bound or particular. They are the values of Europe or Europeans; they belong to Europe or Europeans in some sense. Content-wise, this does not necessarily exclude the possibility that there might be overlaps between European values and, say, US-American values. However, I take it that European

values have to be peculiar to Europe at least to some extent as a basic precondition of the plausibility of the phrase.[18] So talk of European values implies the claim that there is something distinctively European about these values.[19] It is therefore clear that one central function of the phrase is that it serves as an identity marker. It expresses and establishes a certain self-image or self-understanding of Europe or Europeans. In short, these values are "what Europe stands for", "what defines us (as) Europeans"; they represent who or what "we" are. Needless to say, they also contribute to the very constitution of this "we". It is thus unsurprising that the phrase is often used interchangeably with the phrase "European way of life" in political discourse.[20]

Nevertheless, this is only one part of the meaning of "European values". Clearly, the connotations of the term amount to more than its empirical, identity-related dimension. Rather, even though European values are on the one hand attached to Europe or Europeans in some sense, the phrase carries at the same time a strong moral-universalist connotation. Among other things, this is evident from the kind of values that constitute the European values, which (as already stated) are also explicitly referred to as universal – and indirectly also as moral – e.g. in the context of the EU Charter of Fundamental Rights: human dignity, freedom, human rights and so on. So content-wise, European values refer to a set of universal moral values.

It is important to see that there is no necessary connection between these two semantic levels. In other words, one could, in principle, think of a number of values that some community considers fundamental for its practical self-understanding, which, however, are not claimed to be either universal or moral. To see this more clearly, consider a comparison: punctuality and diligence are often listed as typical "German values". Assuming for the moment that this characterisation is correct, these German values then clearly come along with certain social or behavioural expectations, also – and especially – with regard to non-Germans, e.g. in the job market. However, the ground and scope of the corresponding normative claim ("You ought to be punctual and diligent") are neither moral nor universal but restricted to the contingencies of the (alleged) "German culture". Crudely put: whether or not people in Italy ought to be punctual and diligent does not fall within its scope (or at least not directly).[21] Accordingly, the claim to respect these German values is not a moral claim but a claim to respect and maybe also to adapt to the contingencies of a particular "culture".

This is different in the case of European values. The underlying claim is that these values are not just values that Europeans happen to endorse. Rather, they are the morally right values as it were: European values reflect universal moral values, which implies that they should be acknowledged by everyone and everywhere. This moral-universalist connotation, too, is inseparable from talk of European values.

It is therefore crucial to note that the term "values" in "European values" is ambiguous. It first refers to human dignity, equality and so forth as universal moral values and secondly to the values of Europe or Europeans in an empirical sense – where the decisive link between these two semantic components of "European values" is that the former constitute the content of the latter or, in other words, that European values in an empirical sense reflect universal moral values. So, human dignity, equality and the other European values are universal in a moral sense and particular or context-bound in an empirical sense. This appears as contradictory only if one fails to distinguish between the two value concepts explained earlier and hence misses the fact that the term "European values" has both a moral-universalist and a particular, identity-related (empirical) semantic component that are inseparably intertwined in our common understanding of it: European values are a set of values that belong to Europe or Europeans in some sense, meaning roughly that they are "anchored" in the actual beliefs or normative orientation of Europeans, European policy or the like. As such, European values belong to a different normative category than moral values. And yet the particular "values" that constitute the European values are (declaredly) universal moral values. Before drawing conclusions from this for the interpretation of the concept, let us briefly turn to the relevant notion of "European".

4.4 In What Sense Are European Values European?

What makes European values European? What would be a plausible interpretation of the term in the given context? I want to briefly consider five interpretative possibilities. First, the relevant values might be considered European because they are rooted mainly or exclusively in European history. So the term "European" would primarily refer to the historical origins of these values – Europe would be the place where they were first "detected", formulated, conceptually developed, institutionally recognised or the like. However, this is not just contested as a historical thesis.[22] A purely historical interpretation of the relevant notion of European would also be at odds with the fact that the connotations of the term "European values" clearly reach into the present – or how else could they characterise the "European way of life" today? Moreover, even if these values had first emerged in Europe in some sense, this would still not tell us much about their prevalence today – within Europe and all over the world. So, in short, the label "European" would appear to be an illegitimate appropriation under the terms of this historical interpretation.[23]

The same holds *mutatis mutandis* for a second interpretative possibility. One might think that what makes these values European is that they are recognised only or predominantly in or by Europe. However, this claim,

too, would be empirically false. Clearly, there are non-European states or communities of states that support similar values, and, at the same time, it would be devious to assume that all Europeans support these values (see later in this chapter).[24]

One can also directly rule out a third option: namely, that European values are European in that their scope is somehow confined to Europe or Europeans. Such a claim about the particular or context-bound scope of European values would directly contradict their alleged universality. For instance, if one assumes that equality is a universal (moral) value, then this means, broadly, that it is good for everyone to be treated as an equal and that everyone should act in accordance with that value. To be sure, this does not mean that the question of what concrete norms follow from this value might not be addressed in a context-specific fashion, and the relevant norms might be restricted to the respective context accordingly. For instance, the question of what equality requires might lead to rather different conclusions in a European and in a US-American context (to put it simply). However, this regards the norms that follow from the value, not the value itself.[25] In other words, it does not change the fact that one and the same "thing" or practice (e.g. to be treated as an equal) cannot be valuable for everyone and only for Europeans at the same time. Indeed, in light of certain tendencies to stress the European character of European values at the expense of their universal character,[26] this cannot be emphasised strongly enough: the assumed universality of European values implies not only that they are morally binding for everyone rather than only for Europeans; it also rules out the possibility that they are morally binding for Europeans *because* Europe recognises their universal and moral character. In any event, this interpretation, too, would be incoherent.

As a fourth possibility, one might think that "European" simply means that these are the common values of Europeans, i.e. the values that Europeans share. This interpretation differs from the second option explained earlier in that it does not, or at least not necessarily, imply any claim to exclusivity. On a charitable reading, the main thrust of this understanding of "European" would not be to single out what distinguishes Europe from the rest of the world but to find something that unites Europeans, even though it might be the case that other demographic groups share similar values.[27] However, the question arises whether this interpretation has a sufficient basis in fact. On the one hand, the assumption that Europeans share a homogenous normative outlook – i.e. that there is a set of values which all Europeans support – is untenable on empirical grounds. Just think of racist and homophobic attitudes as opposed to the European value of equality and the human right to non-discrimination on grounds of ethnic origin or gender; of the prevalence of "Christian values" in some European states and the resistance to cosmopolitan norms; or of the fact

that "national values" are frequently brought into opposition with "European values".[28] So, in short, it simply seems devious to assume that there are a number of values which all Europeans unequivocally share. On the other hand, one might wonder if this criterion is too demanding. European values might still reflect the normative orientation of many or even the majority of Europeans. Moreover, it would be implausible to maintain that European values belong to Europe or Europeans in some sense and yet to decouple the further interpretation of this claim completely from the actual normative beliefs of Europeans. This is why I suggest that even though this is not the core meaning of "European" in the present context, it should still figure in an interpretation of the term.

This finally leaves us with a fifth option: what makes European values European is that they constitute a *normative self-commitment* of European policy, as it is expressed first and foremost in the European Treaties and in the EU Charter of Fundamental Rights.[29] European values, in other words, are a self-given normative standard of European policy and hence an expression of Europe's normative self-understanding.[30] This interpretation is not only in line with how these values are presented in the context of the Charter, where it is stated that the European Union is "based on" these values.[31] It also largely avoids the pitfalls of the formerly presented interpretative possibilities: It is compatible with the assumed universality of these values. It does not rely on dubitable empirical assumptions about the historical origins or the present dissemination of the relevant values. Nor does the fact that European policies frequently contradict European values already prove it wrong that there is such a commitment. And finally, this interpretation does not presuppose that European values reflect a collective value orientation of all Europeans, for such a political commitment does not require that every single European supports it. However, as noted earlier, I assume that it is a precondition for the plausibility of this interpretation that the relevant normative commitment is anchored in or reflects the (empirical) values of Europeans at least to some extent. The actual normative orientation of Europeans therefore would have to figure in a more detailed reconstruction of this European normative self-understanding, and one might also wonder whether without such a normative orientation the relevant "values" ever would have found their way into the relevant documents.[32]

Let us next consider what these reflections imply with regard to an interpretation of the compound term "European values".

4.5   What Are "European Values"? A Preliminary Proposal

As pointed out earlier, both its particular identity-related and its universal moral dimension firmly belong to our common understanding of the term

"European values". Accordingly, any plausible interpretation of the phrase must not reduce its meaning to only one of these dimensions but must seek a way to reconcile them in a coherent fashion: On the one hand, if European values were only understood as universal moral values, then these values would essentially constitute a moral ought *for* Europe. This would miss an essential dimension of the concept: namely, that these values are self-given by and attached to Europe in some sense as its actual normative orientation. On the other hand, if European values were only understood as the values *of* Europe or Europeans – i.e. in an empirical sense – then another essential dimension of their meaning would get lost: namely, the claim that they reflect universal moral values. So the term "European values" carries a claim about an actual value commitment of European policy and a claim about the moral rightness of this commitment. It implies not only that European policy is (declaredly) committed to this set of values but also that it acknowledges their universal moral character and, hence, that European policy morally ought to be guided by them. European values should, therefore, be understood in the following way that does justice to both dimensions: *"European values" signify a normative self-commitment of European policy to a set of universal moral values*. Put the other way around, one could also say that "European values" signify a set of universal moral values that Europe commits itself to.

   However, this proposed definition still needs to be reconsidered in one important respect. The analysis thus far has focused on the umbrella term "European values". By contrast, it has not been considered yet whether the particular "values" that constitute the European values – human dignity, human rights, freedom and so forth – really qualify as universal moral values. For this, it is crucial to distinguish a generic value concept, which is how the term "value" is commonly used in everyday language, from a more specific value concept: i.e. values as a particular kind of normative category, which again must be distinguished from norms, principles and (human) rights.[33] Understanding the fundamental differences between the concept of a value and these alternative normative concepts is a precondition for seeing more clearly what it is that the EU commits itself to. It then becomes clear that in the case of most European values, it is controversial whether they should be conceived of as universal moral values or rather as universal moral principles or rights and that to present human rights as a moral value is a category mistake. I will explain this in what follows.

4.6   What Values Are Not: Norms, Principles, (Human) Rights

The language of values is arguably the dominant way to express normative demands in the public sphere. Presumably, this is first of all so because, in everyday language, the term "value(s)" is commonly used in a generic

sense: namely, as equivalent to everything that is normative (as opposed to factual). In contrast to this, from a normative perspective, it is important to see that values in a more narrow sense by far do not cover everything that is normative. Rather, values (and moral values more specifically) must be distinguished from other normative concepts like (moral) norms, principles and rights and, more particularly, human rights. Importantly, the distinction between these normative concepts is not just some conceptual pedantry relevant for philosophers only. Rather, these concepts differ with regard to their general practical implications, and accordingly it can make a crucial practical difference whether Europe's normative commitments are understood in terms of values or in terms of principles and (human) rights. I will now first briefly introduce the concepts of a norm, a principle, a right and a human right. I will then highlight some decisive practical differences between these concepts and the concept of a value and also briefly go into some aspects of the relationship between values and norms. Against this background, I will reconsider the alleged value character of the particular European values and argue that, in the case of human rights at least, it is clearly mistaken to frame them as moral values.

A norm is any statement that expresses an ought: i.e. a prescriptive rule of action which states that one ought to do something or ought not do something. For example, "You ought not kill", "You ought to stop at red", "You ought not yell in public", "You ought to respect human rights" and "You ought to respect our values" are all norms. As the examples show, norms can be of very different kinds: moral, legal, social, cultural, political, religious etc. They can also be more or less strict: think of the norm to wash one's hands before dinner as compared to the moral and legal duty to not kill. How exactly various kinds of norms differ from and relate to one another is a complex question which I will not go further into here.

Norms can come at different degrees of generality. A principle (or, more precisely, a practical principle) is a norm with a very high level of generality.[34] For instance, "You ought to act morally" is a moral principle, as distinguished from any particular moral norm in a particular kind of situation. "Everyone ought to always respect human rights" is a moral principle, as distinguished from the more specific norm to respect this or that human right. Because the difference between principles and norms is mainly one of degrees in generality, I will refer to principles and norms interchangeably in what follows.

A right is a particular kind of normative concept: rights are "*entitlements* (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states".[35] As entitlements, rights are possessed by individuals on the ground of some legal principle (legal rights) or some moral principle (moral rights). A right thus belongs to an individual in a sense comparable to a property or

a title. It is "attached" to him or her. To have a right means that its object is *owed* to the right holder.

In the context of this chapter, I am not concerned with rights in general but only with human rights. Human rights in a moral sense (i.e. a particular kind of moral rights) can be distinguished from human rights in a legal sense (i.e. a particular kind of legal rights). Moral human rights are commonly understood as the rights that every human being has simply by virtue of being human. Thus, (moral) human rights are universal in that they are possessed by all human beings (rather than, for example, only by the citizens of this or that state). Moreover, human rights are typically understood as claim rights: i.e. as rights that always correlate with duties by others.[36] These might be negative duties of forbearance (e.g. to not kill somebody) or positive duties to (help) provide everyone access to their rights (e.g. by granting asylum). Finally, many would hold that human rights can only be weighed against one another: a human right can only be justifiably overridden by some other, higher-ranking human right, but it may not justifiably be restricted for some reason that is not human rights-related. Apart from their moral understanding, there is also a global legal regime of human rights today, as reflected in international law. For instance, there is, of course, not only a moral but also a legal human right to asylum.

Not going into the complexity of the relations and differences between these normative concepts, the important point here is that values by far do not cover everything that is normative and that there are differences between the concept of a value and the other normative concepts just explained. In what follows, I want to further highlight some of the practical differences between values, norms and human rights, which help explain why it matters practically whether some normative commitment is understood in terms of values or in terms of norms (or principles) or human rights.

Moral values (which indicate what is morally good) and moral norms (which state what morally ought to be done) are closely connected, but how precisely is a matter of ongoing debate. In particular, when it comes to the justification of morality, it is disputed whether what morally ought to be done follows from what is morally good or the other way around.[37] Here I will stay agnostic towards this question. Suffice it to say that moral values may ground moral norms, and following a moral norm might be considered a moral value.[38] For instance, if freedom is a moral value, then there is also a moral norm to somehow act in accordance with that value. Likewise, if there is a moral norm to respect human rights, then one might also say that respecting human rights is a (or of) moral value.

Maybe the decisive difference between values and norms in practical terms is that values attract or prompt actions, whereas norms prescribe what one ought to do. This has several implications. It first implies a motivational difference. My recognition that something is good or desirable

pushes me, as it were, to protect or promote what I recognise as being so, whereas my recognition that I ought to do something does not motivate me in the same way to actually do what I recognise I ought to do.[39] Secondly, values and norms differ in terms of the practical responses they call for.[40] Generally put, values call for protection or promotion (of what is valuable). A norm, by contrast, demands respect (of the norm) – i.e. to act in accordance with it – where the relevant course of action will be specified by the norm. This also means, thirdly, that norms tend to be more concrete than values with regard to the actions that they demand and that norms, other than values, have a prescriptive character and, thus, a special obligatory force. As explained earlier, values denote what is (or is regarded as) good, and what is (regarded as) good also prompts or calls for some "affirmative" practical response. So, for instance, if "family" is considered as a value in some community, then this will have some effect on how the policies and political institutions of that community are shaped: namely, so as to support families in *some* way. This is first of all simply to say that it would be inconsistent to hold that X is valuable but that this has no practical implications whatsoever with regard to one's actions towards X. However, a value does not call for any particular course of action that would constitute an adequate response to it. Rather, the recognition that X is valuable might be consistent with a whole range of actions which, in the public realm, might range from some non-binding policy goal to support X to passing a law for the protection of X. Norms, by contrast, prescribe concrete actions or courses of action: i.e. they state – by definition – what one ought or ought not to do and are thus directly action guiding.[41] Values do not prescribe at all.

This difference in terms of the required practical response is also evident with regard to values and human rights. As mentioned earlier, human rights correlate with duties to respect them, where this respect is owed to every single individual. Needless to say, this raises highly complicated questions with regard to identifying the relevant duty bearers, determining the scope of the relevant obligations, questions of burden-sharing between states and other actors and so on. However, here it suffices to note that human rights, other than values, have a direct obligatory force and that values do not endow individuals with claims in the way (human) rights do.

Before moving on, I wish to add a clarification. In everyday life, one frequently comes across the claim that some value – rather than some norm – ought to be respected or that some value – rather than something that is valuable – ought to be protected. Rather than proving the preceding explanation wrong, this reinforces the earlier point that it is crucial to distinguish between a moral and an empirical value concept and, moreover, between the different kinds of norms that correlate with these values respectively. I will briefly explain this in what follows.[42]

Consider the example of a person who regards (respect of) animal dignity as one of her personal values, in such a way that this value is particularly important for how she sees herself and for her way of life. For that person, this value will ground a self-directed norm to live in accordance with her value: e.g. by becoming a vegan. However, the question is now what this value implies for others. Imagine further that this person asks someone to "respect her value". What might this plausibly mean? It does not mean that one ought to share her value – i.e. to live according to the same value – for then she would have demanded that others ought to "respect animal dignity" rather than to "respect her value (of animal dignity)". In this case, she would have formulated a moral claim that is based on what she regards as a moral value: i.e. the respect of animal dignity. By contrast, in the claim to "respect someone's value", the relevant value concept is not a moral but an empirical one: i.e. it signifies a particular value orientation. So the demand to "respect someone's values" is a way of demanding respect of this person with her particular normative outlook (and the same holds *mutatis mutandis* for communities). This is important, first, because it does not necessarily imply that one ought to share that value (I might deny that animals have dignity and find living vegan a very bad idea), but that one ought to adapt one's behaviour in certain ways (for instance, it might be disrespectful to pay her a visit with a meat burger in my hand). And secondly, because the relevant norm is derivative of the principle to respect persons which might be outweighed by some other norm following from that principle in a particular situation.[43]

The value concept in the second claim mentioned earlier – the claim that some value, rather than something that is valuable, ought to be protected – is also an empirical one, like when someone claims, "We need to protect our Western values against Islamification". In a statement like this, the term "value" might refer to a common value orientation but also to societal structures that are built upon and oriented towards certain values (think of a secular school system, for instance). Here, this deserves to be stressed because this claim is related to but not equivalent to the other-directed claim to respect values.

To sum up, values must be distinguished from norms, principles and (human) rights. Moral values and moral norms are closely related, in that moral values may ground moral norms, and following a moral norm may be considered a moral value. However, (moral) values on the one hand and (moral) norms and (moral) human rights on the other hand differ significantly in terms of their general normative implications, in particular with regard to their motivational and obligatory force, the specificity of their demands and the kinds of practical responses they require. Generally speaking, values call for protection or promotion of what is valuable; norms demand respect of the norm; and human rights correlate with duties

to respect them. Finally, one must distinguish between norms that correlate with moral and empirical values, respectively.

Against this background, let us now turn to the particular European "values".

4.7 Do European Values Reflect Universal Moral Values?

Recall that the term "value", in its generic meaning, serves as a collective term for all kinds of normative claims, or in other words, all kinds of things that are (regarded as) normatively important might, in a generic sense, be referred to as "values". By contrast, to say that something is a value in a more narrow sense is to say that it is a value *rather than* a principle, norm or (human) right. With this in mind, let us now have a closer look at the "universal moral values" in the European Treaties and the EU Charter of Fundamental Rights: human dignity, human rights, freedom, equality, democracy, solidarity and the rule of law.

Human rights are the most straightforward example: From a normative perspective, human rights are not a value (or values, in the plural). Rather, as explained earlier, they are a particular kind of rights – the rights that every human being has simply by virtue of being human – rights that belong to every individual, that can be claimed by every individual and that correlate with duties by states (among others) to their politico-legal protection. From a normative perspective, to conceive of human rights as a value rather than as rights means to commit a category mistake.[44]

The case is less clear with regard to the other "European values". That is to say, while the rights character of human rights can hardly be denied,[45] it is a matter of substantial theorising and debate whether human dignity, freedom and so on should be understood as values or rather as principles or also as human rights.[46] Going into these debates would be far beyond the scope of this chapter. In the context of this conceptual analysis, it merely deserves to be stressed that it is not at all self-evident or uncontroversial that the relevant normative ideas are (or should be interpreted as) universal moral values. For instance, while some hold that human dignity is a universal moral value, others argue that this is mistaken and that it should be understood as a moral status or principle instead or, more specifically, as a status or principle that grounds human rights, rather than as a value alongside human rights.[47] Likewise, one might argue that democracy (as a particular form of government) and the rule of law (as a particular procedural principle) should be conceived of as principles rather than as values. One might also argue that, rather than commit itself to the "values" of freedom and equality, the EU should recognise a moral (and legal) duty to respect freedom and equality or maybe a number of more specific duties that relate to various aspects of freedom and equality (freedom of speech, gender equality etc.). One might also argue that

these duties, properly understood, are the correlatives of human rights to freedom and equality, in which case the additional mentioning of the "universal values" freedom and equality in the Charter alongside the respective human rights would be redundant at best.[48]

To repeat, these are complex questions which also lead far beyond an analysis of the meaning of the term "European values". In the present context, they first of all indicate the need to refine the definition of European values proposed in the last section: *"European values" signify a normative self-commitment of European policy to a set of human rights and other universal moral ideas (principles or values).* This definition does justice to both the universal moral and particular European dimension of European values as explained earlier while avoiding the misleading implication that all relevant moral ideas are moral values.

The analysis has thus also shown that when it comes to the particular "European values" – i.e. the content of the relevant commitment or the universal moral ideas which European values are meant to reflect – it is at least controversial whether they should be conceived of as moral values. As we saw, in the case of human rights, this is straightforwardly mistaken. The analysis therefore also makes it possible to see more clearly why references to "European values" can be normatively problematic in certain contexts. In short, the reason is this: the key to a more nuanced understanding of the meaning and normative implications of European values, I have argued, is to distinguish between different value concepts as well as other normative concepts, which have different practical implications, and yet in everyday language are all labelled "value" (in a generic sense). However, this means at the same time that the ambiguity of the term "value" in "European values" – which implies a dual reference to universal moral values and to a particular European value orientation – in political discourse facilitates a shift from the normative requirement to respect what these values require content-wise to the normative requirement to protect a European value order. I will explain this in what follows, focusing largely on human rights.

4.8   The Practical Implications of European Values Rhetorics: An Example

Consider the following example. In the context of the 2019 European election, Manfred Weber, the lead candidate of the European People's Party (EPP) and vice-party leader of the German Christian Social Union (CSU), promoted his candidacy with the following statement on the EPP's website:

> [W]e [the family of the EPP] . . . remain true to our convictions: a united Europe based on the *values* human dignity, freedom, human rights, the rule of law, solidarity and subsidiarity.

... We stand for an ambitious Europe that *protects and preserves our values*. . . .

Many people are scared when they see the pictures of the many illegal migrants at the external borders [of the EU, M.G.]. The "European way of life" means that *we help people in need*. But it also means *protecting the borders* with all might against illegal migrants and gangs of people smugglers. Both is necessary. And when it comes to integration we should make plain that in Europe only those can get citizenship who *respect and live our fundamental values*. All others must leave Europe.[49]

This statement by Weber is a paramount example of how political claims that concern related and yet different normative questions – the preservation of Europe's "cultural identity", the practical implications of Europe's normative self-understanding and the protection of European interests – are presented as the normative consequence of one and the same overarching norm: the need to protect and preserve European values. More specifically, the example illustrates how the use of value language in certain political contexts makes it possible to replace normative questions about the respect of human rights by questions about the protection and preservation of European values. So, ironically, the reference to "European values" makes it possible to ignore precisely those normative standards for which, content-wise, these values allegedly stand. One can see this more clearly by looking at the argumentative moves in the statement more closely.

Weber begins by stressing the EPP's "convictions": Europe is based on the "values" of human rights, human dignity, freedom and so on. The question about the normative implications of this commitment might now generally be approached from two different angles.[50] One might first ask what kinds of policies would be in line with this commitment. So one starts from the premise that human rights, human dignity and so on are universal moral rights and principles (or values) that constitute a self-given standard of legitimacy for European policy and asks what this normatively implies – for instance: what kinds of duties follow from a commitment to the respect of human rights towards European citizens, newcomers (e.g. refugees) and people outside Europe, and what do these duties imply more concretely: e.g. with regard to the establishment of certain politico-legal institutions (which might, for instance, ensure an efficient access to asylum procedures)?

As a second option, one might ask what it takes to protect and preserve these European values. So one starts from the premise that the relevant normative ideas are the constitutive elements of a European value order – i.e. of Europe's normative identity or self-understanding – and asks what it takes to protect this value order against potential threats or enemies. What kinds of policies does *this* require? For instance, what criteria do

(European) states and (non-European) individuals have to meet in order to belong to that order? Crucially, in the refugee context, the primary question from this perspective is not what obligations follow from European values for Europe but rather for those who strive to come to or be part of Europe in some sense. So these are the kinds of questions that arise when one starts from the idea that human dignity, human rights etc. are not primarily universal moral rights and principles that morally ought to be respected (by everyone and, in particular, by states and communities of states) but European values that ought to be "protect[ed] and preserv[ed]" (by Europe), as Weber puts it.

I shall add two clarifications right away. First, the difference between these two perspectives does not hinge on whether or not the relevant moral ideas are viewed as European values. Clearly, one might start from the idea that human dignity is a European value and end by asking questions of the former kind. Secondly, these two ways of approaching the normative implications of European values do not, in principle, exclude one another. On the contrary, precisely because European values stand for both a commitment to universal moral ideas and a particular European normative self-understanding, it is clear that normative questions arise from both perspectives and that the respective normative requirements may also potentially conflict with one another.[51]

However, it is striking that in Weber's statement, questions of the former kind are largely substituted by questions of the latter kind. It is the reinterpretation of universal principles (or values) and human rights in terms of European values that require protection, which facilitates this change of perspective, with the effect that the normative question about Europe's moral (and legal) obligations towards refugees, among others, is replaced by the question about the refugees' duties towards Europe. In other words, the argumentative job is done by the idea of Europe as a value community rather than, for instance, by the idea of universal human rights that Europe commits itself to. Quite the contrary – the latter do not play any significant role in the argument. This is also evident from how the statement continues.

Weber seems to concede that European values have *some* normative implications with regard to giving aid to non-Europeans ("we help people in need"). However, it is striking that he does not speak of a human *right* (e.g. to asylum) and a correlative moral and legal *duty* in this context but refers to the "European way of life" instead. Accordingly, to "help people in need" – which arguably means refugee admission here, among other things – appears as a voluntary, benevolent political practice. This stands in stark contrast to the assertion made in the very same statement that Europe is founded on the recognition of human rights. For, as explained earlier, the very idea of human rights implies not only that every human

being has these rights but also that the right-holder has a moral claim (and, in many cases, also a legal claim) to the protection of their right and that Europe has a (moral and legal) duty to protect these rights accordingly. This is especially clear in the case of the human right to asylum, which is not only a moral but also a legal right. In any event, respect of human rights is not a matter of a contingent way of life but of morality and law.

Weber goes on by stressing that protecting European borders "against illegal migrants and gangs of people smugglers" is equally part of the "European way of life". Why is that so? Provided that the "European way of life" is characterised by a commitment to "European values", how does it follow from these values that Europe ought to protect its borders "with all might"? To be sure, Europe might have an interest in protecting its borders for all kinds of reasons, and under certain conditions, it might also be justified in doing so. However, in Weber's statement, the need (or maybe right) to protect European borders appears as a normative consequence of the need to protect European values: European values provide the justification for protecting European borders. The putative plausibility of this inference depends once again on how the term "European values" is used in this context or, more specifically, on the idea of Europe as a value order. It allows Weber to equate the protection of European borders without further argument with the protection of (European) values and thus to present it as a "good thing".[52] By contrast, it is dubitable how the need to protect European borders against certain groups of people might follow from a human rights idea or from any other "European value" as far as I can see.

Finally, according to Weber, immigrants have to "respect and live our fundamental values" – "[a]ll others must leave Europe". In the present context this claim is illuminating for several reasons. To begin with, from a normative perspective, it is far from obvious why disrespecting a value should lead to being expelled from a political community, especially if only one group of people (immigrants) faces this consequence. For the sake of the argument, let us assume that racial discrimination counts as a form of disrespect of a European value (e.g. the "value" of equality or the human right to non-discrimination on grounds of race). While racial discrimination is, of course, morally wrong and may also be prosecutable under certain conditions, it is an entirely different question what political or legal sanctioning mechanisms (if any) might constitute an appropriate reaction to this wrongdoing, with deportation ("all others must leave Europe") arguably being at the far end of the spectrum of possibilities – a possibility which, by the way, would be clearly illegal on grounds of EU and international law.

To be clear about this: One might argue that newcomers need to respect and maybe even internalise ("live") European values to some extent in order to become citizens.[53] This is not to say that this claim is

right but simply that this is a question about which one might reasonably disagree. Accordingly, one might want to distinguish between this claim by Weber and the consequence he proposes in case of non-compliance (deportation). However, this would mean to miss the implicit premise upon which his argument is built and which makes this conclusion seem natural: namely, that the protection of European values is normatively prior to the respect of human rights. In Weber's statement, respect of human rights as a condition for the legitimacy of EU policies is turned into a duty of (potential) migrants and into a condition of admission and naturalisation. This is as far from the idea of unconditional human rights as it can get.

   To be fair, the passage just analysed is part of an election campaign, and we would certainly not expect statements in this context to be particularly nuanced, let alone to offer any detailed justifications for the claims offered. But this does not touch the fundamental point that in Weber's statement, the protection of European values appears as the main normative consequence to be drawn from these values with regard to EU policies towards migrants and refugees. It is the value terminology which facilitates this one-sided perspective and, at the same time, provides his claims with an appearance of moral justifiability. So one reason why framing Europe's normative commitment in terms of "European values" can be problematic in certain contexts is that it facilitates a change of perspective in that protecting and preserving these values might appear as normatively more important than respecting the norms that correlate with the particular European values: i.e. first and foremost, the respect of human rights.

4.9   Conclusion

It is sometimes suggested that talk of "European values" is nonsensical because there simply are no European values.[54] In contrast to this, in this chapter, I have argued that it is possible to interpret the term in a plausible fashion. This interpretation also indicates a way to take questions about the normative implications of European values in the right direction. At least in principle, European values might thus function as a genuine normative standard for the legitimacy of EU policies and its refugee policy more specifically. However, this does not change the fact that the term "European values" is prone to political misuse. Whether this downside of references to "European values" is outweighed by the potential merits of the term in various contexts or whether it might prompt the search for an alternative normative category to frame and discuss the practical implications of Europe's normative commitments remains to be seen.

Notes

1. I thank Marcus Düwell, Therese Herrmann, Matthias Hoesch, Andreas Nie-derberger and Jos Philips for their enormously helpful comments on an earlier version of this chapter.
2. I refer to Europe and the European Union (EU) indiscriminately throughout this paper. For a critical historical reconstruction of when and how European values came to play that role, see the contribution by Wim Weymans in this volume.
3. Throughout this chapter, I use the term "normative" in a broad sense so as to refer to moral normativity, legal normativity, questions of political morality and maybe other normative dimensions. Many of the considerations in this chapter apply to various normative dimensions: for instance, the distinction between values and other normative concepts that I develop in Section 5 is not restricted to the moral concept of a value, a norm etc. However, at the same time, there are, of course, important differences such as between a legal and a moral concept of a value, and it makes a difference whether one refers to the EU's legal or moral commitments. My focus in this chapter lies on moral questions, so I will point out these differences only where necessary and will make clear whenever I refer to *moral* values, norms etc. more specifically.
4. Among other things, these differences have a lot to do with whether one regards European values primarily as constitutive of the "European way of life" that requires protection (which especially conservative voices will stress) or whether one focuses on what these values demand content-wise: i.e. first and foremost, the respect of human rights (which NGOs will typically emphasise). See fur-ther on this Section 7 of this chapter. However, it also has to do with a fact that I will largely bracket in this chapter: namely, that the particular European values stand in no clear hierarchy, so that it frequently seems as a matter of pick and choose which value one regards as primary in a particular situation. For instance, when on February 27, 2020, Turkey announced that it would no longer hinder refugees trying to cross its borders into Europe, and Greece tried to prevent the refugees from doing so by committing massive human rights violations, the president of the European Commission, Ursula von der Leyen, expressed her support of Greece's attempt in terms of European solidarity and the rule of law while NGOs criticised it as contradicting the "European values" human rights and human dignity. See <https://ec.europa.eu/commission/press-corner/detail/en/statement_20_380> [July 13, 2022] and <www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/> [July 13, 2022].
5. This is what I will mean by "conceptual analysis" throughout this chapter. By contrast, I will conduct neither a discourse analysis that would pursue the dis-cursive functions and meanings of "European values" in various contexts nor a systematic normative study of whether or not the EU's normative foundations should be framed in terms of (European) values (which would again presup-pose an analysis of the functions of both values and value language in various politico-legal contexts).
6. The EU Charter of Fundamental Rights states in its preamble: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, uni-versal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It 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. The Union contributes

to the preservation and to the development of these common values". (Charter of Fundamental Rights of the European Union, Preamble, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [January 15, 2023]). The Treaty of Lisbon states in Article 2: "The Union is founded on the values 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". (Treaty of Lisbon, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2008.115.01.0001.01.ENG&toc=OJ%3AC%3A2008%3A115%3ATOC> [January 15, 2023]).

7. See e.g. Joas 1999 and Korsgaard 1996. In particular, there is also a rich philosophical and sociological tradition of value criticism. See, for instance, Böckenförde 1987; Luhmann 1993; Nietzsche 1969 and Schmitt 2020.

8. I use the term "things" in a generic sense here, so as to include animals and human beings.

9. The distinction between an empirical and a normative value concept must not be confused with the distinction between a subjective and an objective value concept. This will become clear in what follows.

10. Here and in what follows I use the rather inconvenient expression "from my/somebody's perspective", rather than simply saying "for me/somebody" to avoid the potential misunderstanding that I am referring to what is "objectively" valuable or good for somebody from some external perspective in spite of the fact that they might not recognise this as being valuable for them. For example, one might say that human rights are valuable *for* a person, in the broad sense that it is good for them that their human rights are respected, even though they might not value human rights. However, this perspective on values and the questions associated with it are irrelevant in the context of this chapter.

11. By using the term "subject-relative", I do not mean to advocate a "subjectivist" value theory. Nor do I want to enter the debate on whether there are "subject-independent" values, or all values depend on acts of value attribution.

12. A different question is whether some value judgment is morally justified. For example, someone might hold that "racial hygiene" is valuable or even morally valuable, but this would be wrong from a moral perspective.

13. To be sure, this is an imprecise way of speaking, which, however, is quite common in everyday language. To be more precise, one would, for example, have to say "Respecting gender equality is a value for me", or "Living in a state that protects gender equality is a value for me". See also Section 6.

14. I stay agnostic towards the question here of how one may conceptualise this quality of being morally valuable – e.g. as some objective, mind-independent normative fact that "inheres" in things or as something that all human beings necessarily have to attribute to certain things.

15. This view is controversial. It might be argued that human dignity should be interpreted as a moral status or principle rather than as a value (see Düwell 2010 and Göbel 2019), and one might also argue that the value human dignity should be conceptualised differently than suggested here. However, here I am merely interested in the basic concept of a value that underlies this view.

16. E.g. one might hold that happiness is a universal value because it constitutes a good for all human beings (all human beings strive for happiness, whatever their individual ideas of happiness might be). However, this universal value of happiness would still not necessarily be a moral value: It might not provide a reason

(let alone give rise to a moral duty) to support the happiness of others. Rather, it might just prompt each individual to maximise his or her own happiness, maybe even at the expense of other people's happiness. Moreover, one might, of course, reject the idea of universal morality and yet claim that there are moral values. A contextualist, for instance, might argue that supporting the members of one's family or community is a (or of) moral value but that this value is itself not grounded in any universal value. Finally, there are, of course, concepts of values that are normative but not moral: e.g. political values or legal values.

17. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [January 15, 2023]. Solidarity might be an exception to this because it might be understood as "solidarity among Europeans" and would thus not be universal.

18. I am not claiming that this has to be so as a matter of fact. Rather, I suspect that this must be so from the perspective of those who use the phrase.

19. This follows, I take it, from the simple fact that values, in the sense of the values of a person or a community (i.e. empirical values), are inseparably linked to questions of identity(-formation), thus drawing a boundary to some not-me or not-us, i.e. a person or community with a different set of values. However, this is arguably a matter of degrees. I assume that talk of European values would still make sense if a significant part of the world shared the same values, but if the same held for the whole rest of the world, it would become pointless.

20. See also Section 7.

21. With this I do not mean to suggest that there might not be a claim of rightness implied. Arguably, someone who holds that something is "her value" will also think that it is in some sense good or better to have this value. Here, the important point is merely that this is not necessarily a claim about moral rightness or even universal moral rightness. So someone who advocates "German values" would hold that it is indeed better to be punctual and diligent but might still not regard this as a moral claim.

22. See the contribution by Wim Weymans in this volume.

23. I shall stress that this is not meant to rule out the possibility that many people who use the term "European values" might indeed hold such a view (i.e. about European values having their origins in Europe). In other words, if one conducted a discourse analysis and determined the meaning of "European values" on that basis, this historical interpretation would probably figure in it. However, the goal of these conceptual reflections is not to faithfully reconstruct what people think but to develop an interpretation that also meets certain plausibility criteria.

24. Here the same point applies *mutatis mutandis* as with regard to the preceding interpretative possibility – see note 23.

25. Of course a value too might be interpreted differently in different contexts (i.e. what equality is to begin with). However, I assume – but cannot argue for this here – that the assumption that some value is universal at least implies that there is a universal core meaning and a norm that at least on an abstract level is universal as well, even though the more concrete norms that follow from it certainly require context-specific considerations. Cf. Göbel 2019, Ch. 7.

26. See Section 7.

27. I would still assume, though, as explained in note 19, that these values would have to be thought of as specifically European at least to some extent, as a general plausibility condition.

28. Cf. Gördemann/Herrmann/Langer 2021, esp. Chs. 3 and 4.

29. There is no space here to go into the question what such a commitment does or should imply. Especially, one might wonder whether it should be understood as a broad orientation of EU policies or whether it calls for its "translation" into more robust (e.g. legal) structures. See on this also Section 5.

30. One might object here that the claim that this standard is self-imposed contradicts the idea that values, other than norms or life principles, are not something that one adopts but rather something that one simply has. Generally, for values in an empirical sense, this is certainly right. However, it makes a difference whether a community deliberately decides that its policies should be guided by a particular set of values. In this case, the notion of self-imposed or self-given values seems appropriate.

31. See   <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [January 15, 2023].

32. The Treaty of Lisbon also states in Article 2 that "[t]hese values are common to the Member States". See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2008.115.01.0001.01.ENG&toc=OJ%3AC%3A2008%3A115%3ATOC> [January 15, 2023].

33. Cf. Düwell/Göbel/Philips 2021. The distinction between these normative concepts is not restricted to moral values, norms, rights etc. but also applies, for example, to legal values and various kinds of norms. I will make clear in what follows whenever I refer to moral values, norms, principles and (human) rights more specifically. Moreover, these conceptual distinctions are not meant to be exhaustive. For instance, I bracket the concept of a (moral or legal) status here.

34. One might hold, however, that principles, other than norms, can also state the permission to do something.

35. Wenar 2021, introductory section, emphasis added.

36. On the concept of a claim right see Hohfeld 1917.

37. See Rawls 1993, 173–211. The classical view is that this question divides moral philosophers into two camps: teleologists and consequentialists who argue that what morally ought to be done follows from what is good (in short: values ground norms) and deontologists who reject this and argue instead that one first needs to understand what ought to be done in order to know what is morally good. However, the line between these positions is certainly not as sharp as often suggested, and one might even wonder whether the distinction between them fundamentally makes sense.

38. Let me stress again that this does not mean that moral norms necessarily have to be grounded in moral values, which many would explicitly reject.

39. For an overview of relevant debates about this question, see Scarano 2011. This is one reason why one might argue that it is important that the policies in some community are based on and oriented towards common values: namely, because this will facilitate consent to certain practices in spite of otherwise diverging interests.

40. See in more detail on this Philipp Schink's contribution to this volume.

41. This does not mean that what norms prescribe might not be in need of further, context-specific interpretation.

42. It will become clear why this matters practically in Section 7.

43. Think, for instance, of a neo-Nazi who demands respect for her value of the superiority of the white race. The reason why we arguably would have difficulties respecting the particular value orientation of that person is that the relevant norm – respect of value plurality – is, in this case, outweighed by a different norm: e.g. to recognise one another as equals and not to discriminate

on racial grounds (where one might further argue that both norms follow from a principle to respect persons).

44. See also Göbel 2020 and Düwell/Göbel/Philips 2021. It is a different question whether human rights are grounded in some value or whether some value lies at the core of human rights. See Griffin 2008.

45. There is, however, an exception to this: namely, a line of argument that would stress that the concept of a right presupposes the existence of a right holder and of a duty bearer, which combined with the assumption that, in the case of human rights, it is sometimes impossible to identify this duty bearer leads to the claim that they are not rights "proper".

46. There are two different (though related) questions at stake here. The general philosophical question is how human dignity, freedom etc. should be understood, which also touches on metaethical questions about the role of values, norms and rights in practical reasoning. So this is first of all a matter of philosophical theorising. A different question is what practical implications it has to frame the normative foundation of some political community – here the EU – in terms of values rather than, for example, in the form of a catalogue of rights. This again touches on complicated questions: e.g., about the functions of values in political and legal contexts.

47. See Düwell 2010 and 2014 and Göbel 2019.

48. From a human rights perspective, to list freedom and equality as values alongside human rights is problematic because it puts these values potentially into opposition with the human rights to freedom and equality.

49. Until recently, the quote was accessible via the following link, which has since expired: <www.eppgroup.eu/de/newsroom/nachrichten/wir-mussen-unseren-european-way-of-life-verteidigen> [June 21, 2022] (translation M.G., emphasis added). I adapted the spelling of "European Way of Life", which is English in the German original. Parts of the quote are still accessible via the following link: <www.eppgroup.eu/de/newsroom/nachrichten/wir-muessen-unseren-european-way-of-life-verteidigen> [March 1, 2023].

50. As I will explain later, these perspectives do not necessarily exclude one another and might even be complementary under certain conditions.

51. E.g. one might hold that respect of the human right to asylum might potentially be in tension with the requirement to maintain social cohesion in terms of a shared value orientation. (I am just mentioning this as an example. Whether this is a real problem is a different question.) Note also that in order to address such tensions adequately, one needs to turn from the umbrella term "European values" to the particular value (or norm or right) at stake. One might then, for instance, attempt to argue – though I doubt successfully so – that in some cases, the human right to asylum of a refugee might be justifiedly overridden by a human right of a European citizen. In contrast to this, to say that some human right may be justifiedly overridden by a normative requirement to respect some value would plainly contradict the human rights idea.

52. Note that this only follows with the help of an additional premise: namely, that immigrants actually constitute a threat to this value order.

53. It is not clear from the statement *why* "our fundamental values" ought to be respected by immigrants. Because they are universal moral values and should thus be taken into account by everyone? Because disrespecting European values would mean to disrespect "us" (as Europeans)? Or maybe for both reasons? Arguably, the statement plays with precisely this ambiguity.

54. See Kundnani 2019.

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5 "Wo Sind EUre Werte?"

Remarks on the Practical Response to Values

Philipp Schink

5.1 Introduction

In early December 2021, a large European flag flew at the party headquarters of the Social Democratic Party of Germany (SPD) in Berlin. In the centre of the circle of stars was written, "Wo sind EUre Werte?" – "Where are yEUr values?" Using this slogan, activists had protested the current German chancellor in front of party headquarters against the migration policy of the EU at its external borders.[1] They demanded an end to illegal pushbacks, safe escape corridors and, in particular, rapid admission to EU territory to end the suffering of refugees at the Belarusian border. If the EU's treaties, the speeches of its representatives, and European public opinion consistently refer to values such as human dignity, the rule of law and freedom, why, activists say, do these values not apply to the treatment of refugees and migrants?

In this chapter, I would like to take the activists' indignation that the EU does not seem to care much about the values underlying the European unification project when it comes to responding appropriately to migration and refugee movements as an opportunity to explore a series of questions concerning the relationship between "European values" and normative requirements. How does the finding that something is of value regulate action? In doing so, I will abstract somewhat from the activists' immediate concern and explore more basic questions about how values can actually guide action. I will first show, against a certain value scepticism, that the inclusion of values in EU treaties does not entail insurmountable problems. In a second step, I will outline how the relationship between values and prescriptivity can be conceptualised. In doing so, however, I will not fully descend into the depths of the philosophical debate about normativity and will instead follow a middle path. Finally, I will point out two different ways of responding to values in practical terms and discuss their respective attractiveness. While exploring these points, I will consider and refer back to the question of what an appropriate response from the EU and its member states to the migration and refugee movements might look like.

The discussion about "European values" is often determined by more in-depth discussion as to what exactly can be understood by these values.[2] This involves both discussing which values are now to be included in the European canon and discussing how these are to be understood in more detail. Grounded in a communitarian perspective, this discussion explores the question of whether there is such a thing as Europe's cultural values, which would predate the European political project and be a necessary precondition of its founding, but which could not be generated by it itself.[3] The perspective that is often found in the background and gives this discussion its practical significance is that the existence of a stock of values is established as a result of historical-cultural development and that these values are then to be politically positivised, as it were, at the institutional level of the EU. This "bottom-up" approach is critically directed against attempts to impose values on the European social unification process as the result of negotiation and enforcement processes at the political level: i.e. from a "top-down" perspective. Admittedly, this is to some extent a "democratic" understanding of the communitarian answer to the question of which values should underlie the European unification project: namely, those values that actually have meaning in the lives of EU citizens rather than values primarily relevant to the lives of a political or economic elite.

I will not explore this complicated and multi-layered debate and its underlying issues in the following.[4] Instead, I will simply refer to the values that have actually found their way into the various EU documents and treaties since the 2000s and take them as an undisputed basis. The question of what practical attitude should be taken towards these values is at least as important as the question of which values should form the basis of the European project. What practical implications are entailed in the incorporation of values and the shift to a language of values that can be observed in the history of the European treaties? These questions are not only central to a more precise understanding of what political character the EU has or should have; they are also important in order to understand what kind of regulative control goes hand in hand with the inclusion of a certain canon of values in EU treaties. It is not only a question of how executive and legislative processes and actions can refer to values for guidance. Rather, the European process likewise always concerns how processes, measures and actions referring to values in the wrong way can be sanctioned.

5.2　Values in the Treaties of the European Union

It is only in the last 20 years or so that values have been placed in the foreground of various important EU treaties and charters. Before that time,

instead of values, there was usually talk of principles. For example, in the Treaty of Nice, it is stated:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.[5]

In the same place in Article 2 of the Lisbon Treaty, which followed the Treaty of Nice and is the treaty in force today, the talk of "principles" has now been replaced by the talk of "values":

> The Union is founded on the values 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[6]

And the preamble to the Charter of Fundamental Rights of the European Union states:

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, 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. It 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. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.[7]

At first glance, the replacement of "principles" with "values" may elicit only an indifferent shrug, since the treaty passages otherwise appear to be largely identical in meaning. Nevertheless, the change to a language of values has triggered scepticism and concern among a number of commentators. This critical reaction ranges from the concern that the language of values is per se vague and not very concrete compared to the language of

principles to the reductionist assumption that the former can be reduced to the latter anyway. For instance, Dimitry Kochenov suggests:

> Although it is universally accepted that "moral and political values are central to the public law enterprise", while the EU Treaty speaks in Article 2 TEU about the "values" of the Union, it is absolutely clear that what is meant by "values" in this context is actually "principles" – fundamental principles – of EU law.[8]

To understand what exactly is at stake in this controversy, it is helpful to look at the difference (and also possible connection) between values and principles.

Principles are, both in general and in jurisprudential, political or philosophical terminology, fundamental rules whose function is to guide and regulate individual actions. If freedom, democracy, human dignity etc. are to be understood as principles, this means that these terms contain general rules offering direct guidance for judgment and action by indicating what is relevant and what must be disregarded in the respective context.[9] An illustrative example of a principle would be, for example, "It is morally wrong to murder". Or Kant's principle of humanity: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means".[10] If we consider the Treaty of Nice with these two examples in mind, it is natural to understand the "principles" cited in the quoted passage only as elliptical formulations of far more complex general principles. To speak of the principles of freedom, democracy etc. does not say anything at all about the content of these principles. That the range of possible interpretations here is considerable is immediately apparent if we consider two better-known principles of freedom, at least in philosophical discussion. For example, the first principle of justice dealing with freedom is stated by the American philosopher John Rawls in his *Theory of Justice*: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others".[11] The famous "principle of liberty" found in John Stuart Mill's *On Liberty*, on the other hand, represents a principle with a significantly different thrust:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.[12]

Despite all the ambiguity about the exact content of the principles listed in the aforementioned European treaties, it should be clear what (supposed)

advantages are expected from the integration of principles into the European treaties. With this integration, direct regulation of the political conduct of the EU institutions as well as their member states should become possible. Principles should enable both common political judgments in individual cases and an orientation of policy as a whole: individual cases – i.e. the achievement which is attributed to principles – must "only" be examined to see whether they fall under a certain principle. Now it is indeed the case that quite a few commentators have criticised the replacement of principles with "values" in the EU treaties as well as in the Charter precisely in light of these advantages associated with principles. To a certain extent, direct action guidance is inherent in principles, but this does not seem to be the case with values. The concern is that a binding guidance for action would be undermined by replacing principles with values in documents central to the process of European unification, such as the Treaty on European Union and the Charter of Fundamental Rights. In short, the concern is that the integration of values gives the preamble of the Charter of Fundamental Rights and the central articles of the EU Treaty the character of Sunday speeches: values are always referred to when it comes to being as vague and unspecific as possible with a lot of rhetorical bombast. Sunday speeches may appeal to people's guilty consciences or give listeners the warm feeling that they are somehow good after all, but the vagueness of the language of values, critics fear, has political consequences beyond that. This concern was prominently expressed by Carl Schmitt with the phrase "tyranny of values". According to Schmitt, since values are always subjective, they only invite endless conflicts of interpretation and arbitrariness. Schmitt, who was a legal scholar and ideologue of the Nazi regime, saw in the integration of values in the early Federal Republic the writing on the wall of a "tyranny of values".[13]

This concern can indeed be heard as a constant background noise when it comes to the inclusion of the language of values (and the consequent replacement of the language of principles) in the Charter and especially in the EU Treaty. This expresses the double concern that, due to the presumed vagueness of the terminology of values, they would either not fulfil any practical guidance function at all (and thus would remain inconsequential) or that their inclusion would open up a discretionary latitude for the conduct of EU institutions as well as the governments of the member states, which could lead to the fact that both political and legal decisions could hardly be effectively anchored with democratic control. Commentators on the progressive left are particularly concerned that replacing principles with values in EU documents will lead to a step backwards in the process of European unification. Instead of establishing well-defined principles that would put political action on a binding basis, it is this binding nature that would be undermined. However, reactionaries are levelling a

similar criticism. Complaints regarding the criticism that the EU Commission and the EU Parliament are currently levelling at member states such as Poland or Hungary, both characterised by a rapid dismantling of the rule of law and an overall strong development towards authoritarian nationalism, are thus readily sublimated by representatives of those states to the problem of a "tyranny of values". As Poland's ambassador to Germany Andrzej Przyłębski pointedly put it in an interview in 2017: "The problem is interpretation. Brussels is too ideologically driven. And that is by liberal ideology".[14]

It is precisely because of the EU's political crisis that the question of what practical attitude should be adopted towards values is of particular interest. The crisis of the European unification project is indeed manifold and driven by many factors. In the context of this chapter, those factors and developments that are in one way or another connected with the question of flight and migration to the EU are of particular interest. Flight and migration are social facts that have triggered increasingly fierce moral and political conflicts and controversies within the EU over the past 30 years. Especially since the "long summer of migration",[15] there has been an ongoing political crisis in the European Union over how to deal with the fact of migration appropriately.[16] Determinants of the crisis are the anti-migration-and-refugees attitude of, among others, the Visegrád states and Austria, as well as an attitude on the part of the core European states that is strongly oriented towards the idea of controlling irregular migration. By means of "compassion [and] determination"[17] (i.e. de facto deterrence and containment), a "robust management [of the] external borders"[18] is pursued, in which both illegal pushback actions are effectively tolerated and the use of Libyan militias for migration prevention is sought:

> In the past six years, the European Union, weary of the financial and political costs of receiving migrants from sub-Saharan Africa, has created a shadow immigration system that stops them before they reach Europe. It has equipped and trained the Libyan Coast Guard, a quasi-military organisation linked to militias in the country, to patrol the Mediterranean, sabotaging humanitarian rescue operations and capturing migrants. The migrants are then detained indefinitely in a network of profit-making prisons run by the militias.[19]

But of course the crisis also has further determinants. For example, the aforementioned dispute between the EU institutions and, for example, Poland and Hungary regarding the lack of rule of law and authoritarian transformation of democratic structures in these states also plays a major role. Thus, the governments of these member states are using their power to block the establishment and effective implementation of intra-European

procedures for the allocation of refugees and migrants. In this way, the current reactionary governments of these countries are strategically aiming for the EU to yield on the issue of sanctioning the erosion of the rule of law and democracy.

Now, could this EU crisis be understood as a consequence of introducing values into its core treaties? It could be assumed that the crisis is essentially caused by the fact that there is no agreement on the respective understanding of the values and that, due to the subjective character of the values, it is also not possible to decide on substantial divergences of interpretation. No reference to the canon of values laid down in the treaties could in any way resolve such a dispute. There are, however, reasonable doubts that the current conflicts in the EU are actually conflicts of values in this sense. Understanding the ongoing conflict between the core European countries and EU institutions and, for example, the Orbán government in Hungary primarily as an expression of conflicting values (or as an expression of conflicting interpretations of the respective values) actually contributes to the ideological concealment of a power politics that aims to secure the influence of a nationalist elite on state control resources by undermining democratic participation opportunities in order to promote its own economic interests.[20] To seek an explanation of the crisis in the alleged subjectivist character of values and thereby hastily endorsing the Schmittian conception of values overlooks the fact that it is not so much collisions of divergent interpretations of values as collisions of interests at the forefront here. Indeed, it overlooks the fact that government action in these countries can by no means be regarded as representative of the convictions of these countries' populations:

> [T]hese rogue governments are not taking their citizens out of the normative embrace of the European Union because their citizens have demanded that these governments do so. The rogue governments we see today are undermining the values of the European Union when the EU is more popular in these Member States than their own governments are.[21]

With these certainly sparse references to the strategic use of values, the problem of the precise understanding of values in the EU treaties is, of course, not exhaustively answered. In what follows, I want to explore above all the question of what kind of practical attitude is actually to be taken towards values. In what ways should EU institutions and member states respond in their actions and policies to the values laid down in the Treaties? This question has a significance of its own, quite different from the question of exactly which values are or should be subject to the European project or how the values laid down in the treaties should be interpreted in detail. It allows us to draw conclusions in a different way about what is involved in the integration of values into the European treaties.

5.3   What Are Values?

Something is of value if it is good: i.e. when we call a state of affairs or something else valuable, we make an evaluative judgment about it. Thus, when the EU documents speak of values such as freedom, democracy, human dignity or the rule of law, this is first of all synonymous with the statement that the states of affairs to which these terms refer are good and worth valuing. If one looks at the terms listed as values in the Charter or the Lisbon Treaty, it is immediately evident that these values cannot all be on the same level. To clarify this point, it helps to draw on the distinction between intrinsic and instrumental values widely used in the discussion of value theory. In a next step, it can be asked whether the values mentioned in the treaties actually all belong to one of the two categories or whether they should not be included in both.

Something has intrinsic value if it is valuable "in itself" or "as such": i.e. if it is pursued for its own sake.[22] In philosophical discussion, the assumption of intrinsic value is usually invoked when the subject of what an individual's good consists of, what constitutes a good life or what goals are intrinsically desirable is in dispute. In contrast, something has instrumental value when it is itself a means to an end. As a first approximation, to find out what is of intrinsic value or what we strive for and value only because it helps us realise or achieve something we value for its own sake, it is natural to ask why we strive for something. Thus, one could ask why it should be good for the states of Europe to become a union. In answering the question, someone liberal-minded would probably say, for example, that the union is good because it guarantees economic prosperity. It makes sense to then ask why economic prosperity should be valued, and in answering this question, the point would eventually be reached where a further why question would no longer make sense. In fact, it is immediately obvious that it makes sense to ask why economic prosperity is good, but it makes much less sense to ask why human well-being should be valued. At some point, such questions have to come up against a wall, figuratively speaking, and this is not because at some point we no longer feel like answering them.[23] Instead, it is the structure of how the things we value are related to each other. If we value a European union because it guarantees economic prosperity and value the latter because it ultimately guarantees well-being, then the union derives its value from prosperity and the latter ultimately from the well-being it provides. And if something derives its value from something else, then at some point, something must have intrinsic value, which, as Michael Zimmerman delineates,[24] explains why the other "upstream" things are of value. Anything that is not good in instrumental terms must, the idea goes, be good because of intrinsic properties, and these explain why we value things that are means to ends for us. The assumption of intrinsic value thus performs an indispensable ordering function in our evaluative statements.

Armed with this distinction, we now look at the values mentioned in the Treaty and the Charter, and it quickly becomes clear that they can hardly be placed on the same level. At first glance, human dignity and freedom, for example, are more plausible candidates for intrinsic value than democracy and, above all, the rule of law.[25] Or, to put it more precisely, asking why the rule of law should be valued seems to be well explained by a multistep reduction to the value of freedom – conversely, this seems unpromising.[26] Similarly, it makes sense at first glance to assume that democracy as a form of political order is valuable because it guarantees freedom.[27] Whether freedom and human dignity in general can ultimately be assumed to be intrinsic values is a question I would like to leave open; as mentioned earlier, in the present chapter, I will not be exploring the question of whether these values can actually be plausibly understood as intrinsic values. In my opinion at least, while the question of why we value equality, freedom and dignity does not sound outright nonsensical, it does invite further explanation. In addition, the various formulations in the EU treaties seem to suggest that the values listed are "political values": i.e., they are conceived as instrumental values constituting a frame of reference to which both the process of inner-European unification and non-European affairs have to be oriented. The question of what these political values are ultimately to be reduced to is deliberately left open.[28] It should be clear that even if all the values mentioned in the treaties are instrumental values, democracy and the rule of law occupy a different place in a value structure (or hierarchy) than human dignity and freedom. However, I believe the assumption of a fixed and invariant connection between the different levels of values, i.e. that it is assumed that the rule of law and democracy would always lead to an increase in freedom and human dignity or would safeguard freedom and human dignity is a legitimate understanding of both the preamble of the Charter of Fundamental Rights and Article 2 of the EU Treaty. Of course, the stipulation of such a connection in a treaty is not enough to be able to establish such a connection in reality, however; this is the delineated political task of the EU. The values listed in the treaties should be viewed as a network in which the instrumental value of one is established, reinforced or stabilised by the existence of the other values.

From these considerations regarding the internal relationship of the relevant values, the picture emerges that Article 2 sets a frame of reference for the political conduct of the EU and its member states. Conflicts about the relationship between the values mentioned and how these values are weighted in the decisions are factored in from the outset. With the network of values and the openness regarding the exact relationship between them, however, the EU has given itself the central points under which political conflicts are conducted. It is precisely the interrelation of values that limits the interpretation of individual values. Seen in this light, these values

have the political function of setting a process of discovery, agreement or unification in motion, in the course of which a closer definition of the values and their interrelationship takes place. The reference to values should make it possible for the European ship to be built at sea, so to speak.

5.4   The Relationship Between Values and Deontic Categories

In this chapter, however, I am particularly interested in a further point: the role that values play in EU policy and, correspondingly, what expectations can be directed at that policy, are essentially related to the understanding of how we should respond to values in our judgments and actions or how our judgments and actions are regulated by reference to those values.

To approach this question, I will first take a step back and discuss very fundamentally how values and prescriptivity are actually related. The interesting question in the following is the structure of the relationship between the evaluative or axiological dimension and the deontic dimension. Normativity is often divided into two broad conceptual groups: the value concepts, mentioned earlier, and the deontic concepts, which refer primarily to actions or ways of acting and express an ought. These include concepts such as being forbidden and permitted and, above all, being required. Rational, right, wrong, appropriate, fitting, reasonable etc. are also counted among the deontic categories.[29] The crucial question now is how "ought" and "right" relate to "good". To understand the role of values in EU documents, the question of deontic theory is indeed central. To better approach an answer to this question, it helps to introduce a distinction commonly used in practical philosophy with respect to theories of normativity. Theories about the connection between evaluative and deontic categories – and this context is of interest here – can be roughly divided into teleological and non-teleological approaches. Teleological approaches assume that we respond correctly to values when we promote them through our actions. Non-teleological approaches, on the other hand, assume that we respond correctly to values when we respect them through our actions.

Indeed, the language of both teleological and non-teleological approaches can be found in EU documents. For instance, the Charter states that the values mentioned are to be preserved and developed; Article 3 of the EU Treaty states under 1: "The Union's aim is to *promote* peace, its values and the well-being of its peoples". Article 49, concerning the possible admission of new member states, again states, "Any European State which *respects* the values referred to in Article 2 *and* is *committed to promoting* them may apply to become a member of the Union (emphasis added)". Moreover, both the Charter and the Treaty speak of "respect", such as respect for human dignity. Respecting values such as human dignity and freedom, however, appears to be something fundamentally different to promoting these values.

The question, then, is how to actually respond to these values in the conduct and policies of the EU and its institutions and member states. The question of how exactly the "European values" can be understood individually, how they relate to each other etc. is thus joined by the question of whether we should respect or promote them in our judgments and actions. These two suggestions on how to refer to values are, of course, not the only ways to do so, and of course, it is also disputed within the philosophical discussion whether this distinction is really tenable.[30] For the present context, however, they help illustrate a fundamental problem in dealing with the introduction of values into EU documents and also to illustrate the appeal of each of the two practical ways of responding to values.

Let us begin with the question of what it would mean to respect a value. Respect is notoriously difficult to define in terms of its meaning, and it is also a highly controversial term in philosophical discussions. In the Kantian tradition, it is often explained in relation to the second formulation of the categorical imperative and the "prohibition of instrumentalisation": to respect someone consists in never treating them merely as a means, but always also as an end. The idea of "ends in themselves" and of not treating others merely as means can also be invoked in determining the kind of response called for if we were to respect a value. It is immediately clear that respecting a value in actions would have to be understood as contrary to promoting those values. For example, if I respect the value of honesty (to remain in Kantian realms) in my actions, then I am always trying to be honest. If, however, I want to promote the value of honesty through my actions, then I aim, for example, at having as many people as possible be honest as often as possible. In which way I achieve this – e.g. whether I am particularly honest and thus fulfil a role model function, or I am particularly dishonest, and thus demonstrate the negative consequences of dishonesty and act as a deterrent – is not given and depends on the respective situation. Whether or not I adopt a respectful attitude towards the value of honesty in my actions (which here means nothing other than being honest) depends solely on the extent to which I thereby promote a state of the world in which this value is more strongly realised than in another. This different connection is often illustrated in the literature using the example of the value of peace:

> With a value like that of being peaceable, I promote it if I do whatever promises the maximal realisation of the value; this may include not being peaceable myself, as in fighting the war to end all wars. I [respect] that value on the other hand if I choose options that exemplify it, being peaceable myself, even if this means that there is less peace overall.[31]

Taking a respectful attitude towards values is thus in a sense open to both teleological and non-teleological approaches, but they draw on two

fundamentally different types of reasons. From a sophisticated teleological perspective, taking a respectful attitude is required if it promotes the best possible state of the world. The fact that a best possible state of affairs is promoted by taking a respectful attitude is therefore the reason for taking a respectful attitude. Non-teleological approaches, on the other hand, resort to fundamentally different types of reasons – which may vary from approach to approach – but it is never assumed that it is already sufficient for an action to promote a state of affairs in the best possible way. To illustrate this again using the example of a pacifist attitude: from a sophisticated teleological perspective, one could come to the conclusion that it would be better in the long run for society as a whole if most members of society were pacifists: i.e. people of a peaceable disposition who always respect peace in their actions. It is important to note, however, that the "pacifist disposition" here is an instrument to promote the best possible state of peace. In this case, it appears justified to refer to a "respectful attitude towards the value of peace" having the status of a normative fiction that serves a specific function.

The difference between teleological and non-teleological approaches is further illustrated by the distinction between agent-relative and agent-neutral reasons. An agent acts for agent-relative reasons if these reasons are centrally related to who is acting. If, on the other hand, this reference is not given, then the reasons are agent-neutral reasons.[32] If agent-relative reasons are in the background, it is important for an agent to be honest or peaceful, for example. This would preclude the agent's actions aimed at ensuring that the value of honesty is promoted as a whole without, however, expressing it in their own attitudes. For teleologists, on the other hand, it does not matter who acts; it matters whether the actions result in a better state of affairs. In short, if an agent respects a value through their actions, their aim is to express this value in their actions, not the goodness of the state of affairs that follows their actions. To illustrate the idea of agent-relative reasons once again with an example from the more recent political debate: in the conflict over whether Germany should be permitted to supply weapons to Ukraine, German Foreign Minister Annalena Baerbock argued in January 2022 that because of German history – i.e. the German war of extermination in the East during the Second World War – Germany should not be allowed to supply weapons to Ukraine.[33] Here, agent-neutral reasons are explicitly not cited – for example, that arms deliveries would not promote peace. Instead, the specific identity of the agent is assumed as the decisive point of reference for determining the normative status of arms deliveries. Following the underlying reasoning, it is not possible to know the normative status of such a supply without knowing who is supplying the weapons.

Before I explore further whether the EU documents themselves might already contain statements on how the cited values should be responded

to – i.e. whether the EU documents suggest an attitude of respect or promotion – I would like to briefly discuss what actually makes each of the two responses to these values mentioned appealing – and what their shortcomings are. To do this, I will again look for the connection with the EU's migration and refugee policy. In doing so, I aim to show, on a rather impressionistic level, characteristics of the two approaches that speak for or against an attitude of respect or promotion towards the values laid down in the treaties; it is certainly not my intention to argue independently for or against teleological or non-teleological approaches.

Moral indignation is most likely the appropriate affective reaction in view of the manifold suffering currently taking place at the EU's external borders and that is (co-)caused by the border regime and the EU's migration policy. This empathic reaction seems to directly correspond with a respectful attitude towards the values; in a respectful attitude, the felt indignation seems to find a normative expression immediately. It is also clear, however, that a respectful attitude is accompanied by an agent-relativity of values. A second aspect that appears to speak for a respectful attitude towards values seems to be connected with the subjective perspective of action. Acting in a highly complex world – especially when it comes to the political or institutional level – often takes place under conditions of insufficient knowledge and almost inevitably has side effects and impacts that are difficult to foresee subjectively, for example. Not considering the consequences of actions, policies or institutional orders is characteristic of a respectful attitude towards values and seems to speak for such an attitude here. As attractive as a respectful attitude towards values may seem at first glance, it is ultimately unconvincing in comparison with a teleological attitude. As explained earlier, a respectful attitude goes hand in hand with the assumption of agent-relative reasons, which means that the identity of the agent would be decisive in determining the normative status of an action or policy. The consequence would be that an action required for A would not be required for B, even if B were in the same situation – and this raises the question of how this could be justified at all. In fact, in attempting to justify an attitude of respect towards values, most would likely ultimately resort to reasons that are agent-neutral: i.e. the attitude of respect would be seen as a surface normative fiction with more complicated teleological assumptions in the background. The EU needs to open its borders to the refugees and migrants holding out in horrific conditions at the Belarusian border not because it is the EU, but because doing so promotes the value of human dignity in general, for example.

Compared to an attitude of respect towards values, the teleological perspective is far more complex. The point of reference is not the character of the respective actions, policies or institutions; instead, it is their effect on the world – i.e. on the social conditions and the individuals living

in them – that has to be determined. This is because the teleological perspective ascertains the normative status of actions, policies and institutions precisely through their effects on the world: i.e. in order to arrive at a normative judgment, a great deal of knowledge about the world must be gained in order to then make an assessment as to the best approach. It is not as if there is no orientation at all through experience etc. Experience still has a role to play and certainly helps guide a decision-making process. But it is important that other more comprehensive information and predictions from the most diverse fields of knowledge are included in the discussion when there is a complete focus on the appropriate means. This characteristic of a teleological attitude towards values almost inevitably moves the dispute about different assessments of the significance of empirical facts into the centre and thus makes a specific kind of demand on the judgments and decisions of the agents. Considered in this way, it can be said that agents, in the course of adopting a teleological perspective, are better attuned to the actual world.

Now that the attractive characteristics of teleological or non-teleological approaches in the context of migration and refugee movements have been briefly mentioned, the question that needs to be answered is whether the EU documents themselves already contain statements on how the cited values should be referred to.

The wording in Article 3 (1) of the Lisbon Treaty suggests a teleological interpretation: i.e. that the respective values are to be promoted. This appears somewhat plausible, including against the background of the teleological perspective characteristics just mentioned; with the "promotion passage", the character of the EU as a political project is once again stressed. The values formulated in the treaties thus represent the goals of this project. Now it would be a mistake to claim that the language of the EU treaties is quite clear. Unfortunately, the language of the Treaties is not as precise as it should be if they are meant to provide a basis for legal rather than political dispute. Thus, as already mentioned, Article 49, which concerns the possible admission of new member states, reads: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". It should now be clear, based on the previous discussion, that strictly speaking, an attitude of respect and promotion is not possible at the same time. This contradiction could be resolved by adopting a "sophisticated teleological interpretation", but this seems implausible in view of the fact that Article 49 concerns the admission of new member states. Instead, the point seems to be that a certain level of realisation of the mentioned values must be achieved before a state can apply for admission to the EU. From this point, we can move on to the more difficult question: what does "promoting values" actually mean?

Generally, promoting something means first of all supporting something in its development, in its progress. But supporting development to what extent? In the context of Article 3, this question arises not only in relation to one value (such as freedom) but also, as we know, to a whole set of values (freedom, human dignity, equality, democracy, the rule of law . . .). This much should be clear: the values must be promoted in a network, but what this means for the weighting of the individual value is thus largely open. The question of how much a value should be supported in its unfolding depends on whether or not policymakers should adopt, say, a maximising stance with respect to the value (or set of values). Such a stance would be taken by an agent if an action or measure, laws or institutions were chosen according to whether they would promote the values in question at least as much as some other alternative. First, it can be noted that, from a teleological perspective, the fact that a particular action or measure promotes a value (or a particular combination of a set of values) better than comparable options always constitutes a reason to perform that action. But is it always also the decisive reason? If so, the promotion criterion laid down in Article 3 of the EU Treaty would indeed have to be understood in terms of a maximisation requirement. One advantage of this interpretation would be the establishment of a clear, practical relationship, at least in theory: both the European institutions and agents, as well as the member states, would theoretically have a clear criterion to provide them with guidance and on which they could base their policies.

Both the Charter of Fundamental Rights and, of course, the EU Treaty itself have a binding effect. This raises the question of compliance and enforcement, and in order to be able to guarantee this, there must be criteria for determining when the government action of EU member states has actually promoted the values in question and when it has not. What is sought, then, are criteria that can be the basis of criticism and of EU sanctions against individual member states – a question that is currently the focus of attention in relation to the appropriate response of EU institutions to the authoritarian transformation of democracies in countries such as Poland and Hungary. At what point are sanctions against member states warranted? Articles 7.1 and 7.2 contain passages that help answer this question:

7.1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

   The Council shall regularly verify that the grounds on which such a
determination was made continue to apply.
   2. The European Council, acting by unanimity on a proposal by one
third of the Member States or by the Commission and after obtaining
the consent of the European Parliament, may determine the existence of
a serious and persistent breach by a Member State of the values referred
to in Article 2, after inviting the Member State in question to submit its
observations.[34]

The formulation of a "serious and persistent breach" of the values in ques-
tion used in Article 7. 1–2 suggests that deciding when to impose sanctions
on the member states in question is primarily a political question. In a
word: if there is a "serious and persistent breach" of values and the sanc-
tions procedure indicated in 7.2 is initiated, then the governments of the
countries against which such a procedure is initiated are, in fact, carrying
out a transformation of the political order of their countries in which the
web of values unravels. Of course, it is clear that the determination of such
a violation cannot be a primarily legal matter since the diagnosis of such a
transformation can hardly be made in the binary code of juridical decisions.
Rather, this is a political decision that involves extensive information and
viewpoints, primarily concerning the assessment of future developments in
the countries concerned. It can thus be concluded that decisions regarding
criticism and sanctions have to be made as a political decision entirely in
the spirit of promoting values. Decisions regarding sanctions must always
be preceded by the assessment of whether the sanction measures will actu-
ally result in a progressive change in the governance of the countries con-
cerned or whether such measures may even lead to a further deterioration.
It is often the case that the underlying assessments and reasons – if they
are reasons actually aimed at promoting values – for political decisions, as
previously outlined with regard to the question of sanctioning "serious and
persistent violations" of EU values by member states, often cannot be made
public at all, or at least not officially. They thus remain in a sense esoteric –
i.e., available only to the initiated – and strategic. Moreover, they are often
characterised by a complexity and by assumptions of probability that are
far from being uncontroversial at the decision-making moment itself. And
from a practical point of view, moreover, it seems no less complicated to
evaluate the decisions made after the fact: i.e., to check whether or not they
have actually resulted in the promotion of values.
   In the discussion so far, I have tried to trace the way in which values
themselves can have an action-guiding function. It became clear that, irre-
spective of the question of how values are defined in terms of content, the
fears mentioned at the beginning proved to be unfounded: the replace-
ment of the language of principles with values in the EU treaties does not

eliminate any criteria by which the actions of the EU and its member states could be judged. On the basis of a few (albeit central) articles and passages from the EU treaties, it is possible to see that it is more likely that an attitude of promotion rather than respect towards values is envisaged in the action and institutional design of the EU.

5.5 Conclusion

In this chapter, I have traced the ways in which the integration of values in the EU treaties does not lead to arbitrary interpretation and purposeless controversy. To conclude with a brief reminder of the beginning of this chapter: the fact that the EU has failed (to put it mildly) to uphold its own values for years in dealing with migrants and refugees certainly has nothing to do with the fact that values instead of principles are now set out in charters and treaties. But if it is so blatantly obvious that values do not determine actions and policies, then this suggests that the European unification project is not about developing a "community of values" after all – or that the interest groups that want to prevent the EU from actually promoting the network of values in the sense of Article 3 are so strong that the EU is internally blocked. The "serious and persistent breach" of the values laid down in the treaties, which can be observed regularly with regard to the treatment of migrants and refugees, perhaps actually suggests that the EU should initiate sanctions proceedings against itself under Article 7 of the Treaty on European Union. This procedure, however, could well end in expulsion, according to all that is currently known.

Notes

1. Firat News Agency (2021).
2. Although the discussion of values and principles in EU documents is dominated by the jurisprudential perspective, in the following, I will refer to the philosophical discussion when it comes to understanding what can be understood by values etc. in the first place. On the jurisprudential perspective cf. di Fabio 2004; Calliess 2004.
3. See Joas/Wiegandt 1995.
4. Cf. Weymans's chapter in this volume.
5. *Consolidated Version of the Treaty on European Union* (Treaty of Nice, 2002).
6. *Consolidated Version of the Treaty on European Union* (Treaty of Lisbon, 2012).
7. *Charter of Fundamental Rights of the European Union* (2012), C 326/02.
8. Kochenov 2017, 9.
9. For further discussion of principles, see Gertken 2014.
10. Kant 1997, 37 (Gr. 429).
11. Rawls 1999, 53.
12. Further: "His own good, either physical or moral, is not a sufficient warrant. . . . To justify [coercion] that, the conduct from which it is desired to deter

him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign". Mill 1977, 223–224.

13. Cf. Schmitt 2011.
14. Meyer, Norbert (2017). (Translation PS. Przyłębski speaks of "linksliberale" ideology.)
15. Hess/Kasparek/Kron 2016.
16. See also Kasparek 2017.
17. von der Leyen 2019 (Translation PS).
18. According to EU-Vice President Margaritis Schinas; see Corall, Astrid/Göbel, Alexander (2020).
19. Urbina, Ian (2021).
20. "Exploiting the countermovement of the working class that was left behind by the transition, by the liberal elites and by the political left without any possibility to control new capitalist social relations or express their anger using a class-based narrative, the weak but growing national bourgeoisie, propelled by a desire to get on an equal footing with the dominant transnational capitalists, allied with nationalist politicians to prop up capital accumulation, pre-empting the dissent of the victims of the new accumulation strategy with a political cocktail of institutional authoritarianism and authoritarian populism". (Scheiring 2020: 311).
21. Scheppele/Halmai 2019. In this article, the authors trace the authoritarian transformation of democracy in Hungary by the Fidesz party.
22. This is indeed only a very rough approximation of the idea of intrinsic value. For the philosophical discussion, see the anthology Rønnow-Rasmussen/Zimmerman 2015 and especially Zimmerman 2001.
23. People who are in caregiving relationships with young children know how enervating it can be to be confronted with a never-ending cascade of "why?" questions.
24. Zimmerman 2001, Ch. 2.
25. On human dignity, see, among others, Schaber 2010; Stoecker 2003 and critically Sangiovanni 2017. On the value of democracy, see Shapiro/Hacker-Cordón 1999; Przeworski 2010. On equality Lippert-Rasmussen 2018, esp. Chapter 6; Holtug/Lippert-Rasmussen 2007; as well as Anderson 1999, 287–337. On the rule of law, see Tamahana 2004; Costa/Zolo 2007; as well as esp. Pech 2010, 359–396. On freedom, see Schink 2017.
26. However, there are also proposals that assume an intrinsic value of the rule of law. Cf. Oakeshott 1999, 129–178 and Harel 2016.
27. Strategies for justifying democracy are numerous. The attempt to explain the value of democracy by recourse to self-determination and to identify this, in turn, with freedom is undeniably especially popular.
28. If the values mentioned in the treaties are all regarded as political or moral values, then it can be asked whether human dignity, freedom, equality, rule of law etc. would ultimately have instrumental value only from the perspective of one or more intrinsic values. If there were only one value underlying all other values and explaining their value, then this would, of course, be attractive in some respects because the difficulties of comparability inevitably associated with value pluralism could then be avoided. Assuming a plurality of intrinsic values automatically leads to the question of how states of affairs in which

different values would each be more strongly or more weakly realised can be compared. If one state of affairs is better than others because there is more value in it – that is, the evaluative point of view precisely helps us compare different states of affairs (or the courses of action leading to their realisation) – it then becomes obscure how states of affairs in which different values are realised could still be related to each other. The problem of incommensurability of different values is quite different from the problem of the relation between instrumental and intrinsic values.

29. See also Kutschera 1999, 1–11.
30. More recently, so-called "fitting-attitude" analyses of value have increasingly attracted philosophical interest. See Rabinowicz/Rønnow-Rasmussen 2004, 391–423. For a critical discussion of the respect/promote distinction, see Mac-Naughton/Rawling 1992, 835–843.
31. Pettit 1989, 117.
32. Cf. the classical passage in Nagel 1986, 152f.: "If a reason can be given a general form which does not include an essential reference to the person who has it, it is an agent-neutral reason. For example, if it is a reason for anyone to do or want something that it would reduce the amount of wretchedness in the world, then that is a neutral reason. If on the other hand the general form of a reason does include an essential reference to the person who has it, it is an agent-relative reason. For example, if it is a reason for anyone to do or want something that it would be in his interest, then that is a relative reason. In such a case, if something were in Jones's interest but contrary to Smith's, Jones would have reason to want it to happen and Smith would have the same reason to want it not to happen".
33. Vates, Daniela (2022).
34. *Consolidated Version of the Treaty of the European Union* (2012), p. C 326/19. See also the discussion in Piris 2010, esp. 70 et seqq.

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Part 3

Normative Consequences of European Values

6 Refugee and Migration Policy on the Basis of Human Dignity[1]

Marcus Düwell

6.1 Introduction

Over the last years, we have seen severe disagreement regarding the assumed duties of affluent countries towards refugees and migrants. It was contested what duties would follow from the "values" of the European Union and whether those discussions were directly problematising the Union's normative basis. This leads to the fundamental question: what are these values? At first glance, the emphasis on "European values" could be understood as a reminder of the Union's commitment to human rights, the rule of law and democracy and thus normative standards with a universal aspiration. But other connotations are also possible: e.g., when "European values" refer to a specific "Western" or "Christian" identity as opposed to an Islamic or Chinese one. These connotations have a significant influence on our topic, visible when comparing attitudes towards Syrian refugees in 2015–2016 with the solidarity extended to Ukrainians in 2022. The vagueness of "European values" leaves the term open to various interpretations, some of them even openly undermining the universal normative commitments of the European Union. These tensions make philosophical investigation necessary.

To start with, it is not fully clear why the European Union should be based on "values" at all instead of simply on its legal treaties. Within nation states, constitutions form the legal ground for the political unit. The reference to values, however, seems to be an attempt to avoid the impression of a formal constitution; such a step would be one too far for many European member states. At the same time, the term "values" does not just refer to a kind of substitute for a formal constitution (a kind of "proto constitution") but introduces (intentionally or not) a moral dimension. Further questions would be: which values? What is the status of these "values"? How do they relate to the legal basis of the member states? How do they relate to the institutional and legal setting of the European Union and, likewise, the legal setting in which the Union and its member states

are embedded via international treaties? How should the interrelationship be understood between the core concepts among those "values": human dignity, liberty and solidarity? Is it plausible to understand those concepts as "values"? How do they have to be prioritised, and how do they exert normative force? Despite all these questions, it seems that each attempt to unpack the European values will entail a commitment to democracy, rule of law and human rights. Whatever the further commitments may be and whatever "values" might be referred to, they have to be consistent with those basic commitments which are firmly embedded in the legal design of the European institutions. Under the heading "European values", the official documents of the European Union refer to the European Charter of Fundamental Rights. Member states are expected to design their legal arrangements in line with human rights principles, and all states are formally committed to human rights via international treaties. A fundamental element of this human rights commitment is the idea that "human dignity is inviolable" (EU Charter of Human Rights, Art. 1). It includes phrases such as "these rights derive from the inherent dignity of the human person" and the idea of human dignity "underpinning the rights".[2] For the purposes of this chapter, I will thus assume that the belief that human dignity functions as the basis of human rights is a firm element of international human rights treaties, although I am aware that, on a theoretical level, this point is contested.[3]

If we concede that human rights principles are at the heart of the "European values", the most charitable interpretation of the term "European" would be that it does not articulate an attempt at moral imperialism; rather, it articulates the European Union's commitment to those normative standards which, in line with the UN treaties, aspire to be a foundation of the global order. In that sense, the Union's commitment to "European values" could be understood as an attempt to commit itself to principles that are acceptable from the perspective of different cultural backgrounds, not just from a European one.[4] I assume this to be the most charitable interpretation of "European values". For the sake of this chapter, I also assume that such a commitment to human rights principles entails a commitment not only to the material content of human rights principles but also to the institutional requirements embedded in them: i.e. democracy, separation of powers and rule of law.[5] The task of this chapter is to investigate the implications of those assumptions, not defend them.

If this reconstruction of the basic commitments of the European values is correct, it can then be asked what the implications of the EU's commitment to human dignity are regarding duties towards migrants and refugees and, more broadly, towards those non-citizens whose human rights are violated or endangered, independently of their abode.[6] The chapter does not aim to answer this question. Instead it aims to contribute to an

enhanced understanding of the questions that must be investigated if such an answer is to be found. The chapter will (1) outline selected normative and methodological presuppositions on which the further argumentation rest, (2) ask under which conditions possible duties towards non-citizens can be intelligible, (3) discuss how one could hierarchise those possible duties, (4) discuss questions regarding the capacities of duty bearers and (5) end with some concluding remarks.

6.2   Selected Normative and Methodological Presuppositions

I will now introduce four presuppositions necessary for understanding this chapter:

First, the chapter assumes that human rights obligations are only justified if a rational view of human beings entails the conviction that human beings have a status requiring others to show them respect. Traditionally, this status is denoted by the term "human dignity". This foundational role of human dignity is independent of specific wordings in some human rights treaties. Instead, I assume that human rights obligations in general are only comprehensible if we grant that the right bearers have this status.[7] Human rights requirements are concretisations of this respect for human dignity. If human dignity forms the supreme normative reference point, it forms the basis for the legitimation and limitation of political power in general. In this sense, the concept of human dignity not only represents the right of human beings not to be instrumentalised or dehumanised (thus being the object of atrocities); it also indicates human beings' fundamental status, which provides normative guidance to the entire system of human rights provisions.[8] Human dignity in that sense is not a single norm (such as the prohibition of murder or stealing) but rather a principle that justifies and generates norms.

Second, this chapter works on the assumption that legal human rights obligations (first of all, duties as laid down in human rights treaties) are open to moral criticism. While this is somewhat trivial, it also relates to the question of what kind of moral dimension is connected to the entire human rights idea. This question is certainly important for our topic since the reference to "European values" evokes a moral dimension. It appears clear that legal human rights provisions cannot be directly understood as moral demands; thus, any moral criticism that ignores this legal status of human rights does not affect its legal interpretation. At the same time, it seems problematic to regard the moral and political-legal dimension of human rights as not only distinct from but also completely independent of one another.[9] Thus, the chapter assumes that a rationale exists in which we can criticise those treaties as being morally dubious or simply immoral. Such criticism is, however, only important for the legal understanding of human

rights if it is directed at those basic moral assumptions forming the foundation of the European political and legal institutions. For example, to criticise the European Union's refugee policy in terms of a moral or religious ideal is one thing. But it is quite another thing to criticise such a policy on the moral grounds which are assumed to be the foundation of the legal and political institutions of the Union itself. In other words, since human dignity is fundamental to the Union's institutions, the legal self-understanding of the Union is affected if violations of human dignity are criticised.

Third, methodologically, the chapter assumes that that valid normative commitments have to be proven by their consistency with the rational self-understanding of agents I consider to be – broadly speaking – a Kantian rather than a Rawlsian methodology.[10] While the Rawlsian "reflective equilibrium" aims to create coherence between agents' convictions, the methodology of the "practical self-understanding" asks whether or not agents can consistently hold specific convictions or if those convictions are inconsistent with their self-understanding as practical beings. Sometimes this type of normative justification is called "retorsive", "reflexive" or "transcendental".[11] This more general methodology needs some further adjustment if it is to be applied to questions of legal and political philosophy. We can and should ask for consistency in the self-understanding of political units such as nation states and the European Union. But these questions must be linked back to the rational self-understanding of individual agents: in this case, citizens. A political unit cannot develop self-understanding which is not intertwined with the self-understanding of its members.

Fourth, the chapter assumes that normative (moral and political) judgments are always "mixed judgments", meaning that their validity depends, on the one hand, on the validity of the basic normative commitments and, on the other hand, on the validity of various empirical and prognostic assumptions relevant to the appropriate specification of these commitments for specific contexts for actions.[12] It is therefore possible to criticise a normative judgment both with regard to its basic normative assumption and due to its insufficient recognition of important empirical assumptions. This methodology differs from other approaches that work with some versions of the distinction between "ideal" and "non-ideal" theory. This means we do not have to first design just institutions under ideal conditions and, in a second step, ask how these criteria of justice should be adjusted in light of feasibility constraints under "non-ideal" circumstances. Instead, the methodology starts with the attempt to develop a consistent reconstruction and justification of human rights principles and to specify them in light of our knowledge about the relevant circumstances of action.

To sum up: the chapter is based on the methodology of (1) rational self-understanding and (2) an approach of mixed judgments. It will focus on human dignity as the justificatory basis of the European Union and the implication of

human dignity for the obligations Europeans may have towards non-citizens. As previously mentioned, this is not an explanation of the existing legal regulations but rather an attempt to determine the sort of questions that have to be asked if we want to consistently determine the implications of the commitment to human dignity. In that sense, we have to ask to whom we may have duties, which duties, and who must fulfil the duties.

6.3 Duties to Whom? Under Which Conditions Does the Principle of Human Dignity Impose Duties on Europeans Towards Non-Citizens?

When people from Syria came to Europe in great numbers in 2015, some politicians argued that the commitment to human dignity meant that we had duties towards them: to welcome them, to grant them asylum and to offer them options for integration and permanent residency. If we regard this statement not solely as a rhetorical one, we can ask the following question: why was the dignity of these people not a reason to act earlier? A lot of them had lived for years in refugee camps in different places in the Middle East and in Turkey – and very often under unimaginable circumstances. This fact was well-known. Why was their dignity not a reason to investigate ways to help them? Why only ask this question when they were standing at the door? And if there were reasons to see their situation as the result of either dysfunctionalities of the relevant international treaties or insufficient political engagement for them (or both), we would have to ask: why was the commitment to human dignity not a reason for earlier action to change people's situation or the legal framework under which such a situation could occur?

Of course, we could refer to everyday experience, which is extensively debated in contemporary philosophy: if you happen to pass by when a person is drowning in a lake and you can save them, you have a duty to do so. Thus, the simple fact that you are the only person around makes you the one who should jump into the lake, and it would be wrong to ask at that moment whether it would be more useful to go home and transfer a lot of money to a charity fund. Thus, spatial presence can have moral significance. But that was not the case here since the desperate situation of those people did not transpire overnight. When they stayed for years in camps somewhere in the Middle East, the commitment to human dignity was not seen as a reason for actions on their behalf. And likewise, the dignity of people in Turkish camps was not seen as a reason to refrain from signing certain deals with Turkey at a later stage, with the aim of significantly reducing the number of Syrian people reaching European soil.

Thus, if we assume that Europeans have at least some duties towards refugees on the basis of their dignity, we will have to ask under which

conditions their dignity imposes duties on Europeans. In this context, the question is not how it is legally regulated but rather an attempt to understand the rationale of possible legal regulations. It cannot be the case that someone *becomes* a "being with dignity" towards whom Europeans have duties the moment they reach European soil. But if we have to think of them as beings with dignity when they are in refugee camps or when they are crossing the Mediterranean Sea, we should be aware that they were also beings with dignity when they stayed in Syria or Northern Africa. Thus, if all humans have dignity and rights, under which conditions do affluent states have duties towards non-citizens? Of course, this is not primarily a question about the personal duties of individuals but about the duties of the member states or the European Union.

There are several possible rationales for the emergence of such duties. There is a necessary (but certainly not sufficient) minimal condition for possible duties towards non-citizens: namely, that people are in dire need (however that may be further specified). What are the further conditions? We could imagine at least three further conditions (which do not exclude each other): (1) Europeans have duties only because people are arriving on European soil; (2) they have duties because prior actions of those states (or their members) have caused their desperate situation (or at least contributed significantly); and (3) they have duties solely because their situation is so desperate, and there is no reasonable expectation for a solution in their home country.

The different rationales would have different implications. If we take the first option (Europeans have duties towards non-citizens in need from the moment they arrive on European soil), the problem is that this would make it possible to simply hinder them from reaching European soil. In fact, this would mean that there were no duties at all, but it would be in the discretionary power of Europeans to decide whether or not they wanted to let people enter Europe. Of course, we can ask which kinds of duties and what possibilities of actions Europeans may have (perhaps very few). But on a fundamental level, we can concede: either the dignity of non-citizens already has normative force on us when they arrive on European soil, or there are no duties at all.

Regarding the second option (responsibilities as compensation for former wrongdoing): this may be a valid reason for action, but in various contexts, it may be difficult to determine the state's specific contribution to the desperate situation faced by the people wanting to leave their country. This will be more difficult if we assume that ecological problems would be a valid reason for duties towards non-citizens. To some degree, Europeans will be co-responsible anyhow, but it will be difficult, if not impossible, to specify their contribution to specific ecological disasters. Those arguments

do not exclude this option categorically, but it is a reason to doubt that it will be of central importance.

The third option (responsibility solely due to a hopeless and desperate situation of non-citizens) is a possibility, but it would require some international arrangement to specify the different tasks and limits of those duties and to avoid overdemandingness. Human dignity justifies that all human beings have at least negative rights and (to some degree) positive rights (rights to some assistance). In the first instance, it would be the task of the state in which someone lives to fulfil the respective duties. In the event that is not possible, other states have duties to non-citizens. What these duties might entail (e.g. whether we have to grant them asylum or take action to support them at home etc.) will be discussed in the next part. But before we can discuss that, we need to understand why we are obligated to them in the first place, and I would suggest that people being in need and the impossibility of enjoying basic human rights be considered as reasons for concrete duties towards non-citizens. Thus, I would propose that the following (necessary but not necessarily sufficient) conditions have to be fulfilled: (1) the people are in dire need, (2) their rights cannot be fulfilled in their places of origin and (3) there is no reasonable hope for a change of this situation. Despite what else may be required to determine concrete duties, at least those assumptions are necessary.

If that is correct, it is not evident that current regulatory regimes about refugees are convincingly justified as an implication of the commitment to human dignity. Because there are at least two urgent questions:

First, if the fundamental need and the denial of the fulfilment of fundamental rights make it necessary to consider a duty towards those people, it is not evident that the causes of the emergence of this situation are decisive. Does it matter whether political, economic or ecological reasons caused their situation? For the current refugee regime, it makes at least, prima facie, a difference. But one could argue that the extent to which fundamental rights are infringed and the lack of prospects for a change should also be important considerations. And second, if Europeans have duties towards people in need in the first place, it is by no means evident that those duties arise only at the moment people arrive on European soil. The attitude of politicians who discovered their duties towards the desperate Syrian people in the Balkans in 2015 perhaps demonstrate their capacity for empathy, but it was not a consistent understanding of their commitment to human dignity that informed their attitude; a commitment to this principle would have already formed reasons for actions many years before, which would have led to further questions about what the appropriate actions might have been.[13]

While these considerations do not specify the concrete duties Europeans have towards non-citizens, we can at least see that it is not evident towards

whom they have duties on the basis of human dignity, and it also appears to be clear that we must discuss duties towards refugees and migrants in the broader scope of European foreign policy and not in isolation. It is possible that the concrete duties are very different, depending on various circumstances. In one case, the most likely option will be to grant people asylum while more indirect forms of support will be a more obvious course of action in others.

6.4   Which Duties? Can We Hierarchise the Duties to Non-Citizens?

It is contested not only to whom Europeans have duties but also which duties these may be. In any case, having a duty requires that the duty bearers know that they have this duty. This is an analytic truth. Of course, it is not necessary to determine the duties in all details before we have to feel obliged to do something, but it must be possible, on a certain level of generality, to determine that we are obliged to do something. Since there are more presumed duties than agents can fulfil, it must be possible to determine the comparative urgency – at least to some degree. If we are not able to form priorities among those duties, decisions are arbitrary. It should be noted that I do not assume that the only possible duties Europeans may have towards non-citizens are to grant them asylum or give them citizenship; it is certainly possible that there are other conceivable (ecological, economic or even military) interventions. I consider this a question that has to be investigated.

A first response – in line with the current refugee policy – could be to distinguish and hierarchise the possible duties on the basis of the causes of escape: are people fleeing from a situation where they are not able to enjoy political rights, or is the socio-economic or ecological situation desperate? There is no clear answer when we focus on the human dignity of the affected people. Instead, we have to assess the validity of the answer within the context of a general conceptualisation of rights.

In one possible conceptualisation of human rights, these rights are based on the interests of human beings.[14] Those approaches assume that there are some interests that are so basic we can assume all human beings to have them and that human rights are protecting those interests against foreseeable threats. It could thus be proposed that our concern about the rights of non-citizens should be prima facie directed towards those most endangered in their basic interests. If we have to prioritise those concerns, we have to consider the rights which people have a right to have fulfilled and how fundamental they are. That would mean it is not decisive whether people flee from an ecologically disastrous situation or a dictatorship, but rather the degree to which their human rights cannot be fulfilled in their place of origin. Alternatively, rights can be conceptualised not from the point of

view of their interests but from their ability to realise their will,[15] following the traditional distinction between interest theories and will theories of rights. Both approaches, however, have to assume that the capacity or concrete capability to act depends on external conditions. Some of those conditions may vary from agent to agent, but there are also generic conditions of agency that are somewhat comparable. The generic conditions for the agents' capacities can be endangered to a greater or lesser degree, and the need for some goods could be the guiding factor to determine the urgency and need for human rights protection. Both proposals would imply that it is not only infringements of political or liberty rights providing a reason why we may have duties to help non-citizens. In the future, it is very likely that the reasons people have to leave their home regions will be (directly or indirectly) connected to ecological factors, for which there are even additional reasons for compensatory actions by affluent states since they are co-responsible for the emergence of this situation. Thus, however we conceptualise this, there are much broader reasons to act on the basis of non-citizens' human rights than solely focusing on their attempt to flee political suppression and war.

The specific duties and the priorities of those duties will depend on the needs of the people in question and on the prospect for a successful change in their situation. A duty only exists if a successful intervention in their situation is possible. The type of intervention can range from economic or technical intervention in specific regions, starting political and diplomatic processes, military interventions or granting people asylum or citizenship. It is clear that an entire set of normative and empirical questions are relevant, and it is clear that determining fixed hierarchies from a solely philosophical perspective is impossible. But that does not mean that it is impossible to find general considerations that can guide the normative assessment. At least two should be mentioned here.

First, while human dignity and human rights are always bound to persons, this is not always true of the corresponding duties. Rights always presuppose rightsholders,[16] but when it comes to the question of what it is they have a right to, more than the situation of the right holder is at stake. Even if those rights are individually exercised (e.g., freedom of expression), there is not only a duty not to hinder the right holder in doing so but also their ability to exercise such a right at stake, and this depends on conditions that agents share with others – Gewirth calls this "generic conditions of agency".[17] With regard to those conditions, political institutions are the primary possible duty bearers (to some degree, perhaps international companies or organisations as well). In any case, there may be reasons to primarily consider the duties as influencing the general condition of people's lives.

Second, there are often many more opportunities for changing a situation before a conflict has emerged than in a situation of a manifest conflict.

Thus, there could be reasons for a long-term agenda when it comes to human rights duties: e.g. duties to work towards circumstances in which the occurrence of foreseeable human rights violations is less likely. This aspect will likely increase in importance when ecological factors cause dramatic situations: for example, predictions of climate change in some regions that will make life in various parts of Africa, the Middle East or Australia virtually impossible. This means that the only possible measures here would be preventive ones. If this is correct, it would imply that there may be situations in which we have to decide whether a measure to prevent a foreseeable disaster should have priority over helping people who are actually in a situation in which their rights are not fulfilled, but the rights infringement is less dramatic than the foreseeable ecological disaster could be. I am merely looking to analyse whether there could be a solution to this problem, not to suggest specific one. I am fully aware it is possible that these considerations could be abused with very problematic consequences, in the sense that the reference to the prevention of ecological disasters in the future is used to justify all kinds of repressive measures in the present. But the awareness of potential abuse cannot be a reason to deny the possibility of preventing really difficult conflicts and potentially tragic decisions.

All that may sound very technical and complex. But if we take it seriously that human dignity poses duties on us, we have to ask how to assess the need of right holders and likewise the ability of potential duty bearers to successfully intervene in their situations. A right to asylum has to be interpreted in this broader context.

6.5   Whose Duties? Questions Regarding the Capacities of Duty Bearers

Rights always come with corresponding duties, and the question is therefore by whom those duties can and have to be fulfilled. This doesn't only concern the concrete allocation of responsibilities between different actors (nation states, international institutions, NGOs etc.) – questions for which pragmatic answers could be found. Instead, it affects the fundamental self-understanding of political actors, such as the European Union and its member states. The (frequently articulated) appeal for "open borders" shows just how much the basic features of states are at stake. Furthermore, the intensity of public discussions about refugees shows how deeply the self-understanding of the European Union was affected. At first glance, it could be believed that there was a moral opposition between those who take universal and equal dignity and rights seriously and therefore plead for open borders and the opposing side, whose defence of national sovereignty was primarily motivated by self-centred fear regarding their own freedom and welfare. But this alternative is not convincing for several reasons. I will mention here only two fundamental aspects and will subsequently formulate some questions for the further debate.

First, if we have reasons to consider ourselves being placed under a normative demand, this rationally implies that we have reasons to create or maintain conditions under which it is possible to fulfil this demand.[18] If those normative demands have a political dimension and imply collective action, this rational connection has an institutional element, thus: we have reasons to create institutions capable of fulfilling those normative demands or improving existing institutions so that they are equipped to do so. Being committed to a normative demand necessarily implies the willingness to create those institutions. Of course, there can be emergency situations in which actions are required regardless of their implications for the institutional setting, but otherwise, this is a necessary connection. If we have reasons to care for non-citizens, we need to have political institutions capable of fulfilling the duties towards them. A policy undermines the ability of the relevant political unit to identify and realise effective strategies for fulfilling duties and at the same time be capable of fulfilling normative demands in the future cannot be morally acceptable. If this assumption is valid, it does not tell us empirically what the best institutional setting is, but whatever institutional setting we consider, it will be morally acceptable only if it is in accordance with this demand.

Second, this consideration leads us to a more general question regarding the role and function of borders.[19] At first glance, borders could be considered a form limiting something external to the unit the border is limiting: the street is outside the front garden. Street and front garden are different spaces, and the geographical location separating them is the border; the street is there where the front garden ends. But social and political borders are not external to what they are limiting. A social space is constituted by the border; the social space creates a border. Plessner has shown that a characteristic feature of human beings is their ability to actively relate to the borders of their biological and social existence. By shaping a political and legal order, we create a border. The border demarcates the space in which the demands and features of this order are executed. Borders of regulatory regimes do not need to coincide with geographic borders, and regulatory regimes do not have to be identical with nation states; various overlapping regulatory regimes can be applied in one geographic territory (a financial regime does not have to be identical with the regime for patent law). This general feature leaves room for different forms of border regimes. The transgression of borders can be regulated under different conditions and thus create an impermeable wall. But in any case, shaping a legal order is a way of establishing a regime with borders.

What follows from here is the question regarding the self-understanding of political actors and non-citizens since it could be tempting to see human rights provisions as strategies for the promulgation of rights not just for citizens and, therefore, as a strategy for breaking down borders. But that is not plausible: human rights provisions are bound to the commitment of states

to those provisions. They are normative standards to examine the appropriateness of legal systems. Human rights provisions thus tell us how legal and political systems should be shaped, and human rights institutions are accordingly instruments to enforce and monitor the observance of human rights provisions. If that is correct, the existence and function of political and legal systems must be ensured. Independent of the content of human rights provisions, we must expect that human rights provisions are shaped so that they do not undermine the functioning of political and legal systems. It is possible, however, that human rights commitments cannot be fulfilled within an existing political entity. This could be a reason for the creation of new political units better equipped to fulfil human rights provisions. In that sense, can the development of the European Union be understood as an instrument for the enhanced ability to fulfil human rights duties? (Whether or not the European Union is better equipped for this than the nation states are could, of course, be contested). Thus, human rights standards demand to shape the political order in a way that human rights duties can be fulfilled in the long term. This is true not only for the internal structure of a political system but also for the way in which access to citizenship and asylum are organised.

On the basis of these general considerations, some conclusions can be drawn.

First, the outline so far shows that the commitment to human dignity and human rights always leads to a plurality of duties. This plurality requires an institutional setting capable of weighing up these duties, considering strategies for how these duties can be fulfilled and pursuing those strategies consistently.

Second, political actors must strive for consistent policies based on considerations as a matter of urgency regarding the needs of non-citizens and their own ability for successful support. If Europeans have duties to non-citizens, they must be capable of effectively working towards a solution to those factors causally responsible for the situation of the people in need. This also implies the ability to successful contribute to shaping and implementing international policies.

Third, the latter aspect becomes more demanding if both manifest conflicts and foreseeable future conflicts are taken into consideration. This is, however, unavoidable since ecological problems will be among most significant reasons people will be in desperate situations in the future.

Fourth, if duties towards non-citizens are based on human rights requirements, those duties will have to be balanced with the rights of citizens, including the demands of democracy and the institutionalisation of the rule of law, which are necessary elements of those rights provisions. Frictions are clearly unavoidable in this regard.

Fifth, it seems obvious that no long-term strategy can prevent the existence of refugees or the fact that people have to leave their regions and their homes. Affluent states certainly have duties towards them. These duties

comprise collective duties to develop a perspective for those people as well as individual duties by states to fulfil their fair share in granting those people residency. This will also imply a duty to give people an opportunity to become citizens.

For philosophical reasons, it is not obvious which institutional setting is best equipped to meet all these requirements. Prima facie, it is hard to see which alternative for a stronger European Union could be available when it comes to policies to prevent conflicts and deal with people who are already displaced. But this is, of course, not only a philosophical matter. In any case, we have seen that human rights provisions do not support institutional settings best equipped to ensure the fulfilment of long-term human rights duties and do not, per se, justify the breaking down of borders.

6.6   Conclusion

The introduction stated that the aim of this chapter was not to defend any substantial position. The aim was to methodologically show what kind of questions have to be answered if we want to understand what kinds of duties arise from a commitment to the respect for human dignity. I discussed this from a European perspective since the context of this volume focuses on European values. I assumed that the commitment to human dignity is at the centre of those values. To understand the implications that follow from this commitment requires a discussion of at least three different questions: regarding the subject to whom we have duties, regarding the kind of duties and regarding the subject that has to carry out those duties. We see that all three contexts raise an entire set of questions.

The intention behind raising these questions is not to develop a route to escape from duties towards people in dire situations. But it should become clear that reference to European values cannot replace a much more systematic elaboration, and this particularly applies to references to "human dignity" as the foundational concept of human rights policy. A discourse on European values makes European policy vulnerable: all kinds of moral ideals enter the political arena; reference to values can undermine the legal basis of the Union; European values can be abused as a strategy to keep people from other ethnic or religious backgrounds away. One should be aware that there are those dangers and that they can come with a price if one carelessly refers to "human dignity". The task of such a moral political discourse should not be to undermine the normative framework of the European Union but to clarify it. In that sense, this chapter's implicit critique of the policies during the "refugee crisis" are not so much inspired by the decision of September 2015 to open the German borders as by the observation that is lacking in a consistent and long-term strategy. A commitment to human dignity would require precisely this.

Notes

1. I want to thank members of the consortium NovaMigra for comments on this text, in particular Marie Göbel, Andreas Niederberger and Jos Philips.
2. For reference see e.g., Beyleveld/Brownsword 2001, 12ff. See as well Düwell 2022; Göbel 2019; McCrudden 2008; Rothhaar 2015.
3. See e.g. Sangiovanni 2017.
4. See Marie Göbel's chapter in this volume.
5. I am fully aware that these considerations touch on fundamentally contested questions. A historically very thoughtful discussion of this topic can be found in Plessner 2018.
6. The chapter uses broader terminology because it will not just discuss duties towards those recognised as "refugees". It will instead be a relevant question of how to relate or compare duties towards people who live elsewhere to duties to those who want to live here because basic rights are not or cannot be fulfilled at their place of origin.
7. Düwell 2014a, 2022.
8. See as well Rothhaar 2015.
9. See on this point Göbel 2019.
10. Düwell 2017; Beyleveld/Düwell 2020.
11. Illies 2003.
12. Düwell 2014b.
13. It should be clear that this is not an argument against the decision of the German government to open their borders in September 2015, to which there was likely no serious alternative. Whether it was acceptable that this situation occurred in the first place is another question.
14. E.g., Beitz 2009; Philips 2020.
15. See, e.g., Gewirth 1996.
16. In discussions about intergenerational justice and rights of future generations, we at least need the anticipation that there will be right holders in the future.
17. Gewirth 1978, 63ff.
18. For the following, see Gewirth, 1978, 63ff.
19. For the following, see Lindemann 2009; Makkreel 2015; Plessner 2019.

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7 Human Rights and the EU's Responsibilities Towards Refugees

Jos Philips

7.1 Introduction*

One may say, looking at (among other things) its central legal documents,[1] that the EU is committed to human rights. I mean this in the sense that the EU regards it as very important that it lives up, both domestically and internationally, to what human rights demand.[2]

   However, when it comes to the treatment of refugees – the subject of the present chapter – it is in a number of ways not so clear what human rights demand. When saying this, I am not thinking of human rights as a juridical discourse, in which the implications for how refugees should (not) be treated can sometimes be fairly definite: think, for example, of such principles as non-refoulement (that is to say, an asylum seeker may not be sent back to a country where they are in danger of being persecuted on certain grounds) and the right to asylum as specified in the Charter of Fundamental Rights of the EU (Art. 18).[3] Instead, I consider human rights as a moral idea, stating (put very broadly) that the very important interests of all human beings ought to be reliably protected. One can think here of such interests as being safe, not being tortured, being able to freely express one's views and having a decent standard of living. This moral idea is one that the EU is committed to, in the sense that it finds it very important to live up to its demands,[4] and for this moral idea, it is in several ways less clear what it implies for the treatment of refugees. To take a central case: human rights, morally understood, cannot immediately imply that all refugees who arrive at the EU's borders always and necessarily have to be admitted.[5] If we think of a small country such as Portugal, we see that having to admit all refugees may sometimes not be plausible.[6] However, it is at the same time very implausible that, as far as human rights are concerned, "anything goes" with regard to questions such as how borders may (not) be protected, what changes of the international order should be sought, the numbers of refugees that should be admitted to the EU or to a particular country, what rights refugees should have once they have been

admitted etc. A plausible moral idea of human rights does, it seems, have certain implications for these (manifold) questions regarding the permissible treatment of refugees, and clarity is to be provided in terms of what these implications are and why.

This chapter will not deal with all these questions. I will assume, for instance, that there are certain "deontological constraints" (that is, certain ways of acting, or failing to act, that morally have to remain off limits) concerning the protection of the EU's borders and with regard to discouraging asylum seekers from reaching the EU's borders[7] and, likewise, that there are constraints saying that migrants who are at risk of drowning are to be rescued. I will also assume that human rights would demand the EU to do a suitably specified fair share in a global cooperative scheme that would give all refugees a safe place, if (nearly) all countries cooperated in such a scheme;[8] where I assume that in this case, the costs of cooperating would be less than sizeable for the citizens of the countries concerned. (Discussing the full-cooperation case in which the cost is sizeable is beyond the scope of the present chapter.) While assuming all this, this chapter will focus on defending the claim that, *based on human rights, the EU has the responsibility to admit refugees at least up to the point at which sizeable costs for its citizens would arise – even if admitting them up to that point means doing more than a suitably specified fair share.*[9] This also means that the EU and EU countries can be morally required to take up the slack of other countries that fail to do their fair share in protecting refugees.[10] The italicised claim is my broad answer to the question of how many refugees the EU should admit, based on a human rights view; my arguments will become clear in what follows. I am not aware that this precise position has been defended in recent literature, although somewhat similar positions have been taken.[11]

This chapter will defend, in short, that when we are talking about admitting refugees, human rights involve duties for the EU which (at least) go to the point of becoming sizably demanding. I emphasise, however, that admitting refugees does not, in the end, always come at a cost (financial or otherwise).[12] One may think, as just one example, of the circumstance that the EU's population is ageing and that admitting refugees could very well bring benefits in this light.

This chapter will often focus on the EU and take a human rights approach. Human rights seem a suitable focus as they are very prominent as an international moral discourse and practice[13] and also very prominent among the EU's "values" – in word and also in (at least some of) the EU's deeds, aimed at human rights realisation at home and sometimes also abroad.[14]

The chapter proceeds as follows. Section 2 clarifies the central concepts of a refugee and of human rights as well as the idea of so-called nonideal theory. Section 3 forms the core of the chapter and argues that the

EU should, in admitting refugees, at least act up until the point at which sizeable cost to its citizens (the notion of "sizeable cost" will be clarified) would be incurred. Section 4 deals with objections. Section 5 concludes and briefly considers the question of whether the EU's committing itself to human rights makes any difference to how it should act towards refugees. Or can the EU's responsibilities be specified independently of such a commitment?

7.2   Central Concepts and the Perspective of the Chapter

I will now explain the concepts of a refugee and of human rights and then briefly go into non-ideal theory – a key element of this chapter's perspective. For the most part, my aim will be to clarify rather than extensively defend the conceptual and methodological choices made – let alone to defend them against all possible alternatives.

a)   *Refugee*

In many social and public discourses etc., the notion of a refugee refers to someone who is in a specific kind of trouble: refugees are not where they normally live, and they would be faced with great problems if they returned there. Philosophical discussion will typically try to arrive at a definition that is better elaborated and better defended. It would be a pity if such discussion were to "dissolve" the notion so that refugees ended up, say, being "simply" people in need like so many billions. Certainly, it might turn out that, in the end, the moral duties towards refugees are not (even) more weighty or (even) more extensive than those towards certain other (categories of) people in need – I will come back to this. But even if that were so, the notion of a refugee itself had better be somewhat distinctive and, also, not deviate too far from common usages.

   I propose, for the purposes of this chapter, to understand the distinctiveness of the concept (its role, one might say) as the concept's singling out a category of people who present very strong moral claims for admission to another country.[15] In daily usages in society, a term (i.e. "refugee") can, of course, refer to many different things (and will often be quite unclear). I have said that refugees are often taken to be people in a particular kind of trouble. Law and policy have often been more specific: refugees face persecution if they return to their country (Geneva Convention), or they face a situation of generalised violence or the like (cf. UNHCR).[16] In philosophical discussions and elsewhere, it has been asked:[17] what if people would face other severe problems with their human rights protection or realisation if they returned home?[18] I think that the following is, in principle, a good line to take: people *can't return home, or they will have a serious*

problem in terms of the protection or realisation of their human rights.
(Importantly, I do not think that any broadening of the concept of a refugee should practically be proposed in the current political situation, but in the philosophical discussions in the "background culture"[19] of a society, the italicised proposal appears to be a sensible line to take.) More precisely, I believe the concept of refugee would best refer to people who cannot return to their home country because they would have a serious problem with the protection or realisation of their human rights, a problem which would be solved most appropriately (in a sense to be further explained) in their home country.[20] For in certain cases, also in the non-ideal situations that interest me (see later in this chapter), the most defensible outcome may be a solution at home rather than envisaging – as is the topic of the present chapter – that people be admitted to another country.[21] (In all cases, the people concerned should, of course, be respected as – among other things – willing, autonomous beings and should have a voice in and, wherever possible, a measure of control over the directions of their lives.)

The additional aspect, then, for people to be deemed refugees would be that the solution to their problems should not – at present – be most appropriately provided at home. This aspect stems from the concern of keeping the concept of a refugee somewhat distinctive.[22] I believe various factors can contribute to the most appropriate solution not being in someone's home country. To provide it there may not be feasible in the short run for, say, some internal non-state agent or some outside agent,[23] or it may be that a solution cannot be provided by – for instance – an outside actor in an acceptable way (for example, it could not be done in keeping with due respect for a people or a country or while steering clear of forceful intervention with, potentially, a lot of bloodshed). It may, I believe, be very hard to specify such contributing factors, and endeavours to do so should certainly involve the people concerned themselves. In any case, it is not possible to try to do all this in this chapter, and I will have to leave this discussion here.[24]

Finally, due to this addition ("not most appropriately solved in someone's own country"), some people may fail to qualify as refugees while still having strong, justified claims that states and/or various non-state agents take certain steps to ensure the protection and the realisation of their human rights.[25] While such claims on the part of refugees (in this chapter's sense) will not always be stronger and/or more justified, the moral claims of refugees for admission to another country are generally stronger.

b) *Human Rights*

I now turn to the concept of human rights.[26] I will focus on human rights as a moral concept, rather than a legal one – more particularly, as a minimum

ideal of justice, meaning that if human rights were fulfilled everywhere, the world would be broadly, albeit not entirely, just.[27] Here, I mean justice in the Rawlsian sense of "the first virtue of social institutions"[28] and also of a world order.[29] The content of these requirements concerns the reliable protection of very important interests of all human beings.[30] More concretely, I would think of a list such as the Universal Declaration of Human Rights, which specifies, in the words of James Nickel, seven "families" of human rights: security rights, due process rights, liberty rights, rights of political participation, equality rights and social rights and, in addition, rights that address the problems faced by distinctive groups.[31]

When the EU stresses the importance of countries – both within and outside the EU – abiding by human rights, it is broadly such a list that is in play.[32] And its appeal is not least moral:[33] countries (as well as other agents) should respect and fulfil the human rights on this list, where the general ideas driving this seem to be such notions as the importance of the weighty interests of all human beings and of a world that is just. In other words, the conception of human rights that I propose seems to fit rather well with some very important things that the EU subscribes to (both in words and also in certain actions) and that we may, loosely, call a central part of the EU's "values".[34]

One could wonder whether it is at all plausible for a conception of human rights such as the one just briefly outlined to have sufficient "resources" for determining how refugees should be treated and, in particular (for the present chapter), for how many refugees the EU should admit. Or is it too indeterminate for that, even if a number is articulated in a very general way: for instance, by referring (as I will) to something like "sizeable cost to EU citizens"?

Replying to this doubt allows me to briefly elaborate on the justification of human rights in the moral conception proposed. As I see it, a particular human right (say, a human right to freedom of expression, meaning that the ability of people to express their views ought to be reliably protected in certain ways) exists if two things are the case: (1) reliably protecting the interest in question is very important,[35] and (2) there are suitable duty bearers for reliably protecting it.[36] The way to establish (1) is mainly by showing what are the benefits for people if the interest is reliably protected and the disadvantages if it is not. Telling stories may be the main way to do this.[37] Establishing (2) will mainly be done by drawing on widely acceptable ideas about when agents have duties: for example, that this depends on their capacities to provide reliable protection (perhaps at a limited cost to themselves) and on the extent to which they have played a role in causing a problem for the protection of an interest.[38] Thus, in justifying what human rights exist, this conception would draw on considerations of (1) the importance of human interests and (2) who the suitable duty bearers

for reliably protecting those interests are. Both of these considerations are important resources – as we will see – for drawing conclusions about the EU's responsibilities towards refugees. Both will play a role in arguing that the EU must admit at least as many refugees as it can until there is sizeable cost for its citizens. In this sense, human rights are helpful: my conclusions will draw on considerations already (very nearly) implied in human rights.

c) *Non-Ideal Theory and Some Further Assumptions*

In this chapter, I will mainly focus on non-ideal theory – theory about situations in which some institutions and their actions and certain actions of individuals are (at least provisionally) taken as a given, even if such actions are probably not the best possible, taking into account how human beings are.[39] Among other things, I am especially interested in what the EU should do even if certain other parties (such as, perhaps, the US) do not act as they should. Presumably, the first answer in such cases will always be that one should try, with permissible means, to get the "defectors" to act as they should. But the question remains as to what should be done if they cannot be brought to act in such a way; this is one of the things that particularly interests me in this chapter.

   A final point about what the chapter assumes: I am, as stated earlier, simply presupposing that there are certain "deontological constraints" – things that one should always or may never do to asylum seekers. To mention only two examples, people who are at risk of drowning need to be rescued, regardless of longer-term considerations, and people may not be shot at or treated in other inhumane ways when a country or the EU guards its borders. In the case of the examples just mentioned, the relevant categorical dos and don'ts simply flow, respectively, from an elementary morality of rescue (cf. Peter Singer's well-known example of the child drowning in a pond)[40] and from (almost) absolute prohibitions to actively and greatly set back people's very important interests ("don't kill", etc.). To further discuss such deontological constraints is beyond the scope of this chapter.

7.3   A Responsibility for the EU to Admit Refugees at Least Until Its Citizens Would Incur Sizeable Cost

Ideally, an institutional arrangement would be in place that can in fact (and not just on paper) effectively protect refugees.[41] Such an arrangement might, for example, be an effective international treaty between largely sovereign states – including entities such as the EU – in which all participants do a fair share in admitting and otherwise protecting refugees. However, let us focus on a situation in which by no means all countries do a fair share. This is, and will probably long remain, closer to the world's current

reality. As said, the first thing to be tried by the complying countries is to get the non-compliers to do their fair share after all. Yet what must these countries or the EU do if the non-compliers cannot be brought to act as they should, as will presumably often be the case? I want to defend that based on human rights, the EU has (EU countries have) the responsibility to admit refugees at least to the point at which sizeable costs for its citizens would arise, even if admitting them up to that point means doing more than a suitably specified fair share.[42]

Let me, first off, give a specification – not, of course, the only one possible – of "sizeable cost". "Cost" does not merely mean "financial cost" here. Rather, the cost for a country's citizens remains less than "sizeable" – or, in other words, quite small – as long as nothing very important is compromised, such as a well-functioning legal system, good health care, a well-functioning political community and civil society, a reasonable level of economic prosperity and employment etc.[43] I am well aware that a list such as this one faces questions from at least two directions: first, for greater specification, and second, for greater abstraction: that is to say, for further clarification of what the list is a list of (basic goods, capabilities etc.)[44] so that it becomes clearer why exactly these things should be "very important" – and what that means. I must leave either kind of question open here and simply propose that as long as no things such as those mentioned are compromised, there are no sizeable things at stake for the citizens of a country or of the EU in admitting more refugees.[45] As said earlier, admitting refugees certainly does not always come at a cost for a country and its citizens, but sometimes it may – especially if very great numbers of refugees are concerned in a short timeframe.

I am now in a position to make the argument for the claim that the EU or a country should admit refugees at least up to the point of incurring sizeable cost, even if that means doing more than a fair share. The idea is that until sizeable cost arises, there is (by definition) nothing really substantial at stake for a country's citizens.[46] Now, if non-citizens in need are not even helped out when there is nothing really substantial at stake for citizens, non-citizens count for hardly anything at all. (This is, to be sure, a statement about non-citizens in general; I will come back to the question of whether refugees represent a special case.)

However, suppose that one would consider already having done one's fair share as a sufficient justification for not doing more in this case. This would mean, I would object, that the cost of non-compliance by other countries would have to be borne by the refugees – by the people whose very important interests are in great jeopardy. And this seems even more morally problematic than the EU or a country having to do more than its fair share by taking up the slack of the non-compliers.[47]

But what if there *is* something really substantial at stake? That is, in my terminology, what if the cost *is* sizeable or more? I take it for granted that a

country's government (or EU institutions) may, to a certain extent, be partial to their citizens. A French government that would have as much concern for Chilean citizens as for French citizens – except in such respects as not actively harming them[48] – would not recognisably be a French government at all. It is a moot point, however, just how far the partiality of a government or of the EU for its own citizens may go. It is clear that all kinds of valuable goods could be safeguarded for EU citizens if the EU acted to avoid sizeable or higher costs for those citizens,[49] but people who are not EU citizens may suffer. Would we, at this price, want a world in which some countries and their citizens are in relatively fine shape because of such partiality? Perhaps the answer is affirmative: for instance, because otherwise, everyone would suffer or because the existence of countries of a certain kind – for example, democratic countries – might be beneficial for everyone.[50] Yet defending partiality in the sense that governments often need not go beyond less-than-sizeable costs for their citizens may also be a "bias of the lucky against the unlucky".[51] It is because of this hesitation that I say that countries and the EU should admit at least as many refugees as they can at less-than-sizeable cost to their citizens; perhaps they should admit more refugees than this.[52]

Suppose they need not admit more refugees than they can at less-than-sizeable cost to their own citizens. Then the reasons for not having to do more could be strong,[53] and they might be strong enough to overrule the reasons for doing a fair share when the cost of doing a fair share is sizeable or more. Whether this is so will depend on large issues, such as which concept of morality one embraces. But if it were so, there could be (what may be called) tragic situations in which some refugees need protection while no one is morally required to take them in.

To what extent does this account rely on human rights in formulating duties towards refugees? The claim that the EU should admit refugees at least up until the point at which sizeable costs would arise for its citizens draws on the weight of the important interests of human beings. If a human being's important interests do not matter, why care about some human being in dire need, even if you can easily help them out (or even also if you have been directly or indirectly involved in causing their need)? In addition, there will, even if less-than-sizeable costs are at stake for its citizens, be a duty for the EU to admit refugees only if we accept certain ideas about duties – for example, the idea that one has a duty where one has the capacity to help someone at little cost to oneself or where one was objectionably involved in bringing about someone's dire need. Now, these thoughts about interests and duties are also a crucial part of what is needed for accepting that there are (certain particular) human rights in the first place.[54] So the concept of human rights that I propose on the one hand and the previous thoughts about the EU's duties towards refugees on the other fit each other well.

Let me make two qualifications. The first concerns the thought that the EU may not have the duty to admit more refugees than it can with non-sizeable costs for its citizens. This thought is certainly connected to thoughts about capacity as a suitable ground for bearing duties. But, as we have seen, it also involves ideas regarding the degree to which states may be partial to their citizens, and these ideas arguably – although this is disputable – play less of a role in the concept of human rights that I proposed. Secondly, it may be asked how this concept of human rights is supposed to lead to duties towards refugees specifically. Is it not the case that the duties that can be distilled from it are, in fact, rather general duties to respect, protect and promote human rights? I will, in reverse order, discuss these two issues in the next section.

7.4   Some Objections

Important objections to the claim that the EU should admit refugees at least until sizeable costs would arise for its citizens include the following. First, why admit refugees rather than focusing on other people whose human rights are badly protected or badly fulfilled?[55] Secondly, once again, just how partial may a state be towards its own citizens? And could the degree of permissible partiality differ for states and for the EU? Finally, do the (un)supportive attitudes of citizens make a difference in how states and the EU should or may act towards refugees?

a)   *Do Refugees Represent a Special Case?*

Suppose that a state or the EU should be committed to human rights (understood broadly as the concept outlined earlier). Then, according to what has been said here, that state has certain duties to respect, protect and promote human rights, certainly for its citizens, but also for non-citizens. If the reliable protection of the very important interests of non-citizens really matters – and this is what human rights say – then it is plausibly forbidden for a government to actively set back these interests (save perhaps in very exceptional circumstances), and it must arguably further the fulfilment of these interests insofar as this is compatible with duly caring for its own citizens. A government cannot (save perhaps in very exceptional circumstances) abide by human rights if it kills or wounds foreigners or if it does not (say) assist starving people when it can easily help out.[56] But – assuming that there is a limit to what a government ought to do to better fulfil the human rights of foreigners – then why should it admit refugees, rather than focusing on some other people in need?[57]

I believe the answer is twofold. First, thinking about human rights-related duties should indeed begin by considering all human rights-related duties.

Negative duties (not killing etc.) will have to be upheld across the board, but with positive duties, there will be some leeway. Secondly, however, one of the criteria will plausibly be that all vulnerable groups of individuals receive attention. It is generally impermissible to pay no attention at all to one vulnerable group (for example, refugees) because one is already doing a lot for another (say, disabled people). I could imagine there to be some exceptions, but their case would really have to be made. One may add that the human rights situation of refugees is usually very serious and one of imminent danger: by definition, the way for them is to go elsewhere because of a severe human rights problem they would face at home. In deciding how to go about fulfilling human rights in situations in which one cannot do everything, refugees therefore generally put quite strong claims for priority on the table. A very good case can be made that refugees must find a safe place. If they do not, the consequences will be dire for them.[58]

b)   *The Partiality of States and of the EU Towards Their Citizens: Revisited*

I would now like to revisit some questions and doubts regarding the permissible degree of a state's and the EU's partiality towards their citizens. Earlier, I said that a state or the EU should take refugees in – or, more broadly, work to better fulfil the human rights of foreigners, of which protecting refugees is a vital part – at least as long as the cost to its citizens is less than sizeable. As long as that is the case, nothing of great substance is at stake for its citizens. But why would a state or the EU be allowed to be partial towards its own citizens up to that point?

While I am not certain whether this question can be answered at all, I am certain of two things: (1) that a state may, to a certain extent, be partial towards its own citizens; otherwise the French state would not recognisably be the French state at all, and (2) that a state may, in any case, not take partiality beyond the point at which important goods – for example, a well-functioning legal system, a reasonable level of economic prosperity and employment – have already been reasonably protected for its citizens, insofar as this is feasible by social arrangements. If it were permissible to take it even further, foreigners would count for very little indeed. So to take partiality to the point just indicated is the maximum degree of partiality that may be permissible,[59] but perhaps only less is permissible – all the more so where the EU or a country has contributed to human rights problems for foreigners.

Secondly, how does this account of partiality, which has been focusing on states, apply to the EU? I want to leave aside questions of how best to understand the EU – for instance, more as a collaboration of sovereign states, more on a federal model or in some combined or altogether different

way. Still, it may be plausible from a variety of perspectives that an EU not partial towards EU citizens to a certain extent would not recognisably be an EU (along the lines of the example of the French state), but, at the same time, the benefits at stake for EU citizens must at least be sizeable for partiality to be possibly permissible. If one follows this line, it is likely that the EU as a whole – and many EU countries specifically – should admit more refugees and do more for refugees than they currently do.

c)   *Support From Citizens*

I would like to address one final question that may arise in relation to the position that I have taken: could the fact that in some countries many citizens would not support admitting refugees up to the point of sizeable costs, would arise be a morally acceptable reason for these countries or the EU to admit fewer refugees? My answer is threefold. First, in the short term, citizens' attitudes and behaviour, also if morally problematic, can (but will not always) be a given for policymakers when devising and carrying out policy. Where this is so, it is inevitable for policymakers to take these attitudes and this behaviour into account, and they should do so in what seems morally the least problematic way. The result could be called non-ideal justice, or perhaps it is better considered as an extent of injustice. Second, with certain attitudes and behaviour on the part of citizens, it is plausibly not the business of a government in a liberal-democratic society to try to change it, be it in the shorter or longer run. This is different, however – and this is the third point – when such attitudes and behaviour touch on the fundamentals of a liberal-democratic social order: on the freedoms, equality and rights which are the cornerstones of that order. Then, where governments could change the attitudes and behaviour in question, they should try to do so, and the liberal-democratic ideal itself is important in deciding which means are (im)permissible in such endeavours.

7.5   Conclusion

I have defended that, based on human rights, the EU has the responsibility to admit refugees at least to the point at which sizeable costs for its citizens would arise, even if admitting them up to that point means doing more than a suitably specified fair share. I have taken this position, which can be applied to countries, with the EU specifically in mind.

  If the EU takes this position seriously, many questions – some more practical, some more theoretical – will obviously arise in trying to follow through on it. Let me close by briefly addressing one: does this position have its validity and importance whether or not the EU is committed to human rights (in the sense that it finds it very important to protect and fulfil human

rights)?[60] Or does the EU's commitment to human rights somehow make a difference to this position's validity or importance? My view on this comprises two parts.[61]

The first part is this: polities (such as the EU or a country) should, as a matter of minimum justice, appropriately protect and fulfil human rights at home and abroad – and the position developed in this chapter tells us something about what this means for the treatment of refugees. A polity that does not appropriately protect and fulfil human rights is simply unjust, and this is so whether it subscribes to human rights or not. The EU is not more unjust than some other polity if the EU subscribes to human rights in words but does not follow suit with its deeds while that other polity did not subscribe to human rights at all, either in words or in deeds.

Yet, secondly, if the EU commits itself to human rights – as it, in fact, does – but does not act in accordance with them, this may open it up to some moral complaints that do not hold for a polity not committed to human rights. For example, there could be complaints of hypocrisy[62] or complaints that the EU has failed to act in accordance with human rights despite knowing well that – and, not seldom, also how – it should do this. And in this sense, the EU does have additional moral reasons, based on its commitment to human rights, to take the position developed in this chapter seriously.

Notes

*   Many thanks to Marie Göbel, Andreas Niederberger, Marcus Düwell and Matthias Hoesch for very useful comments on an earlier version of this chapter. Some of the thoughts in this chapter were first proposed in an Ethical Annotation which I edited at Utrecht University's Ethics Institute (see Philips et al. 2023).
1.   Some important documents are the Charter of Fundamental Rights of the European Union (2000) and the subsequent Treaty of Lisbon (2007). It is beyond the present scope to explore other sources that make it clear what the EU finds important or what it does, and go into the related question of what the EU is in the first place.
2.   This is not to say that the EU's actions always live up to what it finds important.
3.   Indirectly, the Dublin Regulation (2013) is also relevant. This is an EU law stating that the country where someone first applies for asylum is responsible for handling the asylum request.
4.   Based on the central documents mentioned in note 1 – documents that can be regarded as having moral importance in addition to legal status. Morally, they typically do not provide clarity about the points that follow in the text. The EU is, of course, also legally committed to human rights, and there are various reasons for it to live up to its legal commitments, in part no matter how the moral side turns out. This chapter focuses only on the moral side.
5.   Many of my arguments are also applicable to countries. Cf. Section 4.
6.   I believe that the Portugal example is relevant for the EU (however much larger the EU obviously is than Portugal), once one varies the numbers.

7. A similar point would hold for other migrants, although this chapter will only focus on refugees. I assume, of course, that there is no constraint saying that someone who is a refugee always and necessarily has to be admitted to a particular country. Such a constraint is in conflict with my argumentation for the italicized thesis.

8. "Nearly all" would have to be developed more precisely (it is meant to exclude, for example, Syria for refugees fleeing from Syria), but that is beyond the present scope.

9. I will use the expressions "(moral) responsibility" and "(moral) duties" synonymously. Clearly, certain elements of the italicized claim (such as "at least", "sizeable costs", "suitably specified fair share") need explanation; see later in this chapter. Due to space constraints, I cannot further discuss the distinction between citizens, denizens, residents etc. or the question of what the most fortunate terminology would be. ("Citizens"/"foreigners" will be commonly used, and emphatically a neutral sense is intended.)

10. Further development and defence of this claim will follow in Section 3. For the determination of a fair share, cf. Gibney 2015.

11. My position is substantively close to that of, for example, Matthew Gibney (2004, 82–84), who does not, however, base his position on human rights, while it is less demanding than that of, say, Joseph Carens (see 2013, 219; Carens's position is, in important respects, not human rights based) and more demanding than that of, for example, David Miller (e.g. 2016, 193, n. 43; Miller's view is importantly based on human rights but on a different conception than this chapter's).

12. By this I mean that, although at some point some costs are more than likely involved, they are plausibly outweighed. As always in this chapter, I am talking about the societal level. To develop the notion of "little societal cost" at the level of social groups or individuals – thus involving considerations of social justice – is a task I cannot undertake here. Thanks to Andreas Niederberger for pressing this point.

13. See e.g. Sikkink 2017. Of course, human rights as a global discourse and practice are also contested in many ways (for some debates, see e.g. Philips 2020, Ch. 3).

14. Even though EU countries and the EU do unfortunately sometimes, even structurally, violate and fail to fulfil human rights, including those of their own citizens. See e.g. Amnesty International 2019.

15. In this chapter, I will focus on people who are not in the country where they normally live. It is beyond its scope to discuss internally displaced persons and persons without a nationality, although their plight is, of course, extremely important. A particularly strong moral claim for admission is not necessarily a decisive moral claim; a notion of a refugee should, I think, typically leave it an open question, at least to an extent, whether someone should, in the end, be admitted to some country. Or, put more generally and adequately, it is arguments that should make clear what moral duties and permissions etc. there are, rather than conceptual stipulation. It is, of course, imaginable that so much in the way of argumentation has preceded a certain conceptualisation of who is a refugee that many questions about moral duties are already answered once it is clear that someone is a refugee.

16. Cf. UNHCR 2011, 19. See also <www.unhcr.org/what-is-a-refugee.html> [May 1, 2022].

17. Cf., for one, Carens 2013, 200–201.

18. I use "protection" generally, but sometimes also (along with "respect") to refer mainly to negative aspects (non-violation, preventing violation), while "realisation" or "fulfilment" (or sometimes also "promotion") emphatically also includes more positive aspects. In the wake of Shue 1996 (Ch. 2), a tripartite distinction between duties to "respect, protect [against disrespect by others, JP] and fulfil" human rights has gained some currency (see e.g. <www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> [May 1, 2022]). The details are beyond the scope of this chapter.
19. Cf. Rawls 2007, 6.
20. This is, as I will explain further, broadly inspired by David Miller 2016, 82. Elaborating on this, one could go on to distinguish various kinds of refugees (as e.g. Owen 2020 does). I am not sure that this would be a good move; it may end up weakening the case for protection. (How and if this is plausibly so would, however, need further investigation, which I cannot provide here.)
21. Importantly, discussing how to get institutions worldwide "into a more just shape" always also needs to be in view in discussions concerning refugees.
22. Here I somewhat agree with Miller 2016. But Miller himself wants to exclude those who "could [also] be helped . . . by outside intervention of one kind or another" (82) from qualifying as refugees. I don't think this suggestion works. (I am indebted to Matthias Hoesch for discussion on this point.) The position I take here, that admission to another country should be the most appropriate reaction to someone's plight, is in certain respects closer to Owen's 2020.
23. In giving these examples of agents, I am assuming that, in many situations of interest in the present context, a country's government will be either unwilling or unable to provide protection. To be sure, people may become refugees due to factors that have nothing to do with their country's government, but they will, in any case, not be refugees if their government is both willing and able to protect and fulfil their human rights.
24. The difficulty of articulating these factors partly has to do with human rights troubles arising from the misbehaviour, unwillingness or inabilities of various agents (among whom the state where the human rights issues arise or aggressor states) where all of these could potentially be different. More generally, and quite obviously, every real-life situation will be very complex, with many agents, multiple background factors and many possible scenarios involved.
25. Somewhat comparably, Serena Parekh 2020, Ch. 4, warns against placing too much moral weight on a distinction between refugees – she aptly discusses that various understandings are possible – and others in need, among whom are various kinds of migrants.
26. For elaboration on a number of elements of the (incomplete) conception of human rights that I am now going to propose and for how it relates to the philosophical literature on human rights, see Philips 2020, Ch. 2 and 3.
27. That I focus, for reasons also indicated in the introduction, on human rights in a moral sense does not mean that legal rights would be unimportant; they are just beyond the scope of the present chapter. For the relation between moral and legal rights as I see it, cf. note 33.
28. Rawls 1999a, 3.
29. *Pace* Rawls 1999b.
30. This notion of a human right owes much to Shue's 1996 notion of a moral right; cf. also Beitz 2009.
31. Nickel 2007, 93–94.
32. Also e.g. on many (semi-)official occasions.

33. Although there are, of course, also legal aspects, there is no presumption that legal rights should "mirror" (Buchanan 2013) the moral ideal: for one, there are also non-legal aspects to the realisation of the moral ideal, and for another, legal rights are not all about fulfilling this ideal.
34. Human rights as outlined are so central a part of the EU's values, we may add, that, in the EU's normative view of itself, they are not to be overridden by anything else to which the EU also subscribes.
35. And for broad categories of people: see note 26.
36. Thus the existence of a human right, in this conception, is not prior to there being suitable duty bearers.
37. There may be an additional role for examining the coherence, implications etc. of positions taken on (in this case) the importance of reliably protecting certain interests – always, of course, in light of the empirical realities.
38. That is to say, the extent to which they have played such a role without there being a suitable justification for doing this.
39. The terminology and many of the thoughts here come from John Rawls (esp. 1999b). There are many kinds of non-ideal theory, depending on exactly what one takes as a given. I will now, in the text, especially highlight a certain kind of non-compliance. I also assume the existence of borders, of countries and the EU.

    In ideal situations – in which institutions are as good as they can be, given people as they are, there would be (I presume) almost full cooperation with a fair-division scheme of admitting refugees; I do assume that there are substantial numbers of refugees in such situations, due to, among other things, (already inevitable) climate change and also because possibly the great majority, but not all, polities would abide by human rights. It is, not unimportantly, a moot point whether there would be countries and an EU in ideal situations and whether (and if so, how) there would be borders, but I believe it is not at all impossible that there would be (cf. Philips 2020, Ch. 4).
40. Singer 1972. Importantly, enough of the example remains in (always much more complex) real-life situations.
41. See note 39.
42. Just to be sure: the idea is that states may be allowed to just avoid great costs for their citizens, not that states may only stop admitting refugees after these great costs have arisen.
43. Self-determination is another consideration often regarded as morally relevant in the literature (see e.g. Walzer 1983, Miller 2007, Wellmann 2008). It could be understood as, primarily, the ability of a polity, as composed at a given moment, to decide its own course into the future. So understood, it may or may not plausibly imply that a polity should be able to decide who to admit. But it certainly does not imply that every decision that a polity takes about this is morally justified.
44. Very freely based on Rawls 2000 and Nussbaum 2000. In any case, the goods concerned should be important to people with widely different views and from widely different walks of life. My own proposal would be that the list comprises widely acceptable components or preconditions of a good life that can and may be influenced by social arrangements.
45. When these goods become compromised could be discussed in much more detail. I will not, however, pursue this further here.
46. Following up on note 44, I would cast this "non-substantial" cost as: citizens can, insofar as this depends on goods provided through social arrangements,

still have an approximately, although not an entirely, good life. I am thinking in the spirit of certain sufficientarian accounts of justice (for a general discussion, see Shields 2012) where the goods beyond a certain threshold are such that there are only relatively weak morally relevant reasons to further or even protect them.

47. "Comparing" these two morally problematic things appears to make sense (*pace* Karnein 2014, 604); one of these things is best characterised, I think, as "having to behave as a sucker" (someone could object to having to do this); not as "not upholding fairness". I thus agree with Stemplowska 2019 and others such as Hoesch 2017 and Owen that the slack of non-compliance should be taken up. (It is beyond this chapter's scope to discuss whether this may be enforced.) At the same time, and as argued in the text, I believe that cost to a country's citizens may possibly set limits to what needs to be done. I say this not to define a lower limit of duty on which (almost) everyone will agree, but simply because I think cost may continue to play a role even in determining human-rights duties. For more on the conception of human rights used here, see Philips 2020. Thanks to Matthias Hoesch for criticism on this point.

48. I mean, the French government's not violating negative duties: this, at the minimum, should be the same towards French and Chilean citizens, and perhaps some other things should be the same as well. (For the present purposes, "government" and "state" can be used synonymously.)

49. Of course, this should, as indicated, always stay within certain limits, such as upholding negative duties towards all people.

50. Cf. Christiano 2008. However, this argument may easily become ideological and/or cynical.

51. T.M. Scanlon as quoted in Scheffler 1994, 113.

52. The moral permissibility of partiality of individual persons for themselves may be easier to argue for (see e.g. Scheffler 1994; Philips 2007, Ch. 2) than the partiality of governments for their citizens, although the two might be connected.

53. These reasons could ultimately draw on the reasons it is doubtful that individuals must, in general, further the impersonal good at great personal cost (see e.g. Philips 2007, Ch. 2).

54. See Section 2.

55. And why should it admit refugees rather than helping them out in some different way?

56. This is not to say that the bystander model is usually an adequate way to describe the EU's or a country's place and actions in the world; it is not (see e.g. Pogge 2008). Also, a foreign government will not always be the first or even an appropriate duty bearer.

57. And why would it have to fulfil these duties by admitting refugees rather than, say, contributing financially to accommodating them in their region of origin? See note 58.

58. Moreover, accommodating refugees in their region of origin will often bring human rights problems with it and will often be unfair to the accommodating countries; money often cannot compensate for all the social complications (although there may emphatically also be positive sides) generated by sheltering large numbers of refugees.

59. But is this general position compatible with the acknowledgement of certain deontological constraints and negative duties for which one must presumably go to larger costs to uphold them? I made an attempt to reconcile the two in Philips 2007, Ch. 4. The general answer is, I think, that as long as the

constraints cover situations in which the costs (not merely financial) remain relatively small, one can more or less maintain the "until sizeable costs" position. (See Section 2 for some constraints that I find plausible.) If this is no longer the case, one must either resort to a lesser degree of partiality after all or simply admit that – one way or the other – one faces a "tragic" situation, in the sense of one in which there are only bad choices.

The position taken in this chapter assumes, of course, that not admitting refugees does not, as such and by itself, already constitute the violation of a constraint or of negative duties.

60. See Section 1.
61. Elaborate arguments would be needed to decide between the view outlined next and alternatives, and this is beyond the present scope.
62. For further development of a notion of hypocrisy, see e.g. Philips 2020, Ch. 4.

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8 Cosmopolitanism, Global Justice and Refugees

Minimal Moral Conditions for EU Refugee Policy

Therese Herrmann

8.1 Introduction

In the scholarly discussion after the end of the Cold War, the European Union has often been referred to as a vanguard cosmopolitan polity.[1] But there is a growing sense that it has recently questioned or even reversed its cosmopolitan orientation – a development that some have associated with the so-called European refugee crisis of 2015.[2] However, the implicit link between the EU's cosmopolitanism and its refugee politics remains unclear. What would cosmopolitanism suggest for how the EU ought to deal with refugees in the first place?

In debates on EU cosmopolitanism, the idea of cosmopolitanism has often referred to the creation of supranational political institutions in Europe and, coupled with them, the establishment of transnational rights for EU citizens.[3] Yet both describe processes that are largely internal to the EU and leave open what follows from them for the EU's external obligations, including its obligations to refugees. After all, it is perfectly possible for EU member states to deepen transnational integration with the objective of deterring, rather than protecting refugees.[4] And it remains the case that the rights and goods associated with EU citizenship, such as free movement across EU borders, do not apply to refugees and immigrants. Indeed, as the aftermath of the 2015 "refugee crisis" has shown, they can even be restricted for EU citizens in the name of protecting them from abuse by refugees and immigrants.[5]

When it comes to the EU's external relations, cosmopolitanism usually meant that the EU and its member states "ought to subscribe to the principles of human rights, democracy and the rule of law . . . for dealing with international affairs".[6] At the most basic level, this would include a requirement for states not to violate the human rights of non-members. Yet many philosophers argue that it also includes the idea that states have specific responsibilities to protect the human rights of people whose own states will not do so. Refugees are an important case in point. According to

a definition often shared in refugee ethics, refugees are people who acquire a claim to immigrate to another state because their own state failed to secure their basic human rights.[7] But the case of refugees also shows that it is all but clear what it means for a state – and, by extension, for the EU as a supranational polity – to protect the human rights of non-members. The EU and its member states have often argued that their duty to protect refugees should be understood as a humanitarian obligation to help protect the basic needs of the most vulnerable.[8] In moral philosophy, humanitarian duties are distinguished from other kinds of duties because of their smaller scope – they usually cover someone's most urgent needs, but not their wider social and political rights. In addition, many philosophers argue that humanitarian duties are also weaker than other kinds of moral duties. They only require states to make *some* effort to contribute to global refugee protection, but they grant them a significant amount of discretion in deciding when, how and towards whom exactly that duty should be discharged.

The way that refugee resettlement programmes are justified and implemented by states in the Global North, including the EU and its member states, is a clear example for these states' humanitarian approach to refugee protection. Although a number of liberal governments in the Global North commit to resettling a specific quota of refugees hosted in camps in the Global South each year, their commitment is non-binding, and numbers are exceptionally low compared to demand. Resettling states often present their commitment to refugee resettlement as an act of grace, rather than something that refugees or refugee-hosting states in the Global South can demand as a matter of justice. At the same time, states in the Global North resist efforts to make these quotas binding and actively prevent refugees from reaching their territories in order to claim asylum there.[9]

Is the EU's humanitarian understanding of its duties in refugee protection in line with its cosmopolitan commitment to respect and protect the human rights of non-members? The answer might seem obvious if we define cosmopolitanism ambitiously, as entailing, for example, the idea that it would be wrong for a state to treat non-members any differently than its own citizens. But many proponents in the debate argue that the idea of cosmopolitanism entails much less. It only requires us to treat non-members as objects of moral consideration in some way, but not that states treat them on par with their citizens.

In this chapter, I want to look more closely at readings of moral cosmopolitanism and discuss which, if any, conditions it establishes for how states ought to deal with refugees. I make three points: first, after giving an overview of different readings of moral cosmopolitanism in debates on global justice (Section 2), I argue that a lot depends on how we understand the structure, rather than the content, of the duties a state has towards non-members under moral cosmopolitanism. While there is widespread agreement among philosophers that moral cosmopolitanism puts states under a

duty to protect the basic human rights of refugees, some suggest that we should read this duty as a relatively modest duty of humanitarian assistance, while others argue that it should be understood as a strong duty of justice. I explore the difference between duties of justice and duties of humanitarian assistance in Section 3. In Section 4, I show that the difference between humanitarian duties and duties of justice has tangible practical implications for defining the extent and limits of states' duties to protect refugees. To do so, I discuss in some detail David Miller's humanitarian account of such duties and contrast it with the account put forward by David Owen, which understands states' duties to refugees as duties of justice. I'll show that Miller's account puts three kinds of qualifications on states' duties to refugees: the fairness qualification, the indeterminacy qualification and the cost qualification (Section 4). Thirdly, in the last part of the chapter, I come back to my initial description of the EU's humanitarian approach to refugee protection and compare it to Miller's humanitarian account of refugee protection (Section 5). Here, I argue that even if we understand states' duties to refugees minimally as duties of humanitarian assistance, they still imply stronger commitments from the EU and its member states than they are currently willing to make.

8.2   Weak and Strong Moral Cosmopolitanism: An Overview

What kind of normative requirements does cosmopolitanism suggest for the way a polity ought to deal with refugees? Theories of cosmopolitanism rest on the core idea that all human beings are, or should be, members of a single community, regardless of their national or cultural membership.[10] However, they differ widely depending on how they understand this claim in detail. Cosmopolitanism is most commonly interpreted in moral terms.[11] Moral cosmopolitanism thinks of individuals as part of a global moral community in which every human being is required to treat every other human being as an ultimate unit of moral concern.[12] To say that every human being is an ultimate unit of moral concern means to emphasise that moral justification is ultimately owed to individuals, rather than groups, like families, tribes or nations. And it highlights that moral concern is owed to every human being equally and not only to a subset of human beings, such as men, white people, aristocrats or the citizens of a specific state. Some argue that we can only fulfil the requirements of moral cosmopolitanism if we build a set of global institutions that transfer political authority away from individual states.[13] Others maintain that a system of sovereign states which cooperate on the basis of a set of common norms is, in principle, compatible with the demands of moral cosmopolitanism.[14]

Whether we think that the demands of moral cosmopolitanism are compatible with the existence of sovereign states will depend on what exactly

moral cosmopolitanism is taken to imply with regard to global justice. Theorists who defend strong versions of moral cosmopolitanism – often simply referred to as "cosmopolitans" – argue that a meaningful understanding of it requires that the principles of justice that govern the way we interact within states are extended beyond state borders. In modern liberal democracies, these principles typically include rather extensive egalitarian demands. Most liberal philosophers agree that, if we live under the same set of coercive institutions in a state, then we have duties to design these institutions so that, for example, they grant everyone equal civil and political freedoms, ensure equality of opportunity and place limits on permissible inequalities between us.[15]

Supporters of strong cosmopolitanism argue that there is no reason to think that such principles of egalitarian justice apply only within state borders. Some make the point that the fact that someone is born into a specific state is just as arbitrary as their ethnicity, gender or social class and should not be morally significant when it comes to questions of justice.[16] Others point out that, in a globalised society, individuals entertain relations of social cooperation – or of domination – that reach far beyond national borders so that it becomes necessary to expand the scope of justice beyond individual states.[17] The latter take what's referred to as a relational approach to justice. They argue that duties of justice are not triggered between agents as such, but only between those who entertain relations of social cooperation.

Strong cosmopolitanism is sometimes contrasted with so-called weak cosmopolitanism. Adherents of weak cosmopolitanism – also called "statists" – share the idea that justice is a relational matter but argue that the kind of relations of social cooperation that trigger duties of justice can only be found within states. They argue that only specifically stable types of relations of social cooperation trigger duties of justice, usually those that are regulated through coercive institutions.[18] Although statists grant that, in a globalised world, social cooperation routinely takes place across borders and international organisations are acquiring more authority, they argue that these developments haven't replaced states as the only sites where coercive laws can be legitimately made and enforced.[19] This also applies to the EU as a regional transnational order, where, despite the considerable degree of political integration it has seen, states, as "masters of the treaties", continue to control the competences of the Union.[20]

However, when statists argue that the scope of justice is limited to one's own state, this does not mean that no moral principles apply in interactions with those outside a state's boundaries. Rather, they suggest that states (and their citizens) have duties of humanitarian assistance to non-members. These are usually understood as weaker than duties of justice. Typically, they entail states not violating the basic human rights of people beyond their borders and making efforts to protect them if their own states fail to do so.[21]

The difference between duties of justice and duties of humanity is often read as a point about the scope of the moral principles which govern different types of social interaction.[22] Statists argue that we have more demanding duties to our co-citizens than to others while defenders of strong moral cosmopolitanism argue that we owe just as much to others. Statists argue that we owe it only to our co-citizens to design our basic social and political institutions so that they approach an ideal of egalitarian justice while strong cosmopolitans would say that we owe this to everyone.[23] Yet when it comes to refugees, it is crucial to see that the difference between duties of justice and duties of humanity concerns not only their scope but also their strength. Even where statists agree with cosmopolitans on what states owe non-members, cosmopolitans are likely to interpret these duties in much stronger ways as they read them as duties of justice rather than as duties of humanitarian assistance. As I will show in Section 4, the difference matters a great deal for how we understand states' more concrete duties in refugee protection. Hence, in the following, I will go into some detail about the conceptual difference between duties of justice and duties of humanity.

8.3   In What Sense Are Duties of Justice Stronger Than Humanitarian Duties?

According to Laura Valentini, the framework of duties of justice conceives of what is owed to others as resources they are rightfully entitled to.[24] This makes duties of justice particularly weighty, and it puts their recipients in a particularly strong position to claim their due. Bearers of entitlements are not reliant on pleading for help from others. Rather, they are morally entitled to demand that the resources in question are theirs to control in the first place.[25]

Some argue that the only duties of justice that we hold globally, against everyone, are negative in kind.[26] Everyone has an obligation of justice not to actively violate everyone else's entitlements. But this does not mean that everyone also has a positive duty to everyone else to give them access to the resources they are entitled to. Positive duties of justice, so the argument goes, only hold between agents who already share stable relations of social cooperation with one another. As I described earlier, many cosmopolitans argue that today, such relations exist not only within states but also globally. But statists point out that states are still unique as sites where social cooperation is instituted.

An interesting middle ground is occupied by those who focus discussions on global obligations of justice on reparative duties. They point out that, even if we start from the idea that we only have negative duties towards everyone globally, a wide array of obligations still follows if we shift our attention to the question of reparations. Violating a negative duty to respect

others' entitlements may lead to strong positive duties to discharge the debt incurred.[27] Reparative duties are backward looking: they understand someone's present duties as a form of repair for wrongs committed in the past.

The reparative approach to duties of justice is especially pertinent with regard to refugees. It starts by asking whether a state was complicit in producing the refugees it is asked to provide protection for by violating their basic rights or entitlements. One way of thinking of states as complicit in producing refugees is by asking straightforwardly whether a specific state is directly liable for causing displacement – for example, through starting a war abroad, by supporting a dictatorship that persecutes political opponents or, arguably, by having installed conditions through past colonial rule that enable displacement today.[28] Although states rarely recognise their responsibility for producing refugees in other states in practice, virtually all philosophers in refugee ethics agree that a state complicit in causing displacement somewhere else would indeed incur reparative duties of justice to the refugees concerned.[29] Another way of understanding states' complicity in producing refugees elsewhere is to think of states as part of a system which, as a whole, leaves refugees distinctly vulnerable to rights violations. On this account, states would incur reparative duties to refugees not because they helped produce refugees through their individual actions in other states. Rather, the idea is that states together form a structure which is systematically prone to violating the basic rights of refugees. I'll get back to this in Section 3, when I introduce David Owen's account of refugee protection.

In contrast to principles of justice, principles of humanitarian assistance "ground duties to help those in need with resources that are rightfully one's own".[30] Typically, these duties are thought of as remedial: they arise simply because someone is in need of help, and others have the capacity to help at reasonable costs to themselves. But the resources that are the objects of humanitarian assistance are not, in any sense, understood as belonging to the needy. Instead, they are rightfully owned by the helpers. From the perspective of duties of humanitarian assistance, refugees would not be thought of as the bearers of specific entitlements which states have violated. Instead, they would be thought of as, to use a formulation coined by Michael Walzer, "necessitous strangers",[31] whose plight states bear witness to as innocent bystanders. Remedial duties are usually forward looking: what is relevant for their distribution is not whether certain agents have inflicted wrongs on others in the past, but, rather, who is best capable of putting a bad situation right.[32]

The humanitarian and the justice-based approaches are not simply two different ways of grounding the same duties. Rather, the difference also has consequences for how strong we take a specific duty to be. If the duty is understood as a humanitarian duty, it is usually taken to be both less demanding and less stringent than duties of justice.[33] The idea that duties of assistance are less demanding means that the costs duty bearers are asked

to tolerate in discharging their duty are lower than those that bearers of duties of justice are expected to tolerate. To illustrate this, think of the duty to rescue a drowning child from a shallow pond as a classic example of a duty of humanitarian assistance.[34] It seems clear that a passing stranger would be obliged to try to pull the child out of the pond if they can do so at little cost to themselves. But the obligation seems much less strong if rescuing the child would come with significant risks to the rescuer's own safety.[35] The picture would change if we thought of the duty to rescue the child as a duty of reparative justice. If the passer-by bore responsibility for the fact that the child ended up in the pond in the first place, for example because they pushed the child into the pond, most moral philosophers would say that they ought to tolerate greater sacrifices in rescuing the child.[36]

What would it mean to say that duties of justice are not only more demanding but also more stringent than duties of humanitarianism? The stringency criterion refers to the idea that duties of justice are generally particularly weighty duties – weighty enough so that those to whom they are owed have strong grounds for complaint if they are not discharged. The particular stringency of duties of justice is related to the idea that the bearers of these duties usually have little discretion in deciding how, when and towards whom to discharge their duty. This is because, typically, reparative duties of justice, through their backward-looking structure, specify more strictly first, what kind of performance is required to successfully discharge the duty, and secondly, the identity of the agents to whom the duty bearers are obligated.[37] I'll discuss this in more detail when I turn to what the difference between humanitarian duties and duties of justice means for states' duties to refugees in Section 4.

Most theorists agree that humanitarian duties to assist the needy are less stringent than reparative duties of justice. Yet there is no consensus on just how weak they are. Some have argued that humanitarian duties aren't obligatory at all. On that account, fulfilling them is much like saving a stranger from a burning house: although it would certainly be laudable to do so, no one could rightly criticise someone else for failing to.[38] Those in need of help have no claim at all against potential helpers; all they can do is appeal to their sympathy. Others argue that it is indeed mandatory to discharge a humanitarian duty, but I do enough to discharge my duty if I "assist some needy, somehow, and sometimes".[39] Think of the duty to be charitable to strangers in need. I may be able to claim that I do enough to discharge it if I give some money to some needy strangers I encounter, rather than a specific amount every time I come across a stranger in need. Even then, the duty would still be binding in some sense: I would clearly fail to discharge it if I never gave anything to any stranger. Yet I retain a considerable amount of discretion in deciding how, when and towards whom to discharge it.

Yet others argue that humanitarian duties can be both mandatory and determined about their addressees and that this depends very much on their content and the context of the situation in which they arise. If the needs they pertain to are urgent enough and the costs of discharging them are low, then humanitarian duties can be fairly stringent after all.[40] Think back to the example of the child in the pond. If a child appears to be drowning in a shallow pond, I am the only person around and the costs of saving them are low, then my duty to get into the pond and pull the child out seems quite strict, even as it remains humanitarian in character. According to those who take this route of argumentation, what mainly distinguishes humanitarian duties from duties of justice is their forward-looking remedial character. They argue that duties of humanity don't look to the past to ask who wronged someone else. Instead, they look to the future to ask who is in the best position to put a bad situation right.

Yet even if we understand humanitarian duties strongly as remedial duties that are both mandatory and fairly determined about their addressees, they are still less weighty than duties of justice. The idea that humanitarian duties are remedial has consequences for the ways in which they can be assigned to others. In contrast to reparative duties, in which the moral injury sustained by one party creates special duties of repair in another, the framework of humanitarian duties assumes that the parties involved have no previous connection. Moreover, in contrast to purely negative duties not to actively violate others' entitlements, remedial duties to put a bad situation right can't be discharged by everyone at the same time. It is possible for everyone at the same time to fulfil the negative duty of not actively pushing a child into a pond. But it's not possible for everyone at the same time to pull a specific child out of the pond: most people won't be near the pond and thus in no position to save the child at all. And even for those who are, it is not immediately clear what to do if the situation becomes more complex – for example, when not just one child but a whole group of children appear to be drowning and when there are many onlookers who are in a position to help. In addition to that, we may also imagine that the pond in which the children are drowning has grown to a small-size lake, so we can't assume that an average adult can simply wade in and pull the child out. We may still conclude that, given the urgency of the drowning children's needs, any onlooker who simply passes by the scene without doing anything would be acting wrongly. But it's also not clear that each onlooker has a duty to jump into the lake and pull out as many children as possible. It does seem like each onlooker has some form of duty towards the drowning children, but it's not immediately clear what that consists in. Some onlookers may be much better equipped to pull the children out of the lake while, for others, pulling out the children comes with considerable

risks. Moreover, who can do what will not be immediately clear to the onlookers themselves.

Remedial duties usually need some mechanism of distribution in order to become effective.[41] Usually, in domestic contexts, state institutions take that role. For example, welfare states oblige their wealthier citizens to pay taxes and distribute the revenue to the benefit of their more needy citizens. Thereby, they turn their wealthier citizens' rather undetermined remedial duties towards their fellow citizens into specific duties to pay a specific share of money to a specified group of people.[42]

However, such mechanisms don't always exist. Where political institutions are weak, like they arguably are in international politics, they will often be absent or fail to be effective. In this case, we might say that the potential bearers of remedial duties have additional duties to make distribution mechanisms more effective so that their own duties become more determined.[43] But it's not clear what follows for the duties they have now and here towards those in need. In particular, some argue that the unanswered questions about the distribution of duties may mean that there will be "tragic cases"[44] in which someone is in urgent need of help, but there won't be a duty on the side of anyone in particular to come to their aid.[45] I will discuss in more detail in the next part what this means with regard to refugee protection.

To sum up, we've seen that, in debates on what moral cosmopolitanism implies for global justice, all agree that states (and their citizens) have some duties to those outside their borders. Understanding these duties as duties of justice would make them considerably stronger than understanding them as duties of humanitarian assistance. Stronger here means two things. First, it means that the duty is more demanding: that is, less easy to qualify through considerations of costs. And, secondly, it means that the duty is more stringent: that is, it leaves the duty holder less discretion about how, when and towards whom to discharge it. But this is still very abstract. What does it mean more concretely for states' duties to refugees? This is what I want to discuss now.

8.4   Moral Cosmopolitanism and Refugees

The difference between duties of humanity and duties of justice has tangible practical implications when it comes to what states owe to refugees. I already hinted at that in the last section, but I want to flesh out some of these implications in more detail now. I'll do that by discussing David Miller's humanitarian view of states' duties in refugee protection and contrasting it with David Owen's account, which broadly understands states' duties to refugees as duties of justice. I focus on Miller and Owen because they understand the content of these duties in roughly similar terms. Both

think that states have duties to secure the basic human rights of non-members if their own states fail to do so. And both think that this translates into a duty for states to grant refugees asylum on their territory. Furthermore, both employ a fairly narrow conception of human rights, focusing on what they call "basic human rights". They understand these as including rights that protect access to basic goods but not more extensive social and political rights.[46] However, Miller and Owen differ in how they conceptualise the strength of states' duties to protect refugees.

As a general outlook, Miller advocates a statist account in debates on global justice. He understands nation states as inherently valuable sites of self-determination and social cooperation and argues that duties of egalitarian justice only apply between co-citizens.[47] According to Miller, any duties that states (and their citizens) have towards non-members are weaker duties of humanity. Yet, for Miller, that doesn't mean that they are non-binding. Depending on the importance of the goods concerned, duties of humanity can still be fairly strong in Miller's account. This goes especially for duties concerning human rights since human rights, according to Miller, protect access to the goods that are essential for every human being to lead a minimally decent life. Others have duties to respect and protect these rights simply because of the universal importance of these goods.[48] Yet, in spite of this, the fact that Miller thinks of these duties in humanitarian terms allows him to qualify them in ways that wouldn't be possible with stronger duties of justice. I'll discuss these qualifications next.

David Owen agrees that states have duties to protect refugees and that these duties are based in states' obligations to guarantee the basic human rights of those outside their borders. Yet, in contrast to Miller, Owen understands states' duties to refugees through a framework of reparative justice. In Owen's account, individual states form part of a global system of governance that systematically violates refugees' entitlements. Therefore, states' duties to refugees are not the duties of bystanders to come to the help of the needy but, rather, obligations to repair the wrongs that states have subjected refugees to. Owen argues that individual sovereign states form part of a wider system of states, whose design makes refugees foreseeably vulnerable to be permanently deprived of their basic human rights.[49] This is because, according to Owen, the state system is based on a division of labour which assigns to individual states the duty to secure the human rights of those within their jurisdiction while also granting states the right to sovereign border control. People whose own states fail them because they turn out to be either unable or unwilling to secure their basic human rights are thus left unable to claim access to any other state's territory as a matter of entitlement.

How do Miller and Owen differ when it comes to states' more concrete duties to refugees? Miller puts forward a fairly strong version of a

humanitarian account of refugee protection. Because refugees' basic needs are at stake and states are in a position to help without incurring excessive costs, states have binding remedial duties to protect refugees. And yet, according to Miller's humanitarian account, states can qualify their duties in refugee protection, and they can do so in three ways: first, by pointing out that they have already discharged their fair share of states' joint responsibility for refugees; secondly, by pointing to the legitimate differences between their own interpretation of their fair share and that of other states; and, thirdly, by arguing that the costs of taking in their fair share of refugees would be excessive. These qualifications are much harder to make with Owen's account of reparative justice, which argues that refugee protection isn't simply a duty to help the needy with resources that are rightfully one's own but, rather, a duty to give to refugees what they are entitled to in the first place. To bring this out, I will discuss Miller's three qualifications next and contrast them with Owen's account.

a)   *The Fairness Qualification*

Miller's first qualification, which I call the fairness qualification, says that a state has no duty to take in any more refugees than what fairness between states demands. Miller emphasises that this holds even in the event that other states fail to take in their own fair share of refugees so that some refugees will remain entirely without protection.[50]

   This has seemed counter-intuitive to many.[51] Doesn't the urgent task of safeguarding refugees' most basic human rights outweigh the demands of fairness between states? In response, Miller argues that it is generally the case that, when remedial duties are shared between different agents, others are not obliged to "take up the slack" when an agent fails to discharge their part of the duty.[52] According to him, this even applies to classic duties of rescue, such as when a group of strangers are asked to save a set of drowning children from a pond. Once duties are divided up and it is clear, for example, that each bystander is responsible for pulling one child out of the pond, then they are not responsible when another bystander chooses not to save the child assigned to them and simply walks away. Miller asserts that the others might have a strong "humanitarian reason" to save the remaining child, especially if the costs of doing so are low. Yet they do not have a strict duty.[53]

   The idea that states' duties to refugees are forward-looking remedial duties plays an important role in this. Miller notes that things would look different if the duties incurred by the group were reparative duties of justice. Because reparative duties start from wrongs committed in the past, it is usually clearer on whom they fall. Whoever violated someone's entitlements has a duty to repair the damage. In a slightly more complex way,

this is also the case if reparative duties fall on a group, such as a team that collectively took on responsibility for a task or a collective of citizens which may be held responsible for the crimes committed by a government it elected and supported. Here, the problem of how to distribute responsibility among the members of the group also arises. But, as Miller himself emphasises, because the duty incurred by the collective is a duty of justice, it's clear that the collective would have to repay the damage as a whole.[54] If someone fails to do so, others in the group would have to make up for it. It would be wrong to offload the costs of failing to redress the damage onto those to whom it is owed.

Yet, according to Miller, this is not usually the picture that applies to states' duties to refugees. Since Miller thinks of these as remedial duties of humanity, he notes that those who owe the duty and those to whom it is owed have no previous connection. In principle, the duty to help when someone's urgent needs are at stake falls on everyone capable of helping. As Miller emphasises, if there are several potential helpers, remedial duties need to be assigned to specific agents to become effective.[55] But he argues that the potential helpers don't form a group in a strong sense, so each individual helper can't be held responsible for the failures of the others.

Compare this to David Owen's response to the fairness qualification. Because Owen understands states' duty to protect refugees not as a remedial duty of humanity but as a collective duty of reparative justice, he asserts that states are not just obliged to comply with the basic norms of global refugee protection themselves, but they are also under a duty to secure other states' compliance.[56] Where they cannot do so in permissible ways, they ought to take it upon themselves to remedy other states' non-compliance. This is because states are jointly obliged to ensure that the state system is capable of guaranteeing the human rights of everyone who is subject to its authority. If a state were to insist that it ought to do no more than its fair share, even if that meant that some refugees would go unprotected – as Miller suggests – this would merely recreate the structural vulnerability the state system creates for refugees at another level. It would leave the protection of refugees' human rights once again at the mercy of states' good will in the face of the state system's foreseeable failures to secure all states' compliance with its basic legitimacy requirements.[57]

b) The Indeterminacy Qualification

Miller's second qualification on states' duties to refugees, which I call the indeterminacy qualification, is related to the fairness qualification. It starts with the observation that, in the absence of a global authority that indicates what each state's fair share of refugees is, states may come to different conclusions about how to interpret their fair shares, even as they try to

determine them in good faith.[58] A rich state with a small population, which thinks that population size should count a great deal, for example, may in good faith declare that it has fulfilled its fair share of the responsibility while other states may insist that it ought to take more, given its economic capacity. Differences can also arise about who should be understood as a refugee in the first place and about permissible ways for states to discharge their duties in refugee protection.[59]

What are states to do, however, if the indeterminacy in their interpretations of fair responsibility sharing means that some refugees will remain unprotected? For Miller, these differences are irreducible. They express the legitimate range of interpretations of the principle of fairness which states may come to as a result of their particular history and culture. Since, in the absence of an authority capable of issuing binding quotas, no one can arbitrate those conflicts, Miller argues that an individual state cannot legitimately be coerced to take more refugees than the number it thinks it ought to take under its own interpretation of its fair share.[60] There is no duty, in short, for states to "take up the slack" that results from other states' diverging interpretations of their fair shares.[61]

Miller's indeterminacy qualification follows from his account of states' duties to refugees as duties of assistance in a similar way as his fairness qualification did. He contends that states have an initial duty to distribute their remedial duties to refugees and estimate their own fair share of their states' common responsibility in good faith. But they have no secondary duty to stand in when there are disagreements about what a fair distribution would look like so as to ensure that all refugees receive the protection they are due. To see the difference to a justice-based account of states' duties, consider Owen's take once again. According to Owen, individual states would be obliged to take in more refugees than they believe their fair share to be if otherwise, some refugees would go unprotected.[62] This is, again, because Owen argues that refugee protection is a collective duty of justice to repair the wrongs that the state system as a whole has subjected refugees to. Individual states are obliged not only to discharge their own fair shares but also to ensure that states collectively discharge what they owe to refugees in full.

c)   *The Cost Qualification*

Miller's third qualification, which I call the cost qualification, perhaps most obviously brings out the implications of his conception of states' duties to refugees as duties of humanity. Because states' obligations to refugees are humanitarian obligations, Miller argues, they are subject to a cost threshold which considerably favours states. States ought to do what they can to rescue refugees, but because they had no stake in bringing about their plight in the first place, they cannot be asked to sacrifice too much. In

an earlier text, Miller asserts that, with duties of humanitarian assistance "there is built into the duty a very considerable tilt in favour of the intervener, who has no obligation to incur a risk of the same magnitude as the risk to which the victim is now exposed".[63]

Miller doesn't quite make it clear where a state might appropriately set such a threshold. Given the vast administrative resources of modern states and the relatively low costs of refugee protection compared to other ways of securing non-members' human rights – for example, through a "humanitarian" military intervention[64] – Miller tends to put the cost threshold rather high when he discusses actual examples. But, for now, the point is a conceptual one: as duties of humanitarian assistance, states' duties to refugees have a cost limit which favours states as duty bearers. A state need not show that the costs of refugee protection would be existential for it in order to be justified in not discharging its duty.[65] According to Miller, it would be enough to show that costs are sufficiently high.[66]

Owen, by contrast, rejects Miller's cost qualification. Because he understands states' duties to refugees as duties to redress the wrongs the state system has subjected refugees to, rather than as bystander duties to rescue them, he argues that states aren't free to qualify these duties even as the costs of discharging them are considerable. According to Owen, a state may only refuse to take more refugees when that would mean that it can no longer protect its own citizens' basic rights.[67]

To conclude: Miller, like Owen, argues that states have duties to protect refugees which are based in the fact that refugees' human rights are otherwise unprotected. Yet, according to Miller, states can qualify their duties in refugee protection, and they can do so in three ways: through considerations of fairness, through asserting legitimate differences on how to interpret fair shares and through considerations of costs. On a more general level, this means that for Miller, moral cosmopolitanism – interpreted weakly as giving rise to duties of humanity to non-members – is compatible with the idea that, in some cases, refugees' unprotected human rights do not give rise to a correlative duty in any particular state to protect them. There may be "tragic cases", Miller concludes, "where the human rights of the refugees clash with a legitimate claim by the receiving state that its obligations to admit refugees has already been exhausted".[68] Owen's justice-based account, by contrast, rejects all three of Miller's qualifications. In his account, refugees' claims to protection always have correlative duties.

8.5   Humanitarianism, Human Rights and Minimal Moral Conditions for EU Refugee Policy

Until now, I have shown that many cosmopolitans and statists agree that moral cosmopolitanism, at a minimum, establishes that states have duties

to respect the basic human rights of those outside of their borders, and they ought to make efforts to secure these rights if people's own states fail to do so. From that, they derive a duty for states to protect refugees by offering them asylum on their territory. Yet I also discussed how that duty can be read differently, depending on whether one understands it as a duty of humanity or a duty of justice. It can be qualified considerably if it is read as a duty of humanity, even if it is read as a fairly strong one.

But how shall we understand the duties that actual states in the EU, and the EU as a supra-state polity, hold towards refugees? Is it plausible to think of them as weaker duties of humanity, or should we think of them as stronger duties of justice? There are indeed good reasons to think of what states in the Global North owe refugees as strong duties of justice. It is plausible to agree with Owen's argument that individual states form part of a system of states, which, as a whole, makes refugees distinctly vulnerable to being deprived of their basic human rights. As Sarah Song puts the point: "It is only in a world carved into states that people can become refugees. When people are forcibly displaced from their homeland, there is nowhere else on earth they can go but another state".[69] Even if we don't agree that the state system as whole, through its design, violates the entitlements of refugees, it would still be plausible to argue that states in the Global North, including the EU, have created conditions that violate refugees' entitlements through their very efforts to keep them out. The point has recently been made by Serena Parekh, who contends that states in the Global North aren't merely innocent bystanders to refugees' suffering but have shaped and interpreted the global refugee system in a way that actively harms refugees by preventing them from accessing any meaningful type of protection. As a result of these states' policies, the vast majority of refugees remains trapped in squalid refugee camps in the Global South, where a meaningful restoration of their basic human rights remains out of reach.[70]

However, in this chapter, I want to leave these more fundamental questions aside and end on a more minimal point. Even if we think of states' duties to protect refugees' human rights as weaker duties of humanity, as Miller does, they would still require states to make considerably stronger commitments than the EU and its member states are currently ready to make. In Section 3, I laid out that humanitarian duties are generally weaker than duties of justice. Yet I also noted that, depending on their content and the context of the situation, they can still be pretty weighty. In this final part of the chapter, I would like to discuss a few practical implications for EU refugee policy of understanding states' duties to refugees as relatively strong humanitarian duties.

Humanitarian duties derive much of their strength from the importance of their content and the context of the situation in which they arise. They will be stronger the more urgent the needs are they pertain to and the better position

someone is in to help. On that account, states have duties to protect refugees simply because their most basic needs are on the line, and they are in a position to help, often at relatively little cost to themselves. Indeed, the situation of refugees who take life-threatening journeys upon themselves to reach a place of safety is often comparable to the scenario of the child in the pond. Refugees are quite literally drowning at the shores of rich states in the Global North. Even if, like Miller, we think that these states played no part in bringing about the life-threatening conditions refugees find themselves in on their journeys and that they are therefore like the passing stranger in the example of the child in the pond, we would still need to conclude that they ought to protect the refugees concerned, simply because they are in a position to do so.

Following Miller, we can interpret states' humanitarian duties in an even stronger way. As I noted earlier, Miller agrees with many theorists in the debate that states' duty to protect refugees is a matter of refugees' human rights. In Miller's humanitarian account, we can read human rights as a list of universal basic needs that are strong enough to instil *pro tanto* duties of protection in everyone capable of doing so.[71] There are many implications of understanding access to the fulfilment of basic needs in terms of human rights. One implication that is especially relevant for our context is that human rights, as rights, put their focus on what each individual rights holder is due, rather than what best satisfies the needs of all, taken together. Where rights are at stake, it becomes impermissible to add up the satisfaction gained by some at the expense of others. We would be wrong, for example, to devise a global system of refugee protection that would make the most needy refugees significantly better off but would disrespect the human rights of the rest of the global refugee population.

If we accept that, even on a humanitarian account, if interpreted strongly, refugees may have human rights–based claims to be given access to fulfilling their basic needs, it follows that states have at least three kinds of duties towards refugees. First, and most obviously, however states are to divide up their duties among themselves, each individual state's share must be calculated in reference to states' collective duty to protect the global refugee population in total, rather than only the most needy or most likeable refugees. If states are to divide up their duties fairly, as Miller proposes, the fair share each state is required to take will be the fair share of the global refugee population, however large or dynamic that number is going to be. Secondly, as I will argue, if states can't agree on how to determine fair shares, they have duties to create and maintain institutions that can do so more reliably. But the right to seek asylum, coupled with the duty of non-refoulement, is itself such an institution. Hence, states are not permitted to unilaterally reject an asylum seeker by pointing to the fact that they have already taken in what they think is their fair share of refugees, without ensuring that the refugee in question will be able to receive protection

elsewhere. Thirdly, individual states would only be permitted to qualify their duties to refugees by costs under specific, narrowly defined circumstances, none of which apply today with regard to any state in the Global North, including EU member states. In particular, EU member states currently have no empirical grounds to cite costs from refugee immigration to cultural cohesion as costs that might exempt them from their duty of refugee protection.

The first requirement – that states ought to calculate their fair share in reference to the global population of refugees – is considerably more than any state in the Global North, including EU member states, would be willing to admit. According to the UNHCR, in 2021, only 16% of the world's refugees were hosted in high-income countries, while the vast majority of them remain in one of a handful of countries in the Global South, most of them without a real possibility to access a form of protection that would restore their basic human rights.[72] Taking seriously the duty to fairly share responsibility for refugees would require states in the Global North to greatly extend their efforts at resettling refugees. It would also provide a strong argument against the claim that refugees have a duty to ask for asylum in the first state possible and put into serious doubt wealthy states' practices of preventing refugees from reaching their shores via externalised migration control.

But what if, secondly, states can't agree on how to fairly divide up responsibility? As I noted when I focused on the indeterminacy qualification, states might interpret the principle of fairness differently. They might also disagree on who counts as a refugee or on permissible ways to discharge their duties in refugee protection. For example, the EU and its member states have often argued that they do enough to discharge their share of the global responsibility for refugees if they provide financial support to refugee-hosting states in the Global South and support the capacities of the UNHCR to operate there. In return, they claim they have no duties to resettle more refugees and can legitimately keep refugees from reaching their borders in order to seek asylum. Refugee-hosting states have often disagreed and demanded that states in the Global North resettle a larger number of refugees and agree to more binding resettlement mechanisms.[73]

What is to be done when states disagree about how to distribute their responsibility in refugee protection? If we start from the assumption that states have a shared duty, based in refugees' human rights, to provide protection to all refugees, then they cannot just ignore the fact that their disagreements about how to divide up their shared duty routinely leave some refugees unprotected, even if we assume that states' obligation is humanitarian only. Miller agrees with Owen that states would be obliged to build and maintain a set of global institutions which can distribute states' shares more reliably in such circumstances.[74] Yet he also stresses that it is "hard to

imagine" that such a set of institutions will come into being in the foreseeable future, given the depth of states' disagreement on questions of refugee policy.[75] In the meantime, according to Miller, little can be done. In particular, as I laid out earlier, he argues that states have no enforceable duties to give protection to more refugees than they believe their own interpretation of their fair share mandates them to protect.

However, I believe that the logic of states' shared duty to secure the human rights of refugees would require us to go beyond Miller at this point, even if we stick to his more minimal conception of states' duties to refugees as duties of humanity. A future set of global institutions is not the only possible mechanism to ensure that states' duties to refugees could be distributed more reliably. Refugees' right to seek asylum in particular states, coupled with the duty of non-refoulement, are existing mechanisms that can also serve that purpose. It gives refugees themselves the power to establish a special connection with a state, deciding on states' behalf how to distribute the joint duty to protect refugees more reliably.[76] An individual's right to seek asylum is recognised in all major treaties in international refugee law. It entitles asylum seekers to approach the authorities of a foreign state on its territory or at its borders in order to file an asylum claim there. As of yet, international law recognises no positive duty for states to grant asylum to qualifying refugees.[77] However, it does put states under the duty of non-refoulement, which prohibits a state from returning a refugee to a territory where they are at risk of persecution or other severe harm. Arguably, in many cases, this amounts to a *de facto* obligation for states to provide protection to refugees who have claimed asylum in their jurisdiction.[78] In practice, states may circumvent being obligated in this way through concluding a responsibility-sharing agreement with another state. But even as they do so, this does not absolve them from responsibility entirely. A state would only be permitted to refuse responsibility for an asylum seeker if it can point to another state that is positively responsible for granting asylum.

Lastly, interpreting states' humanitarian duties towards refugees strongly also prompts us to reconsider the cost threshold that states may make good to opt out of their duties. An account that bases states' duties to refugees in refugees' unprotected human rights would need to set the cost threshold for these duties considerably higher than a more minimal humanitarian account.[79] To this effect, David Miller argues that, because states' duties to refugees are remedial duties of assistance rather than reparative duties of justice, states are not required to provide protection to refugees if the costs of doing so are significant. But when exactly would the costs of refugee protection count as significant for a state? Miller settles on an account that understands significant costs as "serious costs to justice and social cohesion" and adds that even with the high levels of refugee immigration

during the so-called 2015 refugee crisis, no state in Europe had hit that threshold.[80]

If we take a state's level of wealth as an indicator of whether large-scale refugee reception would constitute significant material costs for it, then the world's richest states in the Global North, including those in the EU, have few grounds for arguing that discharging their duty of refugee protection comes with excessive costs. The world's poorest states will have a much more plausible case for citing cost threshold than any state in the Global North. But what about costs to cultural cohesion? Two kinds of questions follow for the purpose of this discussion. The first is whether, as a matter of principle, it is permissible at all for a liberal democracy to count costs to cultural cohesion among the costs that might be imposed by refugee immigration. The second is whether, even if that were to be permissible, the actual costs to cultural cohesion that any existing EU state has incurred as a consequence of refugee immigration would be high enough to justify suspending its duties to take in refugees.

So, first, would liberal democracies be permitted at all to count the cost to cultural cohesion as a cost that, if sufficiently high, might exempt them from their duty to take in refugees? The idea that immigration presents costs to a nation's cultural cohesion seems to suggest a homogeneous view of the nation's self-identity that can easily come at odds with a liberal state's commitments to the equal respect of its citizens.[81] There is broad agreement among theorists of liberal democracy that these commitments would prohibit a liberal state from fostering a distinct cultural, religious or ethnic self-identity since, in doing so, it would discriminate against citizens who don't share these identities.[82] The only common identity that the state would be permitted to foster on this account would be an exclusively civic identity, which allows citizens to imagine themselves as taking part in joint projects with their co-citizens through the institutions they share.[83]

However, it may be the case that in actually existing democracies, citizens, in fact, are strongly attached to the idea of a culturally, religiously or ethnically homogenous national identity and that, moreover, it is this attachment which allows them to imagine themselves as pursuing common projects with their co-citizens and to cultivate a sense of solidarity with them. So, even though it would be impermissible for a liberal state to present itself to its citizens in terms of a particular cultural identity, empirically, it may be the case that citizens are willing to understand their state's politics as an expression of their own collective doing only because they see it as representing a particular cultural identity. If citizens no longer felt that they interacted with their co-citizens on the basis of this identity, they may indeed be less willing to accept political decisions in their state. Could a liberal state cite this as a cost in the context of large-scale refugee immigration?

For the purpose of this chapter, I am going to assume, following Clara Sandelind,[84] that there may indeed be circumstances in which it could do so. This does not mean that it would be permitted to foster a particular cultural identity after all. It would mean, however, that it could cite as a cost the risk that, given that the source of solidarity many of citizens actually harbour is tied to a specific, culturally charged national identity, less cultural cohesion would mean lesser support for the state's political projects. However, Sandelind adds that the state could only make good such costs if it also accepted an obligation to make efforts to actively foster more civic and less culturally charged public identities among its citizens. Otherwise, states with particularly exclusionary national cultures would have perverse incentives to opt out of their duties in refugee protection, precisely because they have these cultures.[85]

Yet even if we grant that costs to cultural cohesion may count in principle, we would still need to ask whether current levels of immigration in the EU impose costs high enough to hit Miller's threshold. Here, it's relevant not only to assess current levels of immigration but also to look at the political identities of EU member states. Empirically, all member states are liberal democracies – indeed, this is a prerequisite for EU membership – whose national cultures are fluid and contested rather than bounded and homogenous. Even member states that are fairly homogenous demographically feature contested public cultures. Poland, for example, is very homogenous in ethnic and religious terms, with ethnic Poles adhering to Roman Catholicism forming the vast majority of the country's population. Yet interpretations of the country's public cultures in the face of refugee immigration are strongly contested. For example, in the context of the right-wing conservative Polish government's hostile reaction to increased refugee migration into the EU as part of the European 2015 and 2016 "refugee crisis", mayors of major Polish cities signed a joint declaration, in which they declared their cities to be open to immigrants and emphasised the importance of the values of tolerance and inclusiveness for their cities' local cultures.[86] It therefore seems highly unlikely that refugee immigration in the EU would positively threaten, rather than simply enrich or modify, national cultures in Europe.[87]

Consequently, even in the humanitarian picture of states' duties to refugee protection, given the internal diversity of EU member states and the fact that current levels of refugee immigration to the EU remain modest compared to member states' material capacities to receive them, EU member states would not be permitted to reject refugees by citing excessive costs.

8.6   Conclusion

To sum up, in this chapter, I discussed what the idea of moral cosmopolitanism entails for states' refugee policies and inferred some implications

for the EU from my discussion. I started by observing that, while there is widespread agreement that moral cosmopolitanism puts states under a duty to provide protection to refugees in some sense, there is little agreement on what such a duty would entail in more detail. Drawing on discussions in the field of global justice, I suggested that a lot depends on how we understand the structure, rather than just the content, of the duties a state holds towards those outside its borders. Reading states' duties to refugees as duties of reparative justice implies seeing states – either individually or as part of the system of states – as complicit in producing refugee displacement and ascribing them strong reparative duties on this basis. Reading them as weaker duties of humanitarian assistance, by contrast, implies conceptualising states as innocent bystanders to refugees' displacement and ascribing them duties to help refugees that are grounded solely in the urgency of refugees' needs. The difference has practical implications for the extent and limits of states' duties in refugee protection. To demonstrate that, I discussed David Miller's account as an example of a position that conceptualises states' duties to refugees as duties of humanitarian assistance and showed that it puts these duties under three kinds of qualifications: the fairness qualification, the indeterminacy qualification and the cost qualification. I went on to show that these qualifications are absent from David Owen's account, which understands states' duties to refugees as stronger duties of justice.

In the last part of the chapter, I took on a more applied perspective and argued that, even with its limitations, Miller's assistance-based view of states' duties in refugee protection is still stronger than the view EU policymakers often espouse. As a minimum, it would require the EU, first, to make an earnest effort to fairly share responsibility with other states, particularly states in the Global South, which host the vast majority of refugees. Secondly, if states disagree on how fair shares should be distributed, it would imply that refugees themselves must be given the authority to put a state under an obligation to protect them by making use of their right to seek asylum. And, thirdly, the EU would only be permitted to qualify its duty of hosting refugees by citing considerations of costs under specific, limited circumstances, none of which are likely to apply to EU member states any time soon.

Notes

1. See, among others, Beck/Grande 2007; Bohman 2007; and Habermas 2012. I am indebted to Andreas Niederberger, Daniel Sharp, the Research Colloquium in Political Philosophy at the University of Duisburg-Essen and, especially, Marie Göbel for their encouragement and their helpful comments and suggestions.
2. Bellamy/Lacey 2019 and Bhambra 2017. See also the discussion of the effects of the "refugee crisis" on the EU's self-understanding in Lavenex 2019 as well as Niemann/Zaun 2018.

3. See Habermas 2012; Seubert 2018.
4. As scholars of the securitisation of migration in the process of European integration have long pointed out. See Balzacq 2008; Guiradon 2000; and Huysmans 2000.
5. For example, see Ceccorulli 2019 on the securitisation of the Schengen zone in the wake of the EU's "refugee crisis".
6. Eriksen 2006, 253.
7. Human rights–based refugee definitions are widely – though not universally (see, among others, Lister 2013, but also Gibney 2015) – adopted in the philosophical discussion on refugee ethics. Note that this distinguishes philosophical refugee definitions from the main approach in international law, which, based on the 1951 Refugee Convention, defines refugees more narrowly as people subject to specific forms of group-based persecution. However, human rights–based approaches have recently come to play a wider role in international law as well (see Hathaway 2021).
8. See Boucher/Gördemann 2021 on the humanitarian approach the EU took when negotiating states' duties under the Global Compacts on Refugees and Migration.
9. See, among others, Fitzgerald 2018.
10. Kleingeld/Brown 2019.
11. Note that this is not the only way of understanding cosmopolitanism. Other accounts interpret cosmopolitanism primarily in legal and political rather than moral terms. They often build on Kant's legal and political writings in doing so. On the difference between political and moral cosmopolitanism in Kant, see Kleingeld 2016. On interpretations of Kantian cosmopolitanism today, see Benhabib 2004, Ch. 1, and Bohmann 2007.
12. Pogge 1992, 49.
13. Prominent versions of such an idea of institutional cosmopolitanism can be found in Held 1995 and Archibugi 2008. See also Ulaş 2018.
14. Beitz 2005; Pogge 1992.
15. See Valentini 2011, 6.
16. Influential elaborations of such "non-relational" versions of cosmopolitanism can be found in Caney 2005; Carens 2013; and Tan 2004.
17. Prominent takes of such "relational" versions of cosmopolitanism are in Pogge 1992 and Moellendorf 2002.
18. Blake 2001; Nagel 2005.
19. See, among others, Blake 2013 and Freeman 2006. Note that there are also a number of intermediate positions between strong and weak cosmopolitanism. See Cohen/Sabel 2006 and Valentini 2011.
20. See, for example, the discussion in Sangiovanni 2007, 38.
21. For example, see the discussions in Miller 2007, Ch. 7; Miller 2016, Ch. 2; and Blake 2019, 82 et seq.
22. Following Valentini 2011, I will use the term "duties of humanity" synonymously with "humanitarian duties" and "duties of humanitarian assistance".
23. For a discussion of what strong cosmopolitan duties would mean in the context of the EU, see Kamminga 2017.
24. See Valentini 2011, 8.
25. For an account of duties of justice in terms of control over resources, see Barry 1982.
26. See, paradigmatically, O'Neill 2005.

27. See, generally, Pogge 1992 and Young 2006. For the context of refugee protection, see Souter 2022.
28. For a discussion of states' reparative duties to refugees that includes the latter point, see Souter 2022, 22.
29. The point is made by statists and strong cosmopolitans alike; compare Carens 2013, 195; Miller 2016, 114–115; Owen 2020, 87–88; Song 2019, 115; and Walzer 1983, 49–50.
30. Valentini 2011, 8.
31. Walzer 1983, 33.
32. Brian Barry expresses the difference concisely when he writes that "obligations of humanity are goal-based, whereas those of justice are rights-based" (1982, 244). He goes on to note that "humanity is a question of doing good; justice is a question of power" (ibid., 245).
33. See Valentini 2011, 7 et seq., 52; as Valentini clarifies, this holds only if we assume that the content of the duty stays the same – we can't say that duties of assistance are per se weaker than duties of justice. Thus, my duty to save a drowning child will be stronger if it is thought of as a duty of reparative justice. But even if it is thought of as a duty of assistance, it will normally be stronger than – for example – a reparative duty to compensate my friend for damaging their car (Valentini 2011, 52; see also Goodin 2017).
34. See Singer 1972.
35. See, recently, the discussion in Miller 2020. For an argument that the cost threshold in rescue cases is, in fact, considerably higher than Miller indicates, see Wollard 2015, Ch. 7.
36. See Valentini 2011, 51–52.
37. For a classic account of how the determinateness of duties is related to their stringency, see O'Neill 1996, Ch. 5. For a recent discussion that is critical of O'Neill's argument, see Gilabert 2016.
38. In the refugee debate, Shacknove has taken this position, arguing that "where no special or contextual relation exists, no duty to protect or to aid is incurred. Acting may be laudable, but it is not mandatory" (1985, 41).
39. Kuosmanen 2013, 28.
40. See Souter 2022, Ch. 2.
41. The point is emphasized by David Miller in Miller 2020, 337.
42. See Kuosmanen 2013, 33–34.
43. In the discussion on refugees, this is stressed by both Owen 2020 and Kuosmanen 2013.
44. Miller 2007, 227.
45. This is not an uncontroversial position: Many theorists of human rights argue that a human right *always* corresponds with a duty on the part of some other agent, or otherwise, it is not a human right at all. (See, among others, O'Neill 2005). Miller rejects this and argues that human rights are only "*potentially* obligation-imposing" (Miller 2007, 164, supra note 1), since the obligations they impose can be qualified for various reasons: for example, when resources are too scarce to satisfy everyone's human rights (Miller 2007, 248).
46. However, it should be noted that for Owen, immediate access to social and political rights is owed to a refugee who has lost the political standing that allows them to claim these rights in their home state. He argues that loss of political standing is usually the effect of persecution by one's home state, as it is defined in the 1951 Refugee Convention. See Owen 2020, 54 et seq.
47. Miller 2007, 2016.

48. See the discussion in Miller 2007, Ch. 7.
49. Owen 2020, 66 et seq.
50. This could mean that states can also defy non-refoulement, and Miller some-times implies that this is, indeed, how we should understand it (cf. Miller 2016, 92; see also the discussion in Hoesch 2018, 165). But this is not necessarily the case as states could have independent negative duties not to actively push asylum seekers back into a situation where they face the risk of persecution and other severe harms. For the sake of simplicity, I'll set aside this question and assume that, for now, we are only talking about a state's positive duty to provide refugees with protection.
51. See the discussions in Hoesch 2018, Miller 2011, Owen 2018, Owen 2010 and Tomalty 2017.
52. Miller 2013.
53. Miller 2007, 247 et seq.
54. Miller 2013, 219–220.
55. See, especially, the discussion in Miller 2020, 337.
56. Owen 2020, 69.
57. Owen 2016, 286.
58. Miller 2016, 162–163. Miller clarifies the good faith requirement in Miller 2011, 2033–2034.
59. Cf. Miller 2011, 2033–2034.
60. See Miller 2011, 2033–2034.
61. See Miller 2011, 2033–2034, and, more generally, Miller 2013, Ch. 9.
62. See Owen 2016, 283–284.
63. Miller 2001, 243.
64. Cf. Miller 2001.
65. There are at least two distinct ways to reconstruct the deeper normative architecture of qualifying an agent's duties by costs: (1) We might say that when discharging a duty comes with high costs, this nullifies the duty altogether, in much the same way as the duty would be nullified if the agent was physically incapable of fulfilling it. If I can't swim, I have no duty whatsoever to jump into deep water to save a child. (2) Alternatively, we might say that the duty still applies even as it comes with high costs, but it may be overridden by other considerations in a given empirical situation. That is, the duty applies *pro tanto*, but it does not apply all things considered. I thank Daniel Häuser for drawing my attention to this distinction.
66. See Miller 2016, 163; see also Miller 2001, 243. As already noted in note 38, the status of states' duty of non-refoulement is unclear in Miller's discussion, and I will sideline it here.
67. Owen 2016, 284.
68. Miller 2007, 227.
69. Song 2018, 116–117.
70. Parekh 2020, 103 et seq.
71. On Miller's conception of human rights, see Miller 2007, Ch. 4.
72. See UNHCR 2022, 2.
73. See, for the example of the MENA region, Martin/Davis/Benton/Waliany 2019 and Salam 2016.
74. Miller 2011, 2033–2034.
75. Miller 2016, 88.
76. See the discussion in Kuosmanen 2013, 33–35.
77. Note, however, that such a duty is recognised in some regional treaties, including the EU's Charter for Fundamental Rights. See the discussion in Gil-Bazo 2008.

78. Kuosmanen 2013, 35.
79. For a recent discussion on determining costs in the context of humanitarian and reparative obligations, see Souter 2022, Ch. 7.
80. Miller 2016, 163.
81. For an overview of ideas of social cohesion within liberal democracies, see Sevinç 2022. For a recent critical account of Miller's understanding of cultural cohesion in the context of immigration policy, see Finlayson 2020.
82. Rawls 2005 is a classic elaboration of this point.
83. Stilz 2017.
84. Sandelind 2021.
85. Ibid., 125–126.
86. Deklaracja 2017.
87. See Souter 2022, 141.

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9 The European Union's Refugee Policies

Cosmopolitan and/or Democratic?

Martin Deleixhe

9.1 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.[1] 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.[2] 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.[3] 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.[4] 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.[5] 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.[6] 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[7] 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.

9.2   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.[8] 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".[9] 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".[10] 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.[11] 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.[12] 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.

9.3   . . . 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.[13] 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".[14] 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.[15] 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"[16] 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).[17] 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.[18] 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.[19] 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.[20] 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.[21] 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.[22] 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.[23] 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).[24] 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.[25] 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.[26] 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.[27]

9.4 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.[28] Sandra Lavenex, for instance, does not mince words and calls the current Common European Asylum Policy a form of "organized hypocrisy"[29] 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 internecine institutional conflicts, the European Union eventually fails to reconcile organisational obligations and normative commitments, at the expense of the asylum seekers.[30]

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.[31] 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.[32] 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.[33] 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").[34]

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").[35] 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.[36] 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".[37] 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.[38]

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.[39] 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.[40] 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.[41] 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.[42] 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-functionalist 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".[43] This condition has been used in the past to restrict and constrain the mobility of Roma families from Bulgaria and Romania.[44] 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.

9.5   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.[45] 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.[46]

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)[47] with a staunch nationalist rebuke of the perceived intrusiveness of international norms into domestic decision-making.[48] 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".[49] 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"[50] 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*,[51] 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"[52] – 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.[53] 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.[54] 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.[55] 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.[56] 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.[57] 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.[58] 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.[59] As a result, the liberal definition of democracy would prove more inclusive and would lean towards a more cosmopolitan approach.[60]

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.[61] 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 civilization. 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.[62] 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.[63] 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.[64] 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.[65]

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.[66] 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.[67] 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".[68] 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.[69]

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".[70] 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.[71] 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.[72] 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.

9.6   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.[73] 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.[74] 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 fail-
    ing 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 Con-
    stant 1986, 271. I am aware that competing interpretations exist, including a
    liberal construal that emphasises convincingly Rousseau's concerns for indi-
    vidual 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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Index