Democratic Legitimacy in EU Migration Policies

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RECONNECT

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Content

Abstract

This working paper discusses legitimacy challenges in the internal and the external dimension of EU migration policies. It puts particular emphasis on migration policies related to asylum, which has been the most contested aspect of migration ever since the so-called migration crisis. For this reason, it is also in this area that the need is most urgent for reconciling the EU with its citizens. This working paper evaluates the (democratic) legitimacy of EU migration policies by assessing four interconnected themes. First, it asks what the framework is from which to assess the democratic legitimacy of the EU. Secondly, the working paper identifies issues of democratic legitimacy that EU migration governance gives rise to. Thirdly, the paper turns to the complex interplay of values and preferences in migration issues, and the impact of that interplay on EU legitimacy. Fourth, the paper looks at the impact of populism and post-truth politics on the perceived legitimacy of EU migration policies.

1. Introduction – Purpose and Scope

Democratic Legitimacy in EU Migration Policies is the first of three working papers published within work package 13 ('Migration') of the RECONNECT project. In this working paper, we assess the legitimacy, and more specifically the democratic legitimacy, of the European Union's (EU or Union) migration policies.

The topic of migration and migration policies is broad. Migration policies are tightly intertwined with several other policy fields such as development and trade, as well as security and conflict resolution.[1] All of these fields moreover sit at the intersection of migration policy and foreign policy, and therefore include a wide array of sub-dimensions (such as visas, returns, border control, development aid etc.). Migration policy-making has both an internal aspect regarding intra-EU migration, and an external aspect that is interrelated to other foreign policies. EU actions concerning migration consist first of all of frameworks and rules to manage legal migration flows. This includes migration and movement of asylum seekers, highly skilled workers, students, researchers and seasonal workers, and family members of migrants through family reunification. In addition to these, EU migration policies concern processing of asylum requests, relocation of asylum seekers, and readmission agreements for returning illegal migrants.[2]

Migration governance is a key area of EU action. The Strategic Guidelines for legislative and operational planning within the Area of Freedom, Security and Justice (AFSJ) for the 2014-2020 period, recognize the management of 'migration in all its aspects' as one of the priorities of the EU.[3] National governments and the EU share a common interest in acting collectively to address challenges that cannot be resolved by the actions of a single state.[4] Migration is a paramount example of such a challenge. Migration policy-making is characterized by multi-level governance, and competences in both the internal and external dimension of migration are shared between the EU and its Member States. Although the EU plays an important role in migration management, some elements of this policy are still very much within the purview of the Member States.

In this working paper, we discuss legitimacy challenges in EU policy-making in both the internal and the external dimension of migration policies. The working paper will have a particular emphasis on migration policies related to asylum, which has been the most contested aspect of migration ever since the so-called migration crisis. It is also in this area, in other words, that the need is most urgent for reconciling the EU with its citizens. Political sensitivity and disagreement over the nature and scope of solidarity in the EU's common policy on asylum, immigration and border control, undermines the EU's ability to pursue common policies in these areas. As policy-making in migration issues has become a subject of great political controversy, the current scenario has even been characterized as a constitutional moment in which conceptual foundations of the Union are being exposed and reconfigured. Policy-making

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[1] Faustini-Torres, L. 2020. Another nexus? Exploring narratives on the linkage between EU external migration policies and the democratization of the southern Mediterranean neighborhood. *Comparative Migration Studies,* 8(9): 1-22.

[2] An up-to date overview of EU policies in these areas can be found at https://www.consilium.europa.eu/en/policies/migratory-pressures/managing-migration-flows/.

[3] European Council. Council Conclusions 26–27 June 2014.

[4] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2): 207-225.

in migration issues is also complicated by a changing political landscape and populist contestation, preventing EU institutions from developing the Common European Asylum System (CEAS).[5] The EU Commission has for long been forced to stall its plans for redesigning the Dublin system, due to Member State disagreement.[6] Other features, such as a 'race to the bottom' in terms of the level of protection granted to asylum seekers has been tangible among some Member States, further challenging the legitimacy of the EU as an actor in migration issues.

As crises tend to highlight deficits of all sorts, the current debate on EU migration policies provides insights into the legitimacy challenges that the EU faces.[7] This working paper addresses the (democratic) legitimacy of EU migration policies by answering four interconnected research questions. First, as the EU is not a state, it is important to ask what the framework is from which to assess the democratic legitimacy of the EU. Secondly, the working paper identifies what issues of democratic legitimacy EU migration governance gives rise to. Thirdly, the paper turns to the complex interplay of values and preferences in migration issues, and asks how EU fundamental values enter the legitimacy debate. Fourth, the paper looks at how populism and post-truth politics link to the perception of legitimacy of EU migration policies.

After this introduction, the working paper has been divided into three chapters. Chapter two theorizes legitimacy and democratic legitimacy in general. In this chapter, we conceptualize democratic legitimacy and its manifestation in the EU. We focus the analysis on (democratic) legitimacy specifically in EU migration policies. We illustrate the nature of multi-level migration governance, and discuss the state of input and output legitimacy in the migration policies. In this regard, in chapter three, we evaluate the challenge of balancing key underlying principles of EU migration policies. In the fourth chapter, we contemplate the impact of populism and politicization on policy-making and the legitimacy of EU migration policies. Finally, the paper provides concluding remarks on challenges to democratic legitimacy in the migration policies and stakes out future paths for remedying those challenges.

2. EU and Democratic Legitimacy

2.1 Theorizing Democratic Legitimacy

The notion of democratic legitimacy consists of two interrelated concepts: democracy and legitimacy. Both concepts escape an easy definition. To start with the latter, legitimacy, as conceptualized for example by Joseph Raz, is what justifies authority. Legitimate political

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[5] Thym, D. 2016. The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy. *Common Market Law Review,* 53(6): 1545-1573, (p. 1573).

[6] Zalan, E. 2020. Court: Three countries broke EU law on migrant relocation. *EUObserver*, 2 April. Available at: https://euobserver.com/migration/147971. In an attempt to address flaws of the current system, the European Commission at the time of writing launched a proposal on a New Pact on Migration and Asylum. Commission Communication COM/2020/609 final (23 September 2020).

[7] Zaum, D. 2016. Legitimacy. In: *The Oxford Handbook of International Organizations*. Katz Cogan, J., Hurd, I. and Johnstone, I. (eds.). Oxford University Press, Oxford, UK. (p. 1112).

authority has the right to issue laws and to enforce them. In the absence of legitimacy, any attempt to rule is rather an exercise of unjustified de facto power.[8]

As international organizations (both intergovernmental and supranational) essentially exercise public authority, legitimacy has become a parameter by which to assess that authority. Legitimacy is considered essential if an organization is to fulfil its functions successfully. The more legitimate an organization is in the eyes of its members, the greater the prospects for adopting decisions within that organization, the greater the strength of those decisions, and the greater the ability of states to build domestic support to carry them out.[9] Beetham, in his study on the concept of legitimacy, identifies three elements of legitimacy of institutions: conformity with established rules; justification of rules by reference to shared beliefs, and; existence of consent by the subordinate.[10] The first of these elements could be labelled formal legitimacy, and is closely intertwined with the lawfulness or legality of an act.[11] However, to focus on the legality of an act fails to exhaustively explain the legitimacy of organizations. As Weiler demonstrated already 20 years ago in respect of the EU, although questions of formal legal validity may have been the main concern in the early days of European integration, legitimacy concerns have gradually turned to questions of democratic character and the possibility of founding EU law upon a common identity. The further European integration has proceeded, the more insufficient a mere focus on legality has proved as a source of legitimacy.[12]

A substantive conception of legitimacy takes hold of the justification of the exercise of powers, in order for those in power to enjoy moral authority.[13] A rule may be illegitimate even if it has been lawfully enacted. The paradigm example is the fascist regime, the laws of which may be formally valid, but can be claimed to nevertheless lack substantive legitimacy.[14] Legitimate governance, in other words, requires that government actively guarantees certain values.[15] The problem with this aspect of legitimation of authority is that an international organization often embraces a number of values, which may pull in different directions. As will be seen, this is very much the case also in EU migration discourse. In looking to make 'fair' decisions, then, the substantive legitimacy becomes dependent on whose fairness it is that serves as the guiding standard.[16]

Another way to unpack the concept of legitimacy is to examine what kinds of underlying beliefs contribute to an institution's legitimacy. The first underlines shared beliefs about normatively desirable outcomes, and the ability of institutions to achieve them (such as: welfare gains,

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[8] Raz, J. 1986. *The Morality of Freedom*, Oxford University Press. Peter, F. 2013. Authority and Legitimacy. In: *The Routledge Companion to Social and Political Philosophy*. D'Agostino, F. and Gaus, G. (eds). Routledge: 596-607, (p. 596).

[9] See e.g. Bodansky, D. 2008. The Concept of Legitimacy in International Law. Max Planck Institute for Comparative Public Law and International Law, *UGA Legal Studies Research Paper*. No. 07-013; Caron, D. 1993. The Legitimacy of the Collective Authority of the Security Council. *American Journal of International Law,* 87(4): 552-588.

[10] Beetham, D. 1991. *The Legitimation of Power*. Red Globe Press. (p. 15-25).

[11] 'Lawfulness' is for example the definition of legitimacy of Garner, B.A. 2004. Black's Law Dictionary.

[12] Weiler, J. 1999. *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration*. Cambridge University Press.

[13] Beetham, D. 1991. *The Legitimation of Power*. Red Globe Press. (p. 57).

[14] The example is used by Habermas, J. 1975. *Legitimation Crisis*. Beacon Press. (p. 100).

[15] Koskenniemi, M. 2003. Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism. *Associations,* 7: 349-373, (p. 369) and Beetham, D. 1991. *The Legitimation of Power*. Red Globe Press. (p. 17). Often these values are captured in terms of fairness and justice. Weiler, J. 1999. The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration, at 80-81.

[16] Koskenniemi, M. 2003. Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism. *Associations,* 7: 349-373, (p. 363).

promotion of human rights, security). Failing to achieve these outcomes or changes in the underlying beliefs as to what outcomes are normatively desirable can lead to challenges to an organization's legitimacy. A second set of beliefs relates to what has been called process legitimacy: the ways in which power is exercised, the processes by which rulers are selected and by which decisions are made, and the processes that ensure that power is exercised in a procedurally fair manner (such as: representation, transparency)[17]. The third set of legitimating beliefs concern the identity and particular qualities of an organization. In this sense, legitimacy may arise from shared beliefs about its epistemic capacities, the ability to muster resources and expertise, or from certain qualities of its membership (such as democratic character of Member States).[18]

Finally, legitimacy can be used to indicate consent by the subordinate. This is not the same thing as the abstract consent of members of an organization as a source for the exercise of legal powers. Mere membership in an organization is not enough to legitimate all consequent activities of an organization.[19] Instead, consent needs to be renewed. The more an organization evolves, the stronger the need will be for bestowing social legitimacy through such renewal.[20] Social legitimacy (as denoting consent of the subordinate) also becomes the means through which both the appropriateness of upholding certain values and the legality of acts is upheld.[21]

Democracy has been called the 'touchstone' of social legitimacy.[22] Contemporary political philosophy commonly considers democratic decision-making and/or some form of public reasoning to be the main source of legitimate authority. Democratic decisions are legitimate if they are the outcome of a deliberative decision-making process that satisfies conditions of political and epistemic fairness. When these conditions prevail, those under its rule even have a duty to obey the authority.[23]

In a minimal view, democracy is 'a system in which rulers are selected by competitive elections', where such elections are held on a regular basis and under conditions of universal suffrage.[24] Beyond this minimal view, democracy embraces the political equality of citizens, and facilitates 'collective self-rule'.[25] Democracy has been said to owe much of its moral authority to a grander vision: '… a vision of a community coming together, on terms of equality, to forge a common

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[17] See also Morlino, L., Piana, D., Sandulli A. and Corkin, J. 2019. Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice. *RECONNECT Deliverable D4.2.* Available at: https://reconnect-europe.eu/wp-content/uploads/2020/01/D4.2.pdf

[18] Zaum, D. 2016. Legitimacy. In: *The Oxford Handbook of International Organizations.* Katz Cogan, J., Hurd, I. and Johnstone, I. (eds.) Oxford University Press, Oxford, UK. (p. 1110-1111).

[19] Bodansky, D. 1999. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?. *American Journal of International Law,* 93(3): 596-624, (p. 609-610).

[20] The term social legitimacy is used by Weiler, J. 1999. *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration.* Cambridge University Press. (p. 80-81). Beetham, D. 1991. *The Legitimation of Power.* Red Globe Press (p. 19 and 94).

[21] Koskenniemi, M. 2003. Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism. *Associations,* 7: 349-373, (p. 371).

[22] Bodansky, D. 1999. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?. *American Journal of International Law,* 93(3): 596-624, (p. 599).

[23] Peter, F. 2013. Authority and Legitimacy. In: *The Routledge Companion to Social and Political Philosophy.* D'Agostino, F. and Gaus, G (eds.) Routledge. p. 596-607, (p. 598-604).

[24] Owen, D. 2003. Democracy. In: *Political Concepts.* Bellamy, R. and Mason, A (eds.) Manchester University Press. Manchester, UK. p. 105-117, (p. 105-106).

[25] Owen, D. 2003. Democracy. In: *Political Concepts.* Bellamy, R. and Mason, A (eds.) Manchester University Press. Manchester, UK. p. 105-117, (p. 107).

interest and pursue the common good'.[26] The quote contains two elements. First of all, democracy is premised on the existence of a community. This community must be characterized by a shared collective identity and loyalty (or, a *demos*). If there were no sense of commonness, then the aims and concerns of the organization would stand out as unrecognizable to the participants. If there is no *demos* by whom and for whom democratic discourse takes place, then there can be no functioning democracy.[27] This, indeed, brings about some challenges to the EU. Social legitimacy, being related to fundamental values of the *demos* and the policies corresponding to those values, is challenging to enhance unless there are common European values.

In order to make deliberation within an organization possible to begin with, the very justification of that organization as an expression of a community cannot be in dispute.[28] This does not mean that there needs to be agreement between members on the political issues that the organization is concerned with.[29] The values of the EU, constituting the foundation of the EU as a community, are stated in the EU Treaties. However, how those values are perceived and manifested in the Member States varies. This leads to the second aspect of the quote: democratic legitimacy follows from that there is in decision-making an input that makes that decision-making considerate of and sensitive to that *demos*, including the disagreements within it. It is through this process that public political discourse is created. It is also as a result of such discourse that true agreement (on contentious matters) can be reached.[30] As will be seen, the polarizing effect of populist rhetoric questions the image of the EU as an expression of a community, and potentially distorts the process by which consent is renewed.

2.2 Democratic Legitimacy Beyond the State

Democracy can mean different things. Whereas David Held distinguishes nine models (classical democracy; republicanism; liberal democracy; direct democracy; competitive elitist democracy; pluralism; legal democracy; participatory democracy; and deliberative democracy), there are also other ways of distinguishing between forms of 'rule by the people'.[31] This range of categorizations reflects the fact that democracy and legitimacy are perspectival. Individuals will have different conceptions and expectations of legitimacy.[32] In addition, democracy will always be unfinished, subject to contest, and an ideal that never can be fully realized. We can

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[26] Roth, B.R. 2000. Evaluating Democratic Progress. In: *Democratic Governance and International Law*. Fox, G.H. and Roth, B.R. (eds.). Press Syndicate of the University of Cambridge. p. 493-516, (p. 500). See also Morlino, L., Piana, D., Sandulli A. and Corkin, J. 2019. Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice. *RECONNECT Deliverable D4.2.* Available at: https://reconnect-europe.eu/wp-content/uploads/2020/01/D4.2.pdf

[27] Weiler, J. 1999. *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration*. Cambridge University Press. (p. 381) and Archibugi, D. 2004. Cosmopolitan Democracy and its Critics: A Review. *European Journal of International Relations,* 10(3): 437-473, (p. 461).

[28] Although admittedly, even if there was such a dispute, the alienation would still be only relative, as that actor (disputing the community) would still be voicing its concerns in terms that are familiar to the other actors, hereby demonstrating the existence of *some* kind of a community. See Lagerspetz, O. 1998. *Trust: The Tacit Demand*, Springer. (p. 130).

[29] Notably, one can disagree with the substance of a decision, but still accept it as legitimate. Bodansky, D. 1999. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?. *American Journal of International Law,* 93(3): 596-624, (p. 601-602).

[30] Lagerspetz, O. 1998. *Trust: The Tacit Demand*. Springer (p. 107 and 110).

[31] Held, D. 2006, *Models of Democracy*. Stanford University Press. See overview in Timmer, A. 2013. *Concepts of human rights, democracy, and the rule of law: a literature review. Fostering Human Rights among European Policies*. Work Package No. 3 – Deliverable No. 1. doi.org/20.500.11825/67.

[32] Koskenniemi, M. 2003. Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism. *Associations,* 7: 349-373, (p. 356).

therefore only talk about democratization of established power structures as a measure of democracy.[33] This means that there will always be a variety in normative reference points by which to judge democratic legitimacy. In short, democratic legitimacy becomes a question of spectrum.[34]

This variety of reference points is increased further, when considering the meaning of democratic legitimacy beyond the state context. After all, historically, the development of liberal democracy is inseparable from the nation-state, where the people is conceived as the nation. A congruent relationship is presumed to exist between those experiencing outcomes, and those taking decisions.[35] With this point of departure, the internationalization of decision-making can entail a loss of democracy almost per definition, as citizens are removed further from the arenas where actual decisions are made, and parliamentary control over the executive becomes less effective.[36]

In order to meet this challenge, the democratic character of international decision-making needs to be ensured. Although most organizations display democratic 'building blocks', scholars generally seem to agree that national democratic models cannot easily be transposed to the international level.[37] Organizations suffer from flaws, which make them poor substitutes for national democratic governance. As it is not clear how preconditions of a democratic polity can be realized in organizations, the deliberative process is bound to be defective.[38] The more serious these concerns become for a particular organization, the more likely that organization is going to face a legitimacy critique.

What complicates things further, is that whereas in a domestic context democratic legitimacy is concerned with the acceptance of a government and its decisions by the (majority of) citizens, in organizations different conceptions of the constituency coexist. Depending on the image of the constituency, proposals for how to improve the legitimacy of organizations take different shapes. Since international organizations predominantly consist of representatives of state governments, this creates a logical expectation that the legitimacy of an organization should flow from those representatives. When this side of the democratic legitimacy of organizations is emphasized, interest is turned for example to the representation and responsiveness of organizations to its Member States, the openness and transparency of decision-making processes, and accountability mechanisms.[39] Emphasizing the role of individuals as the source of democratic legitimacy, on the other hand, turns interest to the nature and role of

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[33] Eriksen E.O., 2009. *The Unfinished Democratization of Europe*. Oxford University Press, Oxford, UK.

[34] See Robert A. Dahl, 1989, *Democracy and Its Critics*, New Haven: Yale University Press, Mansbridge, J. 2003. Rethinking Representation. *American Political Science Review,* 97(4): 515-528, (p. 515).

[35] Marks, S. 2000. *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology*. Oxford University Press. (p. 80-83).

[36] Rubenfeld, J. 2004. Unilateralism and Constitutionalism. *New York University Law Review,* 79(6) even makes a claim that international law is antidemocratic.

[37] See e.g. de Búrca, G. 1999. The Institutional Development of the EU: A Constitutional Analysis. In: *The Evolution of EU Law*. Craig, P. and de Búrca, G. (eds.), Oxford University Press: Oxford: 55-81, and Wouters, J., Bijlmakers, S., Hachez, N., Lievens, M. and Marx, A., 2013. Global governance and democratic legitimacy: a bottom-up approach. *Innovation: The European Journal of Social Science Research,* 26(3): 197-200.

[38] On deliberation, its preconditions, and realizability, see e.g. Neyer, J., Discourse and Order – On the Conditions of Governance in Non-Hierarchical Multi-Level Systems, in *ARENA Working Papers* 9/2002.

[39] von Bogdandy, A. 2004. Globalization and Europe: How to Square Democracy, Globalization, and International Law. *European Journal of International Law,* 15(5): 885-906, (p. 902-903). Zürn, M., 2000. Democratic Governance Beyond the Nation-State: The EU and Other International Institutions. *European Journal of International Relations,* 6(2): 183-221.

parliaments, for the purpose of ensuring accountability of organizations not only to member governments, but directly to electorates.[40] This duality of the question of constituency becomes particularly tangible in the EU context, as different conceptions of representation translate into different expectations concerning democratic legitimation.

The question of democratic legitimacy is also inherently linked to the question of competence of organizations. Without revisiting the debate on whether the EU is properly characterized as a federal state in the making, a supranational organization, or an entity *sui generis*, it is clear that the EU operates on the basis of conferred powers. This also means that there are limits to that exercise of powers (as expressed in Article 5 of the Treaty on the Functioning of the European Union, TFEU). At the same time, due to the functional nature of organizations, their competences are in constant development. Any reinterpretation of the extent of powers of an organization will raise the question of legitimacy. Also in this respect the EU constitutes a prime example of this nexus, as practically every deepening of European integration has been paralleled by a concern of the legitimacy of Union policy-making. Furthermore legitimacy issues are raised not only concerning Union exercise of competence, but also concerning the lack of competence and consequent inaction.

2.3 Debating Democratic Legitimacy in the EU

The adoption of the Single European Act marked a move to qualified majority voting in EU policy-making. In addition, the role of the Commission was elevated. As the legislative powers of the Parliament remained consultative only, this is often conceived as the initiating moment for the discussion on the democratic legitimacy of the EU.[41]

EU legitimacy can be evaluated against three normative standards, characterized as output (performance), input (participation) and throughput (governance processes) legitimacy[42]. These connect to the formal/substantive/social legitimacy divide; proper exercise of autonomy (formal legitimacy) contributing to throughput legitimacy; a capacity to ensure democratic governance (social legitimacy) delivering input legitimacy; and the representation of the values of the membership (substantive legitimacy) generating output legitimacy. All three aspects are furthermore interlinked in the sense that a challenge to the EU's *output* legitimacy based on the ineffectiveness of its policy performance can transform into a critique of the EU's undemocratic governance structures (*input* legitimacy). An inability to perform linked to procedural incapacity to garner appropriate citizen participation on its part suggests flawed *throughput* legitimacy.[43]

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[40] In general, see Bodansky, D. 1999. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?. *American Journal of International Law,* 93(3): 596-624, (p. 614-615). In respect of the UN, see Bienen, D., Rittberger, V. and Wagner, W. 1998. Democracy in the United Nations System: Cosmopolitan and Communitarian Principles. In: *Re-imagining Political Community: Studies in Cosmopolitan Democracy.* Archibugi, D., Held, D. and Köhler, M. (eds.). Wiley. p. 287-308.

[41] Weiler, J. H. H. 1999. *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration*. Cambridge University Press. (p. 65).

[42] Schmidt, V. 2010. Democracy and Legitimacy in the European Union revisited: Input, output and throughput. *KFG Working Paper Series, 21.* Kolleg-Forschergruppe The Transformative power of Europe. Berlin, Freie Universität Berlin; Schmidt, V. 2015. The Eurozone´s Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?. *European Economy Discussion Papers* 015.

[43] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees. *Journal of European Integration*, 40(4): 411-425.

In respect of democratic legitimacy more particularly, Article 10 of the Treaty on European Union (TEU) states that the Union is founded on the principle of representative democracy. Yet, this still allows for the identification of different models of representation. Bellamy and Castiglione identify three channels through which European citizens are represented in the EU system: directly via the European Parliament; indirectly via the European Council or in the Council; and via national parliaments. The three channels also represent different subjects: citizens in the first case, states in the second, whereas the third is largely unrelated to common European issues. This can potentially generate a tension between the representation of citizens, on the one hand, and of States, on the other. Each channel also involves a different type of representation and form of democracy.[44]

As a consequence, there are also many strands to the critique of EU democratic legitimacy, corresponding to the channel of representation focused on. This critique has taken hold of, *inter alia*, an increase in the power of bureaucrats; decrease in domestic parliamentary control; lack of real powers of the European Parliament; lack of genuine EU elections; and lack of support for policies among EU citizens.[45] As EU governance has evolved, some scholars note that it may no longer be proper to say that the EU suffers from a democratic deficit in a procedural sense.[46] However, even if it could be argued that democratic processes are in place which ensure transparency and representation, it is uncertain whether this suffices to render decision-making legitimate. Waning turnout at European Parliament elections question its representativity, and the painful ratification of the last treaty revision provide evidence that strengthening the input legitimacy in the EU is not straightforward.[47] Moreover, as long as the *demoi* of the EU remain predominately national or even subnational, any attempt to gather around a fictitious common identity will result in consistent minority/majority splits along national lines.[48] This leads to a focus on 'output' legitimacy instead.[49]

3. EU Migration Policies and Democratic Legitimacy

3.1 Policy-making in Migration Issues

Article 3(2) TEU establishes that the Union shall offer its citizens an area of freedom, security and justice. The TFEU (Article 67), further specifies that the Union shall ensure the absence of internal border controls for persons and frame a common policy on asylum, immigration and external border control, as well as ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through coordination measures.[50] If action

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[44] Bellamy, R. and Castiglione, D. 2013. Three models of democracy, political community and representation in the EU. *Journal of European Public Policy*, 20(2): 206-223.

[45] Føllesdal, A. and Hix, S. 2005. Why there is a Democratic Deficit in the EU: A response to Majone and Moravcsik. *Journal of Common Market Studies*, 44(3): 533-562.

[46] Moravcsik, A. 2002. Reassessing Legitimacy in the European Union. *Journal of Common Market Studies,* 40(4): 603-624.

[47] Crespy, A. 2014. Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict. *Political Studies*, 62(1): 81-98.

[48] Bellamy, R. and Castiglione, D. 2013. Three models of democracy, political community and representation in the EU. *Journal of European Public Policy*, 20(2): 206-223, at 219.

[49] Kratochvil, P. and Sychra, Z. 2019. The end of democracy in the EU? The Eurozone crisis and the EU´s democratic deficit. *Journal of European Integration*, 41(2): 169-185, (p. 171).

[50] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2012] OJ C 326/1.

within these areas has one thing in common, it is that it touches on matters that are at the very heart of the sovereignty of the Member States and thus, are highly politicized.[51]

National governments and the EU share a common interest in making collective policies to address major political and economic challenges that cannot be resolved by the actions of a single state.[52] Migration and asylum policies, as part of the public policies of the EU, were in fact rather marginal until the mass refugee flows of recent years.[53] However, events such as the Arab spring, the Syrian civil war, the disintegration of Iraq, and instabilities in the Horn of Africa and its Great Lake region, produced large international movements of persons, and raised the need to govern these movements through common policies.[54]

On the one hand, this generated calls for further deepening and strengthening the integration of migration policies.[55] However, even though the need for a more centralized approach towards migration has been recognized, further integration in this policy field has encountered challenges.[56] On the other hand, then, and in accordance with the principle of subsidiarity, claims have been made that Member States are the proper level for policy-making in migration issues,[57] coupled with demands for decentralization.[58] Migration, it should be noted, is a field of differentiation granting Member States leeway in implementation of common policies. The effects of this differentiation became highlighted in the aftermath of the 2015 'crisis'.[59] Yet, at the same time any pursuit of further integration in respect of migration, has raised fears of a backlash and more general disintegration of the EU.[60]

EU migration law and policy fall within the AFSJ. Article 4(2) of the TFEU specifies that the Union acts on the basis of shared competence, which leaves Member States wide discretion in relation to immigration control. In all but a few cases, decisions are made based on the ordinary legislative procedure (requiring agreement from the European Parliament, and unanimity in the Council). EU migration law is essentially a regime of secondary law, which means that it is not constitutionalized to an extent comparable for example to free movement.[61] Migration policies are also tightly interconnected to several other policy areas, such as development,

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[51] Engström, V. and Heikkilä, M. 2014. *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice. Fostering Human Rights among European Policies*. Work Package No. 11 – Deliverable No. 1, doi.org/20.500.11825/74, (p. 4).

[52] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2): 207-225.

[53] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[54] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[55] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[56] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[57] Article 5(3) TEU states that: '…the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.'.

[58] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[59] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[60] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[61] Azoulai, L. and de Vries, K. 2014. Introduction. In: *EU Migration Law: Legal Complexities and Political Rationales*, Azoulai, L. and de Vries, K. (eds). Oxford University Press, Oxford, UK. p. 1-13.

trade, security and conflict resolution.[62] Those policies sit at the intersection of migration policy and foreign policy, and include therefore all the sub-dimensions of those policies (e.g. visas, returns, border control, development aid, etc.). As a result of these interlinkages, the aims of policy-making in these areas are not necessarily identical or even parallel, but may in fact be contradictory.[63] In addition to migration law and policy being interconnected with other policy areas, the EU's immigration agenda has been formed by a multitude of actors, governmental and non-governmental, national and supranational, each with individual policy agendas. One characteristic of migration law in particular, is its strong operationalization, for example through actors such as European Asylum Support Office and the European Border and Coast Guard.[64] As a result, there is no single logic or overarching rationale of European immigration policy.[65]

3.1.1 Multi-Level Migration Governance

The central tenet of multi-level governance is the existence and interaction of overlapping competences among multiple levels of political actors.[66] As immigration to and movement within Europe is governed by a complex of institutions and processes operating on local, national, European, and international levels, European migration governance has been called a paradigm of multilevel governance.[67] Some scholars have even stated that the EU migration policy-making is a chaotic, flexible arrangement, constituting an instance of à la carte integration.[68] Although the supranational EU institutions play an important role in EU migration policy-making, some elements of these policies are still very much within the purview of the Member States.

The EU asylum policy has its legal basis in the TFEU (Articles 67, 78 and 80) and in the EU Charter of Fundamental Rights (Article 18) and is implemented through the Dublin III Regulation, Eurodac Regulation, Reception Conditions Directive, Qualification Directive and Asylum Procedures Directive.[69] The Dublin III Regulation sets the criteria and mechanisms for determining the Member State responsible for examining an application of international protection. The country is determined by criteria such as family considerations, recent possession of a visa or a residence permit in an EU country and whether the applicant has entered the EU irregularly or regularly.[70] The Eurodac regulation was established to compare

[62] Faustini-Torres, L. 2020. Another nexus? Exploring narratives on the linkage between EU external migration policies and the democratization of the southern Mediterranean neighborhood. *Comparative Migration Studies,* 8(9): 1-22.

[63] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[64] Tsourdi, E. 2020. The Emerging Architecture of EU Asylum Policy. In: *EU Law in Populist Times: Crises and Prospects*, Bignami, F. (ed). Cambridge University Press, Cambridge: 191-226.

[65] Hampshire, J. 2016. Speaking with one voice? The European Union's global approach to migration and mobility and the limits of international migration cooperation. *Journal of Ethnic and Migration Studies*, 42(4): 571-586.

[66] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44

[67] Hampshire, J. 2016. European migration governance since the Lisbon treaty. *Journal of Ethnic and Migration Studies,* 42(4): 537-553.

[68] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[69] Fact Sheet on the European Union – Asylum policy. https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy

[70] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013, p. 31–59, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:23010503_1.

fingerprints of person applying for international protection. The aim was to be better able to determine the Member State responsible for examining the application.[71] Regardless of the Member State responsible, the Reception Conditions directive, Qualifications Directive and the Asylum Procedures Directive (should) ensure equal treatment of applicants in all EU Member States during all the stages and types of procedures concerning applications for international protection.[72] Through the Qualification Directive the European Parliament and the Council 'set standards for the qualification of the third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and the content of protection granted'.[73] The European Council has affirmed that access to justice, legal security and efficient asylum procedures need to be guaranteed to everybody, regardless of the Member State in which the application is made.[74] According to the Directive on Common Asylum Procedures,[75] the requirements for the processes (e.g. effective access, legal assistance, and understandable communication) need to be ensured already at the first instances of the process. Additionally, applicants of international protection have the right to have competent personnel dealing with their asylum cases having appropriate knowledge and training in the field of international protection.[76] The modalities of implementation of asylum legislation remain, however, the preserve of the Member States. Thus, the application of the CEAS, varies drastically from one state to another, in respect of conditions of reception and acceptance for example.

Multi-level governance also characterizes labour migration policies. EU labour migration builds on a clear-cut division of competence with admission for certain categories governed by multilateral trade agreements (WTO General Agreements on Trade in Services), the supranational level presented by the EU Blue Card directive on highly skilled labour migrants and the directives on students and au pairs, and intra-corporate transferees and seasonal workers while the Member States decide on the number of admissions to the EU labour market (Article 7 TFEU).[77] The EU Blue Card scheme, for example, covers conditions for entry and residence of third-country nationals, yet in practice, Member States apply their own admission

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[71] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, p. 1–30, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R0603.

[72] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=en.

[73] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF.

[74] European Commission (EC) Stockholm Programme, 2010/C 115/01. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF (Last visited 8 Jun. 2020)

[75] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95, , Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032 (Last visited 8 Jun. 2020)

[76] Official Journal of the European Union, 2013, L 180/61. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:180:FULL&from=LV (Last visited 8 Jun. 2020)

[77] Panizzon, M. and van Riemsdijk M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

policies.[78] In the media, the need to integrate protection of asylum seekers with the access to labour market in the EU has been highlighted.[79] It has also been argued that high numbers of asylum requests in the Mediterranean area a result from the fact that 'legal labour migration has virtually dried up in the last decade'. [80] Possible solutions could be undertaken at the EU level but also through bilateral agreements between Member States and third countries. [81] The EU has in fact undertaken steps in order to reinforce access to the labour market.[82]

The challenge for national governments, due to the multi-level nature of migration governance, is that they are torn between being responsive to citizens by fulfilling their electoral promises, and acting responsibly by adhering to supranational commitments.[83] In the European Council, a growing influence of national, domestic level politics on Member State positions can be witnessed.[84] The domestic level politicization of migration issues has become a constraint for Member State representatives in the Council, who are increasingly willing to defy the EU consensus in order to promote political status at home[85] and acknowledge their national electorates' preferences to the detriment of deepening EU integration.[86] Due to the political pressure on the national level, the Member States have been renegotiating their obligations towards the Union (for example regarding the duty of solidarity or the relocation scheme) in the European Council to maximize policy space over migration and asylum.[87] Member State governments tend to 'unhook' themselves from formulating a common EU migration and asylum policy,[88] instead trying to find outcomes that better correspond to domestic preferences. Examples of this are many Central and Eastern European governments.[89] The Visegrád countries, with the exception of Hungary, received very small numbers of refugees

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[78] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[79] See e.g. Politico Symposium: How Europe can stop African migration, 12 October 2018, https://www.politico.eu/article/europe-can-stop-african-migration-symposium-experts/
Many Africans will migrate to Europe. The only question is whether they will arrive with valued skills or not. The time to begin building those skills is now. If EU aid retains its exclusive focus on stopping migration, it will exacerbate the migration problems of tomorrow. (Michael Clemens is co-director of migration, displacement and humanitarian policy and senior fellow at the Center for Global Development)

[80] Taylor, P. Don't leave migration to the populists, Politico 1/17/19. Available at: https://www.politico.eu/article/migration-populism-mainstream-leaders-need-to-stand-up/

[81] Taylor, P. Don't leave migration to the populists, Politico 1/17/19. Available at: https://www.politico.eu/article/migration-populism-mainstream-leaders-need-to-stand-up/.

[82] In June 2016 the Commission proposed to reform the blue card directive to attract more highly skilled people from third countries (Proposal for a Directive of the European Parliament and the of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment Strasbourg, 7.6.2016, COM(2016) 378 final). The negotiations are currently ongoing. Furthermore, in 2014 the Council and the Parliament adopted the seasonal workers directive in 2014. It outlines the conditions under which non-EU nationals may enter and stay in the EU as seasonal workers. Finally, in 2014, the Council and the Parliament adopted a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

[83] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

[84] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy*, 26(7): 1018-1036.

[85] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[86] Hooghe, L. and Marks, G. 2009. A poststructuralist theory of European integration. *British Journal of Political Science,* 39(1): 1-23.

[87] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[88] Carrera, S. Blockmans, S., Gros, D. and Guild, E. 2015. *The EU's response to the Refugee Crisis Taking Stock and Setting Policy Priorities.* CEPS Working Paper 20. Center for European public policy, Brussels, Belgium.

[89] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

and asylum seekers during the 2015 migration crisis. Yet migration issues have been prominent in the domestic politics of these countries, and the radical right-wing agenda has gained popularity.[90] In cases such as the ones in Visegrád countries, direct national referendums are used to legitimize those Member States' actions on the EU level, which simultaneously challenge the perception of popular legitimacy of the EU.[91] For the same purpose, so called 'national consultation' rounds have been used for example in Hungary. Questions on those consultations rounds (surveys sent directly to homes) are guided, emotional and rather populistic.[92] A small percentage of voters actually respond (below the threshold of a referendum), yet the results are nevertheless presented as 'the will of the people'. As a consequence of such developments, also the EU has had to change its governance models, towards increasingly communicating with citizens of Member States directly, informing them of EU actions and this way seeking to legitimate those acts.[93]

3.1.2 Legitimacy Challenges of Migration Policy-making

The multilevel nature and the division of competences regarding migration policy-making and governance results in both internal and external legitimacy challenges for the EU. Those challenges are related, for instance, where Member States refuse to accept the decisions made by the EU institutions, hereby questioning the EU's authority and the Union as a legitimate polity.

In a formal sense, the EU predominantly legitimizes its policies by means of the legal rationality of the policy-making process established through the founding treaties and confirmed by the representative credentials of the European Parliament and the Member State governments endorsing EU actions in the European Council.[94] Therefore, an EU policy can be seen as legitimate if the subject matter and procedures followed by EU institutions are in accord with the treaties.[95]

However, citizens elect representatives at the national level while policies in an increasing number of areas is made at the supranational level, where the familiar left-right politics appears to be displaced by technocratic decision making.[96] As a result, citizens might feel that they have little voice on matters of concern. Politicians, on their part, seeking to address voters' concerns about migration and integration often adopt an adversarial discourse, while in reality they face various constraints (such as commercial interests and the obligations arising from international and national human rights law) in trying to adopt corresponding policy measures.[97] Multiple

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[90] Creutz, K., Iso-Markku, T., Raik, K. and Tiilikainen, T. 2019. *The changing global order and its implications for the EU.* FIIA Report 59. Finnish Institute of International Affairs, Helsinki, Finland.

[91] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

[92] https://ec.europa.eu/migrant-integration/news/hungary-governments-national-consultation-on-immigration-and-terrorism-creates-widespread-debate Visited: 12.10.2020

[93] Biegón, D. 2013. Specifying the arena of possibilities: post-structuralist narrative analysis and the European Commission's legitimation strategies. *Journal of Common market Studies,* 51(2): 194-211.

[94] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

[95] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

[96] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

[97] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

ways of legitimating policy in this multi-level system of states are creating cross-level challenges to European Union policy-making.[98] A so-called Goldoni (1745) problem is created in which the need to serve two masters arises, one European and the other domestic.[99] This however, is not referring to a clear EU-Member State divide in which the EU would be imposing something on Member States irrespectively of and against their cumulative will. Instead, the challenge is triggered by the lack of a common European identity and will, which would be explicit and shared among the Member States.

In a substantive sense, Member States confer authority on the EU, and thus, legitimize its actions.[100] However, and as discussed above, Member State input is only one aspect of EU representative legitimacy. When EU policy-making is evaluated by standards of national democracies, it is often judged to have a deficit in democratic input.[101] The failure to involve citizens in the EU decision-making evokes claims of democratic illegitimacy, thereby meshing the output and input patterns of legitimation.[102]

Migration as such is not the only political concern that the EU and its Member States face. Especially economic questions have been raised as a competing concern for example to providing social services for migrants and refugees. The fact that individuals not granted a residence permit are rarely deported only aggravates the critique.[103] This has decreased trust in EU institutions and been prone to increase Euroscepticism.[104] A decline in confidence in the leadership, policy and structural resources of the EU to respond to citizens' preferences, to gain output legitimacy, hereby becomes an additional challenge.[105] However, it is noteworthy that individual Member States have different preferences regarding migration policies. Moreover, there is deep political disagreement also within the Member States. As this is the case, it is highly challenging for the EU to respond in a way that would *not* give rise to a legitimacy critique.

In the face of a situation where migration governance is not only politically contested among Member States, but also a heated subject of debate within practically every Member State, a legitimacy critique is prone to arise. Furthermore, where a mutual interest does not exist, the EU cannot fabricate one. The EU is unable to articulate a European interest that goes beyond

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[98] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

[99] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

[100] Weiler, J. H. H. 2013. In the face of the crisis: Input legitimacy, output legitimacy and political messianism of European integration. In: *The Maastricht Treaty: Second thoughts after 20 years*. Christiansen, T. and Duke, S (Eds.). p. 141-158. Routledge, London, UK.

[101] Kröger, S. and Friedrich, D. 2012. *The challenge of democratic representation in the European Union.* Palgrave Macmillan, Basingstoke

[102] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees. *Journal of European Integration*, 40(4): 411-425.

[103] Karolewski, I. P. and Benedikter, R. 2018. Europe's migration predicament: The European Union's refugees' relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspectives,* 1:40-53.

[104] Karolewski, I. P. and Benedikter, R. 2018. Europe's migration predicament: The European Union's refugees' relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspectives,* 1: 40-53.

[105] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees. *Journal of European Integration*, 40(4): 411-425.

the mutual interests of the Member States.[106] In the absence of such a mutual interest among Member States, the scope of EU policy-making will remain limited (in itself raising a legitimacy critique due to inactivity).

The EU's legitimacy in migration governance is compromised on multiple levels: firstly, internally, given the lack of agreement among Member States and the direct opposition by some Member States to EU policies.[107] Refusal of some Member States to accept EU leadership and competence and the EU's inability to assert strong governance direction has led to the questioning of the EU's role as a policy-maker and problem solver.[108] Migration issues also represent a threat to the EU's legitimacy as some Member States question its right to impose jointly-made decisions, hereby invoking the formal legitimacy of the EU.[109]

When an increasing number of citizens in Member States are not satisfied with the policies adopted on the EU-level, there is a risk of a backlash into 're-nationalised' solutions. The responses of single Member States such as Germany in refugee reception is one example of a 're-nationalised' solution. Following the unprecedented flows of asylum-seekers into central Europe, Germany effectively put the Dublin system on hold in 2015, declaring all Syrian asylum-seekers welcome to remain in Germany. It was hailed by the Commission as an 'act of European solidarity'. However, the approach of Germany to the reception of asylum-seekers was not followed or accepted by other states. Public opinion and many governments turned against Merkel's refugee policies. This act undermined the capacity of the EU to find a common EU approach much in the same way as the opposition to the relocation scheme for example of Hungary did. Moreover, Member States are engaged in bilateral cooperation with non-EU countries on migration. This cooperation consists of a variety of approaches[110] blurring the image of the EU as a uniform international actor.

In order to meet this challenge, a variety of proposals have been made for retaining legitimacy. In order to channel political contestation to the EU level and to deal with the differentiation of migration governance, a proposal has been made to reinforce the responsibility of the Commission (as the guardian of the Treaties) and of the Parliament.[111] In order to increase input legitimacy, also national parliaments could be involved more directly, as a way of introducing external checks on what goes on within individual Member States or at the EU level, and as such enhance transparency.[112] At the national level, referendums are already challenging EU policies by claiming that demands arising from a direct democratic ballot have higher legitimacy.[113] Yet, allowing citizens to vote directly on major policies has been noted to

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[106] Bellamy, R. and Castiglione, D. 2013. Three models of democracy, political community and representation in the EU. *Journal of European Public Policy*, 20(2): 206-223.

[107] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[108] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees. *Journal of European Integration*, 40(4): 411-425.

[109] See e.g. Constitutional Court of Hungary, Decision 22/2016 on Joint Exercise of Competences with the EU, 5 December 2016. Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees. *Journal of European Integration*, 40(4): 411-425.

[110] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[111] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[112] Fossum J. E. 2015. Democracy and Differentiation in Europe. *Journal of European Public Policy.* 22(6): 799-815.

[113] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2):207-225.

potentially simplify complex questions.[114] This highlights how the EU is caught between a weak form of 'thick' representative democracy at the supranational level, and a strong form of 'thin' representative democracy among the Member States.

However, the EU's legitimacy is compromised externally as well, as immigrants and especially asylum seekers see their rights reduced, denied or violated, contrary to the basic values of the EU.[115] The tightening measures aimed at preventing migrants from entering the EU have been criticised by international organisations and civil society organisations for contravening human rights and international commitments.[116] This has decreased trust in the EU institutions' capacity to handle the situation in a sustainable manner. Consequently, the EU is not seen as a convincing promoter of democracy in the international community,[117] affecting its external legitimacy. Addressing the large movements of refugees and migrants calls for policy coherence, as fragmented and ad hoc national policies have proved ineffective for guiding massive population movements into safe, orderly and regular pathways.[118] As Lavenex (2019) has argued, governing migration through regional integration units, instead of bilateral agreements, would embed migration governance into a pre-existing legal structure and be beneficial for rights protection, legitimacy and efficiency of outcomes.[119] Yet, also common arrangements such as the Turkey deal have raised legitimacy concerns.

3.1.3 The Externalization of EU Migration Policies

One of the goals of the EU internal migration policy has been to support those Member States that are overburdened by the large inflows of migrants. This has been done for instance through so called responsibility sharing. However, responsibility sharing has been opposed by a number of countries, who stress the oppressive nature of the relocation scheme and consider it an undue interference in national sovereignty.[120] Whereas the relocation scheme and other asylum policies internal to the EU have caused controversies between Member States, the Union has been fairly consensual and efficient regarding the external measures. In this respect, the EU has successfully worked with third countries for migration control through border, asylum and readmission policies.[121]

Through Article 21(1) TEU the Member States have agreed that: 'the Union's action on the international scene shall be guided by the principles, which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy,

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[114] Hobolt, S. 2009. *Europe in question: Referendums on European integration.* Oxford University Press, Oxford, UK.

[115] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[116] Creutz, K., Iso-Markku, T., Raik, K. and Tiilikainen, T. 2019. *The changing global order and its implications for the EU.* FIIA Report 59. Finnish Institute of International Affairs, Helsinki, Finland.

[117] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72.

[118] United Nations General Assembly. 2016. *Report of the Secretary-General. 'In safety and dignity: addressing large movements of refugees and migrations'.* UN document A/70/539, May 9.

[119] Lavenex, S. 2019. Regional migration governance – building block of global initiatives? *Journal of Ethnic and Migration Studies,* 45(8): 1275-1293.

[120] Falkner, G. 2016. The EU's current crisis and its policy effects: Research design and comparative findings. *Journal of European Integration,* 38(3): 219-235. Karolewski, I. P. and Benedikter, R. 2018. Europe's migration predicament: The European Union's refugees' relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspectives,* 1: 40-53.

[121] Creutz, K., Iso-Markku, T., Raik, K. and Tiilikainen, T. 2019. *The changing global order and its implications for the EU.* FIIA Report 59. Finnish Institute of International Affairs, Helsinki, Finland.

the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law'. Since the beginning of the twenty-first century and after two turning events, 9/11 terrorist attacks and the 'Arab spring', both migration control and democracy promotion became central issues in the EU external migration policies.[122] However, the EU does not promote, for example, values such as democracy at all costs. To the contrary, the EU has tended to prioritize security and stability over democratic change.[123]

In fact, different EU institutional bodies seem to have different understandings of and prioritizations in how to deal with migration.[124] The Commission has been one of the leading actors behind the formulation and implementation of the EU external migration policies. Within the Commission, the Directorate-General on Migration and Home Affairs (DG HOME) has prioritized migration control and security, to international cooperation, development and democracy promotion.[125] In addition, the Council has tended to adopt a security driven approach whereas the Parliament has been critical to such a focus and the inconsistencies between addressing the root causes and curbing migration.[126] Instead, the Parliament has underlined the important role of development and democratization in countries of origin in addressing migration.[127]

One notable common EU response to the 2015 migration crisis has been characterised by the intensified externalisation of migration policies.[128] In concrete terms, the externalisation has led to the creation of a toolbox of EU policy instruments ranging from non-binding international agreements on the readmission of the irregular migrants, to the facilitated issuance of visas to citizens of non-EU countries.[129] One of the main elements of EU response to the refugee crisis has been EU external deals with third countries. The Return Directive[130] underlines the need for concluding readmission agreements with third countries.[131] These agreements set out the rules for returning people residing illegally in the EU to their country of origin. Moreover, the

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[122] Faustini-Torres, L. 2020. Another nexus? Exploring narratives on the linkage between EU external migration policies and the democratization of the southern Mediterranean neighborhood. *Comparative Migration Studies* 8(9): 1-22.

[123] Roccu, R. and Voltolini, B. 2018. Framing and re-framing the EU's engagement with the Mediterranean: Examining the security-stability nexus before and after the Arab uprising. *Mediterranean Politics,* 23(1): 1-22.

[124] Geddes, A. and Lixi, L. 2018. New actors and new understandings in European Union external migration governance? The case of EU-Tunisian migration relations. In: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes.* Carrera, S., den Hertog, A., Panizzon, M. and Kostakopoulou, D. (eds). Leiden: Brill. p. 60-80.

[125] Carrera, S., Radescu, R., and Reslow, N.2016. 45. *EU external migration policies: A preliminary mapping of the instruments, the actors and their priorities.* Report prepared for the FP7 project 'Transnational migration in transition: Transformative characteristics of temporary mobility of people' EURA-NET deliverable 3.1.

[126] Carrera, S., Radescu, R., and Reslow, N. 2016. 45. *EU external migration policies: A preliminary mapping of the instruments, the actors and their priorities.* Report prepared for the FP7 project 'Transnational migration in transition: Transformative characteristics of temporary mobility of people' EURA-NET deliverable 3.1.

[127] Faustini-Torres, L. 2020. Another nexus? Exploring narratives on the linkage between EU external migration policies and the democratization of the southern Mediterranean neighborhood. *Comparative Migration Studies,* 8(9): 1-22.

[128] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[129] Carrera, S., Radescu, R., and Reslow, N. 2015. *EU external migration policies. A preliminary mapping of the instruments, the actors and their priorities*. EURA-net project, Brussels.

[130] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

[131] Preamble, para. 7. 'The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.'

EU has for example relaxed the rules of origin for products manufactured by refugee labour and energy policy in the Jordan/Lebanon Compacts[132] aiming at giving migrants employment opportunities and less need to cross over to the EU.

The most often discussed agreement is the EU-Turkey Statement of 18 March 2016.[133] According to the agreement, all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 would be returned to Turkey, whereas the EU in response grants 3 billion euro to the Facility for Refugees in Turkey. The arrangement, however, sidesteps the ordinary EU legislative process. The Turkey deal was adopted outside the purview of parliamentary control, and risks to fall outside the judicial scope of review of the Court of Justice of the European Union.[134] Such weakening of EU throughput legitimacy, on its part, pushes for bilateral cooperation on migration.[135] While politically effective, the Turkey deal is problematic also from the perspective of international law, similarly to several other measures taken by the EU and the Member States in order to reduce migration.[136] In its attempt to control and reduce migration, the EU chooses to cooperate with countries with poor human rights records. This opens up to abuse of migrants at the hands of the authorities in these countries. Criticism has been directed particularly towards the deal with Turkey, as well as EU cooperation with Libya and Afghanistan.[137] A main point of criticism regarding the deals has related to the danger of human rights abuse in the third countries.[138] Given the importance that the EU attaches to migration cooperation with non-EU countries, this is likely a case of wilfully ignoring unintended consequences because the intended consequences of the policy are so desirable.[139] The EU, in other words, seems to subject fundamental norms and principles to strategic considerations.[140] The risk here is that the EU's normative power in the international system as an actor supporting values such as democracy, rule of law, and respect for human rights and fundamental freedoms will be undermined.

The EU, in all, is not a monolithic actor in its external policy-making.[141] Bilateral cooperation on migration has existed between the southern EU Member States and non-European countries

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[132] Panizzon, M. 2017. Trade and Migration: A typology of the linkage in EU trade and association agreements? In: *Pathways Towards Legal Migration into the EU: Reappraising Concepts* Geddes, A., Guild, E., Carrera, S. and Stephan, M. (eds.) Center for European Public Policy, Brussels, Belgium.

[133] EU-Turkey statement, 18 March 2016, Press release, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

[134] Hanke, P., Wieuszewski, M. and Pnizzon, M. 2019. The 'spirit of the Schengen rules', the humanitarian visa, and contested asylum governance in Europe – The Swiss case. *Journal of Ethnic and Migration Studies,* 45(8): 1361-1376. Slomisnki, P. and Trauner, F. 2018. How do the member states return unwanted migrants? The strategic (non-)use of 'Europe' during the migration crisis. *JCMS: Journal of Common Market Studies* 56(1): 101-118.

[135] Reslow, N. 2019. EU external migration policy: taking stock and looking forward. *Global Affairs*. 5(3): 273-278.

[136] Creutz, K., Iso-Markku, T., Raik, K. and Tiilikainen, T. 2019. *The changing global order and its implications for the EU.* FIIA Report 59. Finnish Institute of International Affairs, Helsinki, Finland.

[137] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[138] Geddes, A. 2018. The Politics of European Union Migration Governance. *Journal of Common Market Studies*, 56. Annual Review pp. 120–130 (p. 123); Monar, J. 2017. Justice and Home Affairs. *Journal of Common Market Studies*, 55. Annual Review pp. 102–117, (p. 102-103); Bauböck, R. 2018. Refugee Protection and Burden-Sharing in the European Union. *Journal of Common Market Studies*, 56(1): 141–156.

[139] Burlyuk, O. 2017. The 'oops!' of EU engagement abroad: analysing unintended consequences of EU external action. *Journal of Common Market Studies,* 55(5): 1009-1025.

[140] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[141] Geddes, A. and Lixi, L. 2018. New actors and new understandings in European Union external migration governance? The case of EU-Tunisian migration relations. In Carrera, Kostakopoulou & Panizzon eds. *The external faces of EU migration, borders and asylum policies: intersecting policy universes.* Leiden: Brill.

since the 1990s.[142] As the pressure to deliver emergency responses rose after 2015, EU Member States created intergovernmental alliances outside the constraint of the EU legal and institutional framework.[143] Governments experimented with new forms of intergovernmental cooperation, aiming to incentivize home and transit countries through the 'leverage' of non-migration policies (e.g. trade, education, energy, development) to cooperate on irregular migration, smuggling and trafficking and return.[144] The Member States have even intentionally designed policies to make them more attractive than anything the EU can offer. One example of this is the Spanish and French governments 'competition' for cooperation with Senegal in migration issues.[145] Such external migration policies by Member States, however, are potentially undermining the EU's external policies as a whole (thus undermining the EU's credibility in the international field).[146] As Bisong (2019) shows with the case of EU-ECOWAS trans-regional partnerships, the multitude of bilateral migration agreements risk eroding the regional migration agenda.[147] As far as this leads to a non-coherent EU external migration policy (consisting of a multitude of bilateral agreements), this may also end up weakening the normative status and legitimacy of the EU internationally.[148]

3.2 Balancing EU Fundamental Values

3.2.1 The Principle of Solidarity

The principle of solidarity has been described as a 'legal bombshell waiting to be detonated'.[149] Solidarity has indeed proven to be something of a deal breaker in respect of EU migration policies. The principle itself is present in various ways in the EU legal order. Solidarity is one of the fundamental EU values and the leading principle of the EU's policies on asylum, migration and border control.[150] The Court of Justice of the European Union (CJEU) has characterized solidarity as a general principle inferred from the nature of the Communities that underlies the legal system at large.[151] The TEU and the TFEU provide evidence of the values that imbue the EU, such as solidarity including collective responsibility and respect among people as key

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[142] Roman, E. 2019. EU's migration policies in the eyes of 'partner countries' civil society actors: The case of Tunisia. *Global Affairs,* 5(3): 203-219.

[143] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[144] Moreno-Lax, V. 2018. EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/Rescue-without-protection' paradigm. *JCMS: Journal of Common Market Studies,* 56: 119-140; Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[145] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[146] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[147] Bisong, A. 2019. Trans-regional institutional cooperation as multilevel governance: ECOWAS migration policy and the EU. *Journal of Ethnic and Migration Studies,* 45(8): 1294-1309.

[148] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44

[149] Borgmann-Prebil, Y. and Ross, M. 2010. Promoting European Solidarity: Between Rhetoric and Reality? In: *Promoting Solidarity in the European Union* Ross, M. and Borgmann-Prebil, Y. (eds). Oxford University Press. pp. 1-22, (p. 5).

[150] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication management Review,* 2(2): 54-72. In general about the concept of solidarity, see Morlino, L., Piana, D., Sandulli A. and Corkin, J. 2019. Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice. *RECONNECT Deliverable D4.2.* Available at: https://reconnect-europe.eu/wp-content/uploads/2020/01/D4.2.pdf

[151] Joint Cases 6/69 and 11/69, *Commission v France* [1969], ECR 523, para 16.

elements.[152] The preamble to the TEU states the desire of the signatory states 'to deepen the solidarity between their people while respecting their history, their culture and their traditions'.[153] As embodied in Article 2 TFEU and the Charter of Fundamental Rights of the European Union, solidarity constitutes a founding value of the EU. As an objective the EU shall promote solidarity among Member States (Article 3(3) TEU), but also solidarity and mutual respect among peoples (Article 3(5) TEU). On the international scene '… the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' are to guide the Union in its action (Article 21(1) TEU). Several other provisions of the TEU refer to solidarity between Member States in particular (Articles 24(2) and (3), 31(1), and 32). A further expression of solidarity is the principle of sincere cooperation as laid down in Article 4(3) TEU, which establishes an open-ended duty of states to fulfil Treaty obligations.[154]

In respect of the AFSJ, Article 67(2) TFEU sets forth that the Union shall ensure the absence of internal border controls and shall frame a common policy on asylum, immigration and external border control, 'based on solidarity between Member States, which is fair towards third-country nationals'. Article 80 TFEU requires asylum, border and migration policies to be 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States'. This can be seen to amplify the duty of sincere cooperation (Article 4(3) TEU).[155] Notably the notions of 'solidarity' and 'fair sharing of responsibility' are not defined in terms of their goals or the standards necessary to meet them. Instead, the solidarity principle is to be interpreted in light of the general AFSJ policy goals, which can pull in different directions.[156] The binding nature and the strong link between the principle of solidarity and fair sharing of responsibility has also been confirmed by the CJEU.[157]

A central element of solidarity is trust, which presupposes loyal cooperation, above all in the sense of joint implementation of EU policies.[158] Although the preamble and Article 2 TEU can

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[152] Cook, K. 2012. Solidarity as a basis for human rights Part One: Legal Principle or mere aspiration? *European Human Rights Law Review,* 5:504-515.

[153] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, preamble, recital 6.

[154] For an overview see Vanheule, D., van Selm, J., and Boswell, C. 2011. European Parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*, Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 27-31. Also see e.g. Domurath, I. 2013. The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach, *Journal of European Integration,* 35(4): 459-475, and Pollet, K. 2013, Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, European Council on Refugees and Exiles, (p. 14).

[155] Pollet, K. 2013. *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, European Council on Refugees and Exiles*. The European Association for the defence of Human Rights (AEDH)

[156] Articles 77 to 79 TFEU. Vanheule, D., van Selm, J., and Boswell, C. 2011. European Parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*, Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), at 37.

[157] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v the Council* [2017], ECLI:EU:C:2017:631, paras 251-253.

[158] Vanheule, D., van Selm, J., and Boswell, C. 2011. European Parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*, Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), at 22. Also see Hilpold, P. 2015. Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union. *Yearbook of European Law,* 34(1): 257-285.

be read so as to refer to solidarity between people and individuals, the principle is predominantly used to refer to solidarity between EU Member States.[159] Solidarity, it would seem, becomes particularly important when the available mechanisms prove insufficient. Lack of EU legislative powers in the AFSJ leads to invoking solidarity in those areas where cooperation is nevertheless important. Due to the element of reciprocity, what is 'fair' is defined by the group for which solidarity is of concern.[160] So far, agreement on that 'fairness' in the context of border and migration policy has been difficult to attain.

Common rules for the control of the EU external borders have always formed a precondition (along with the CEAS) for the abolition of internal border controls in the Schengen area.[161] As the external border becomes of 'common interest', solidarity seeks to mitigate the difference of burdens that the European asylum system creates among EU members. As some Member States have greater responsibilities than others (because of longer land or sea borders, or more people crossing the borders), solidarity serves for example to share the financial burden, but also as a means of expressing trust in those with external borders to manage them properly.[162]

Needless to say, burden-sharing can take various forms, all of which can be called upon in the name of solidarity. States can make joint efforts to prevent and resolve refugee crises, they may share the burden of preventing and deflecting arrivals, or they may share the burdens of reception.[163] Not only, then, is there a dichotomy towards whom solidarity should be shown (states or individuals), but the principle also allows for disagreement as to what it means to act in solidarity.

Perhaps unexpectedly, therefore, EU policy-making in the name of solidarity has been met with various responses. The transition of Frontex into the European Border and Coast Guard has been agreed upon in order to make border management more effective and 'to safeguard the functioning of the Schengen area as well as the overarching principle of solidarity'.[164] At the same time other 'solidarity measures' such as relocation measures have met strong opposition,

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[159] See e.g. Bast, J. 2016. Deepening Supranational Integration: Interstate Solidarity in EU Migration Law, *European Public Law,* 22(2): 289-304. Even the reference in the preamble to social solidarity is closely linked to Union citizenship, hereby excluding non-EU 'people'. Mitsilegas, V. 2014. Solidarity and Trust in the Common European Asylum System. *Comparative Migration Studies,* 2(2): 181-202, (p. 188).

[160] Rosenfeldt, H. 2017. The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU. In: *Securitising Asylum: Extraterritoriality and Human Rights Challenges*, Mitsilegas, V., Moreno-Lax, V. and Vavoula, N. (eds). Brill.

[161] See Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011, amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 1: 'Union policy in the field of the external borders aims at an integrated border management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the Union and a fundamental component of an area of freedom, security and justice. To that end, the establishment of common rules on standards and procedures for the control and surveillance of the external borders is contemplated'. Also see Case C-378/97, *Wijsenbeek* [1999] ECR-I 6207, para. 42.

[162] Vanheule, D., van Selm, J., and Boswell, C. 2011. European Parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*, Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), (p. 99-100). Also see e.g. Balleix, C. 2014. From Lampedusa to the Post-Stockholm Programme: Difficult European solidarity in the field of migration, *European Policy Brief,* 24.

[163] Noll, G. 2000. *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*. Doctoral dissertation. Kluwer. (p. 242-245).

[164] European Commission, Proposal for a Regulation of the Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, Strasbourg, 15.12.2015.

and even been challenged before the CJEU.[165] The legislative proposal for a permanent relocation mechanism never materialized due to disagreement between Member States.[166] As a result there is not only disagreement between the Commission and (some) Member States, but also among Member States, forcing the Commission to rethink the development of the EU asylum system.[167]

Solidarity, in other words, seems to be difficult to impose through normative means where it does not pre-exist.[168] To the extent that the EU and Member States depart from the values expressed in the treaties, a legitimacy gap is perceived both in terms of the EU's compound legitimacy and that of its Member States. Accordingly, the refugee crisis also represents a crisis of values and authority as EU and national actions and rhetoric deviate from the normative standards set by the treaties.[169]

3.2.2 EU Values In-between Technicalization and Politicization of Migration Policies

In order for EU policies to be justified and acceptable to members, they must be founded in those original values that have been consensually accepted as good, desirable and acceptable to all.[170] Yet, those values may pull in different directions. There is a conundrum in which both the EU and the individual EU Member States find themselves, generating tension between the humanitarian prescription and the wish of the EU population (or at least part of it) to control the EU borders and to have a democratic influence on the socio-political reality on the ground.[171]

On the one hand, EU leaders and citizens have been promoting a rights-based approach, wishing migrants welcome to Europe. However, lack of solidarity connected to the politicized nature of migration policies and the possibility of 'cherry-picking' through differentiated integration, renders migration policies scattered and the assessment of the actual output of the policies challenging. Unintended consequences arising from the EU external migration

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[165] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24 September 2015. The CJEU did note that 'By refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary and the Czech Republic have failed to fulfil their obligations under European Union law.' Judgment in Commission v Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection) (C-715/17, C-718/17 and C-719/17), delivered on 2 April 2020.

[166] Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, Brussels, 9 September 2015 COM(2015) 450 final, 2015/0208 (COD).

[167] Zalan, E. 2020. Court: Three countries broke EU law on migrant relocation. *EUObserver*, 2 April. Available at: https://euobserver.com/migration/147971.

[168] Menéndez, A.J. 2016. The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration. *European Law Journal,* 22(4): 388-416, (p. 399).

[169] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees, *Journal of European Integration*, 40(4): 411-425, (p. 419-422).

[170] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European Integration?*, Communication Management Review,* 2(2): 54-72

[171] Karolewski, I. P. and Benedikter, R. 2018. Europe's migration predicament: The European Union's refugees' relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspectives,* 1:40-53.

policies are a result of the multi-actor nature of the policy and policy interaction.[172] Populist parties often use the unintended consequences for political purposes. For instance, the ineffectiveness of EU policies intended to deal with an unexpected surge in immigration has stimulated an anti-EU backlash at the national level.[173]At the same time as some EU leaders have been promoting the need for solidarity in dealing with the refugee crisis, agreement (and solidarity) mainly seem to prevail concerning measures for protection of the borders, both national and European external borders.[174]

Accepting EU's lack of input legitimacy, a claim can be made that EU institutions may achieve legitimacy through effective policy outputs such as successful management of migration.[175] Turned around, if a policy is instrumentally ineffective in achieving popular goals, this creates a conflict between democratically expressed demands of national electorates and the outputs the EU is able to deliver. Consequently, the EU would also lose output legitimacy.[176] If output legitimacy does not manage to compensate for the relatively weak input legitimacy, this could translate into an acute legitimacy crisis of the EU.[177] The risk of loss of output legitimacy invites to compromise between EU's fundamental values.

In striking a balance between the EU´s fundamental values, intensified claims for more rigid border security and control have affected the freedom of movement, as the EU is pushed to gain output legitimacy (reducing the number of migrants entering the European Union). Striking such a balance has been made easier as migration has become 'securitized' and presented as a danger to public order, cultural identity, and domestic and labour market stability.[178] Such a framing of migration echoes a more general trend of postmodernism, whereby societies become increasingly occupied with insecurities, leading to risks and calls for increased security becoming reproduced in an endless loop.[179] Through such securitization a special rhetoric is invoked, which seemingly moves that issue beyond contestation. The more irregular immigration is phrased as a risk and threat, the easier it becomes to defend a politics of exception, operationalization, and technicalization, with corresponding policies. Securitization, in other words, risks foreclosing political debate.[180]

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[172] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44

[173] Otjes, S. and Katsanidou, A. 2017. Beyond Kriesiland: EU integration as a super issue after the Eurocrisis. *European Journal of Political Research,* 56(2): 301-319.

[174] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees, *Journal of European Integration*, 40(4): 411-425

[175] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2): 207-225.

[176] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2): 207-225.

[177] Thym, D. 2016. The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy. *Common Market Law Review,* 53(6): 1545-1573, (p. 1571-1572).

[178] Huysmans, J. 2000. The European Union and the securitization of the migration. *Journal of Common Market Studies,* 38(5): 751-777.

[179] Beck, U. 1992. *Risk Society: Towards a New Modernity,* London: Sage.

[180] Engström, V. and Heikkilä, M. 2014. *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice. Fostering Human Rights among European Policies*. Work Package No. 11 – Deliverable No. 1, doi.org/20.500.11825/74, at 150-154 for an overview.

Also, the correspondence of EU's practice of externalizing migration control with foundational values has been questioned.[181] Externalizing the problem outside the European borders, regardless of the conditions of refugee protection and the state of the democracy and human rights in those countries (e.g. Lebanon or Libya), has been criticized widely.[182] Offshoring of migration governance can create a tension with respecting human dignity, freedom and democracy promotion for example. As these are widely shared values among EU citizens, the compromising of those values will affect the legitimacy of the EU in the eyes of those citizens.

In yet another twist of the migration discourse, also protection and promotion of human rights becomes politicized. As irregular migrants are presented not only as 'threats', but also as victims to be saved, securitization becomes a 'migrant-centred' and rights-compliant way of addressing migration. As migration governance is framed in a situation of crisis, demanding action outside democratically approved processes (defined as instantaneous, spontaneous and unconditional emergency relief granted gratuitously and charitably), this upsets an already complex structure of multi-level migration governance and opens up for further room for balancing between the core values of the EU.[183] The same logic also displays offshoring of migration governance as a humanitarian act, preventing refugees from putting their lives at risk. In the process, human rights end up as a tool for securitization.[184] Such a linking of humanitarian and security agendas threatens to obfuscate the discourse on the goals of migration policies altogether.[185]

As a way of overcoming the politicization of migration policy-making the Commission has proposed the transformation of the European Asylum Support Office (EASO) into an EU-level first-instance decision-making agency with national branches in each Member State.[186] Yet, once again disagreement on such a proposal can be phrased through competing conceptions of legitimacy. From the point of view of democratic legitimacy, a claim can be made that politicization of EU migration decision making at the national level is necessary for European integration to be accepted by EU citizens.[187] However, if interest is turned to output legitimacy, that politicization obstructs EU action due to conflicting preferences at the national level.[188] Conferring competence to EASO might improve the output legitimacy of EU policy-making.

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[181] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees, *Journal of European Integration*, 40(4): 411-425

[182] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European Integration?, *Communication Management Review,* 2(2): 54-72

[183] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'Migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[184] Moreno-Lax, V. 2018. The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm. *Journal of Common Market Studies*, 56(1): 119–140.

[185] Panizzon, M. and van Riemsdjik M. 2019. Introduction to Special Issue: 'migration governance in an era of large movements: a multi-level approach. *Journal of Ethnic and Migration Studies,* 45(8): 1-17.

[186] d'Appollonia, A. C. 2019. EU migration policy and border controls: from chaotic to cohesive differentiation. *Comparative European Politics,* 17: 192-208.

[187] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

[188] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

However, as EASO is basically an expert body, it might also aggravate the democratic deficit through a further agencification and technicalization of EU migration governance.[189]

4. Populism, Migration and Legitimacy

Populism is a phenomenon that ranges from left-wing to right-wing politics. It could even be called a form or a structure of actions and discourses for influencing political content, which is flexible enough to encompass divergent ideologies.[190] Despite academic difficulties with defining populism, a common feature is an appeal to 'the people' often 'against both the established structure of power and the dominant ideas and values of the society'.[191] Populism can be seen to have an 'inner logic' that consists of two elements. While building on democratic principles, populism draws extreme and one-sided conclusions and thus, violates key dimensions of democratic constitutionalism, such as those of pluralism and inclusiveness.[192] The second element is that the populist possesses the singular and morally privileged understanding of what the people want, which has not been manifested through democratic choice.[193]

Populism's relationship to democracy is ambivalent. On the one hand, populism can be located within democracy. On the other, the 'twisting' of democratic representation of populism bears several risks.[194] The claim of populists is based on the mobilisation of a united 'people' against an enemy (or enemies) that allegedly undermine the common good, rendering the 'people' into a victim.[195] As the notion of 'real' representation of a society is opposed to 'others', a construction particularly prominent in populist rhetoric on migration, the end result is an anti-pluralism of public debate.[196] In fact, populist leaders in many countries have little interest in deliberation. In case populism seeks to suppress deliberation, polarize the debate, and engage with post-truth politics, populism becomes the antithesis of deliberative democracy.[197]

Populism in Europe predates the migration discussion.[198] The way for populist nationalism was paved by austerity and neoliberal structural reforms, which triggered a 'lost decade' of economic stagnation, rising unemployment, increased poverty, and dwindling EU solidarity

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[189] Engström, V. and Heikkilä, M. 2014. *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice. Fostering Human Rights among European Policies*. Work Package No. 11 – Deliverable No. 1, doi.org/20.500.11825/74.

[190] Dieh, P. 2019. Populist Twist: The Relationship between the Leader and the People in Populism, in Castiglione, D. and Pollak, J. *Creating Political Presence: The New Politics of Democratic Representation,* University of Chicago Press: Chicago: 110–138 (p. 113).

[191] Crum, B., Oleart, A., Overeem, P. 2020. *Renewing or Undermining Democratic Pluralism? The conditioning of populist parties across EU member states*, RECONNECT – working paper https://reconnect-europe.eu/wp-content/uploads/2020/05/D5.2.pdf, p. 8.

[192] Blokker, P. (forthcoming) Populism as a Constitutional Project. *International Journal of Constitutional Law (ICON)*

[193] Bugaric, B. 2019. The Two Faces of Populism: Between Authoritarian and Democratic Populism. *German Law Journal*, 20(3): 390-400.

[194] Dieh, P. 2019. Populist Twist: The Relationship between the Leader and the People in Populism, in Castiglione, D. and Pollak, J. *Creating Political Presence: The New Politics of Democratic Representation,* University of Chicago Press: Chicago: 110–138.

[195] Blokker, P. (forthcoming) Populism as a Constitutional Project. *International Journal of Constitutional Law (ICON)*

[196] Bílková, V. 2018. Populism and Human Rights. In: *Netherlands Yearbook of International Law – Populism and Human Rights*. J. E. Nijman and W. G. Werner (eds.) Asser Press, Hague, Netherlands. p. 143-174.

[197] Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. 2018. Deliberative Democracy: An Introduction. In: *The Oxford Handbook of Deliberative Democracy*. Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. (eds). Oxford University Press, Oxford.

[198] *Migration und Populism.* MIDEM Annual Report 2018, Dresden 2018, p. 11-13.

driving the trust in the EU to an all-time low.[199] In addition to the Eurozone crisis, the EU has in recent years faced two other crises: the refugee crisis and the 'rule of law crisis'.[200] To a certain extent, these overlap – especially on the level of causes and consequences – but they are also interconnected when it comes to methods adopted by the Member States to cope with them. The Eurozone crisis resulted in budgetary constraints, which later had an impact on the functioning of asylum procedures.[201] The migration crisis on its part was used by populist politicians for pursuing policies that have contributed to a rule of law backsliding in several Member States.

A common populist claim is that democracy must be claimed back from the elites, setting the 'people' in the centre of the populists' agenda. Populism also undermines the role of democratic institutions and their role as checks and balances in democratic decision-making.[202] This logic easily transforms into a legitimacy critique of the EU, which by its very structure moves decision-making further from domestic politics. Populists picture the EU at large as an actor that threatens both domestic sovereignty and cultural identity. Right wing nationalist populists often commonly oppose further attempts toward closer integration, as the EU is not seen to represent the 'people'.[203] However, most anti-immigration sentiment does not necessarily relate directly to the EU to begin with, but to questions such as the effects of immigration for social cohesion, and the impact on the labour market or public services. Immigration often also serves to project wider societal unease.[204] Through anti-immigration policies and xenophobia, migrants become scapegoats for any problems a country faces.[205] Populism can also represent an outright rejection of multiculturalism, picturing an authentic 'people' that the populists represent, that excludes foreigners and immigrants.[206]

One reason for the reluctant response to EU initiatives, such as the relocation scheme in many EU countries, has been attributed to the rise of nationalistic populist parties in national elections in several EU member states, shifting political balances more towards Euroscepticism.[207] As a consequence, EU authority has become increasingly contested, with a rapid escalation in the polarization of political debates.[208] The centralist manner of the

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[199] Bugaric, B. 2019. The Two Faces of Populism: Between Authoritarian and Democratic Populism. *German Law Journal*, 20(3): 390-400 (p.396)

[200] Viviane Reding, *Speech: The EU and the Rule of Law – What next?*, 4 September 2013 – https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677.

[201] Trauner, F. 2016. Asylum policy: the EU's 'crises' and the looming policy regime failure. *Journal of European Integration*, 38(3): 311–325 (p. 313); Thym, D. 2016. The 'refugee crisis' as a challenge of legal design and institutional legitimacy. *Common Market Law Review,* 53(6): 1545–1574 (p. 1555-56).

[202] Kyle, J. and Mounk, Y. 2018. *The Populist Harm to Democracy: An Empirical Assessment*. Tony Blair Institute for Global Change, Published at: http://institute.global/insight/renewing-centre/populist-harm-democracy on December 26 2018, p. 18-19.

[203] Bugaric, B. 2019. The Two Faces of Populism: Between Authoritarian and Democratic Populism. *German Law Journal*, 20(3): 390-400 (p. 397).

[204] Thym, D. 2016. The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy. *Common Market Law Review,* 53(6): 1545-1573, (p. 1566).

[205] Lazaridis G. and Tsagkroni, V., 2015, 'Securitisation of Migration and Far Right Populist Othering in Scandinavian Countries', in Lazaridis, G. and Khursheed, W. (eds.), The Securitisation of Migration in the EU.

[206] Donders, Y. 2020. Diversity in Europe: from Pluralism to Populism? In: *European Populism and Human Rights.* Vidmar, J. (ed), Brill Leiden, The Netherlands. P.55-68.

[207] Karolewski, I. P. and Benedikter, R. 2018. Europe's migration predicament: The European Union's refugees' relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspectives,* 1:40-53.

[208] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

implementation of the migration policies and the tension of those with the interests of many Member States has brought into question the legitimacy of those policies, as well as the authority of the EU institutions.[209]

The MIDEM report of 2018 provides a 5-steps-chain explaining the relation between migration and populism. The report argues that the first step was 'external shock' (refugee crisis), which resulted in challenges for EU states. This caused extensive media attention, which further aggravated scepticism towards migration. Authors argue that migration 'more likely triggers and strengthens pre-existing' anti-migration fears. Anti-immigration attitude and dissatisfaction with the crisis management resulted in votes for right-wing populist parties, which based their programs on immigration fears. As a consequence, 'anti-immigration populism led to a restrictive turn in migration policies'.[210] Politicization of migration was a result of the polarization of the attitudes towards EU migration policy.[211] In addition, the gap between the public opinion and the policy outcomes were important factors in making immigration a highly salient issue on the populists' agenda.[212] A response to the gap was often fueled with 'nativist populism', defined by 'core opposition to immigration, whether driven by sociocultural, identity, ethnoreligious or labor-market and social-welfare concerns'.[213]

Populist rhetoric has also entered formal legal challenges of EU law. The European Agenda for Migration (EAM) of 2015, contained numerous actions, such as hotspot system (filtering people and categorising them as asylum seekers or 'economic migrants'), a relocation mechanism, and external deals (e.g. with Turkey and Libya).[214] The most controversial element was the 'emergency relocation scheme' for migrants arriving in Greece and Italy. This policy (as set forth in Council Decision 2015/1601) was challenged by the Slovak Republic and Hungary before the Court of Justice,[215] questioning the legal basis of the decision, the procedure of adoption and claiming a violation of the principle of proportionality.[216] The countries argued for instance that relocation might undermine security and may threaten Christian values.[217] One of the arguments made, directly referred to 'otherness' as a threat to the 'ordinary people'. The Polish government argued, for example, that the relocation scheme was disproportionate with respect to states 'virtually ethnically homogeneous, like Poland' and 'whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their

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[209] Maldini, P. and Takahashi, M. 2017. Refugee Crisis and the European Union: Do the failed migration and asylum policies indicate a political and structural crisis of European integration? *Communication Management Review,* 2(2): 54-72.

[210] *Migration und Populism*, MIDEM Annual Report 2018, Dresden 2018, p.12

[211] Pasetti, F. and Garcés-Mascareñas, B. 2018. *Who is responsible, for what and to whom? Patterns of politicisation on refugees and the European solidarity crisis*, Ceaseval Research on the Common European Asylum System No. 16, Chemnitz, November. p. 7.

[212] Morales, L., Pilet, J-B. and Ruedin, D. 2015. The Gap between Public Preferences and Policies on Immigration: A Comparative Examination of the Effect of Politicisation on Policy Congruence. *Journal of Ethnic and Migration Studies*, 41(9): 1495-1516.

[213] Papademetriou D. G., Hooper, K. and Benton, M. 2018. *In Search of a New Equilibrium: Immigration Policymaking in the Newest Era of Nativist Populism*. Transatlantic Council on Migration – report. Migration Policy Institute. (p. 1.)

[214] Commission Communication, COM(2015) 240 final (13 May 2015).

[215] In April 2016, Poland was granted leave to intervene in support of the applicants' actions.

[216] De Witte, B. and Tsourdi, E. 2017. Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council. Joined Cases C-643/15 & C-647/15, Slovak Republic and Hungary v. Council of the European Union, Judgment of the Court (Grand Chamber) of 6 September 2017, EU:C:2017:631. *Common Market Law Review*, 55(5): 1457-1497 (p. 1458 and 1467).

[217] Orban says migrants threaten 'Christian' Europe', Politico Europe, 3 Sept. 2015, available at www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis.

territory'.[218] In a similar way, in criticizing the EU-Turkey deal, Viktor Orbán stated that 'we cannot make decisions over people's heads, that change their lives and that of future generations. Taking up refugees will change the profile of Hungary and Europe ethnically, culturally and religiously'.[219] The Hungarian referendum was a follow-up to this argument, where voters were asked to reject the EU plan for relocation. [220] In September 2017 the Court dismissed both actions and this argument in particular by stating that 'considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union'.[221] On the one hand, the ruling was seen as milestone since solidarity and fair-sharing for the first time were framed as obligations, rather than as discretionary acts.[222] On the other hand, however, it still remains unclear under what conditions the duty of solidarity may be a source of legally binding obligations.[223]

The Commission consequently decided to initiate infringement proceedings against Poland, Hungary and the Czech Republic, since they failed to comply with the relocation mechanism. Member States underlined before the court 'risks posed by the possible relocation on their territory of dangerous and extremist persons who might carry out violent acts or acts of a terrorist nature'.[224] This reflects a nationalist populism, which builds on securitization of the migration issue, and correspondingly promises to protect the ordinary people.[225] Especially for far-right populist parties such a linking of migration with security is a common discursive strategy across European countries.[226] In April 2020 the Court found that 'Member States can rely neither on their responsibilities concerning the maintenance of law and order and the safeguarding of internal security, nor on the alleged malfunctioning of the relocation mechanism to avoid implementing that mechanism'.[227] The Court underlined that the burdens resulting from the refugee crisis 'must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs the Union's asylum policy'.[228]

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[218] Judgement of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, para. 302.

[219] Ibidem.

[220] Bauböck, R. 2018. Refugee Protection and Burden-Sharing in the European Union, *Journal of Common Market Studies,* 56(1): 141–156.

[221] Judgement of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, para. 305.

[222] De Witte, B. and Tsourdi, E. 2017. Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council. Joined Cases C-643/15 & C-647/15, Slovak Republic and Hungary v. Council of the European Union, Judgment of the Court (Grand Chamber) of 6 September 2017, EU:C:2017:631. *Common Market Law Review*, 55(5): 1457-1497 (p. 1493)

[223] de Arriba-Sellier, N. 2017. *Welcome refugees, adieu solidarité*, LeidenLawBlog 26 September. Available at: https://leidenlawblog.nl/articles/welcome-refugees-adieu-solidarite. Obradovic, D. 2017. *Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy*, European Law Blog. 2 October. Available at: https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/

[224] Para. 135.

[225] Bugaric, B. 2019. The Two Faces of Populism: Between Authoritarian and Democratic Populism. *German Law Journal*, 20(3): 390-400. (p. 391).

[226] On this development in the Nordic countries, see Lazaridis G. and Tsagkroni, V., 2015, 'Securitisation of Migration and Far Right Populist Othering in Scandinavian Countries', in Lazaridis, G. and Khursheed, W. (eds.), The Securitisation of Migration in the EU.

[227] Press release – Judgment of the Court (Third Chamber) of 2 April 2020, European Commission v Republic of Poland and Others.

[228] Judgment of the Court (Third Chamber) of 2 April 2020, European Commission v Republic of Poland and Others, para. 80.

The legitimacy claims of populism not only challenge core EU policies, but also the very foundations of the integration project.[229] A populist rhetoric raises concerns regarding the way in which human rights, including protection of refugees, is pictured.[230] A common populist argument claims that the human rights project has stopped serving its original purpose, as it has been hijacked. Whereas the original purpose was to protect the 'people', the project has given up on this mission and has started to serve particular groups and promote particular agendas.[231]

Also the meaning of solidarity has become ever more one-sided. Advocate General Sharpston in the opinion delivered on 31 October 2019 underlined that 'solidarity is the lifeblood of the European project', which 'requires one to shoulder collective responsibilities and (yes) burdens to further the common good'[232] and which 'cannot be based on a penny-pinching cost-benefit analysis along the lines'.[233] Nonetheless, the more migration discourse is conducted through a populist rhetoric, the lesser the prospects of solidarity being interpreted as an obligation to receive migrants and asylum seekers.

This creates a dilemma for the EU. Hodson and Puetter (2019) argue that as some EU Member States push for deepening integration, they do so at the risk of producing a 'destructive dissensus'.[234] This is because consensus seeking in the Council leads mainstream Member State leaders to accommodate extreme right populist governments to the detriment of EU norms and values.[235] On the one hand, deliberation must be conflict tolerant and allow for the voicing of dissent, especially in highly political questions such as migration. On the other hand, as this translates into populist challenges to supra-national governance, the politicization hollows out the EU as a value community and obstructs the performance of reflective (political) discourse.[236]

Populism also reinforces already existing legitimacy challenges. While the EU faces challenges concerning both its input and output legitimacy, the contestation and polarization of the debate by populist parties has made reform of governance structures impossible. This, on its own, reinforces the output deficit.[237]

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[229] Bugaric, B. 2019. The Two Faces of Populism: Between Authoritarian and Democratic Populism. *German Law Journal*, 20(3): 390-400 (p. 396).

[230] Roth, K. 2017. *The Dangerous Rise of Populism. Global Attacks on Human Rights Values.* A world Report. Human Rights Watch. p. 1-14.

[231] Bílková, V. 2018. Populism and Human Rights. In: *Netherlands Yearbook of International Law – Populism and Human Rights.* J. E. Nijman and W. G. Werner (eds.) Asser Press, Hague, Netherlands. p. 143-174 (p. 161).

[232] Para. 253

[233] Para. 254.

[234] Hodson, D. and Puetter, U. 2019. The European Union in disequilibrium. *Journal of European Public Policy,* 26(8): 1153-1171.

[235] Schmidt, V. 2019. Politicization in the EU: between national politics and EU political dynamics. *Journal of European Public Policy,* 26(7): 1018-1036.

[236] Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. 2018. Deliberative Democracy: An Introduction. In: *The Oxford Handbook of Deliberative Democracy*. Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. (eds). Oxford University Press, Oxford.

[237] Thym, D. 2016. The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy. *Common Market Law Review,* 53(6): 1545-1573 (p. 1572).

5. General Remarks: Challenges to Democratic Legitimacy in EU Migration Policies

In order to be reconciled with its citizens, the EU ought to be perceived as legitimate actor. Consequently, enjoying a degree of legitimacy is vital for reconnecting the EU with its citizens. In this working paper, we have discussed the challenges of (democratic) legitimacy in the internal and the external dimensions of EU migration policies. The focus has been specifically on migration policies related to asylum, which has been the most contested aspect of migration ever since the so-called refugee crisis.

We have assessed the democratic legitimacy of EU's migration policies through a framework, which is based on three normative standards. The standards are characterized as output (performance), input (participation) and throughput (governance process) legitimacy. Output legitimacy underlines shared beliefs about normatively desirable outcomes and achieving them through specific performance. According to contemporary political philosophy, the decisions of the actors holding the power to design the performance are legitimate if they are the outcome of a democratic decision-making process. This underlines representation but also the legality of the acts representing the input legitimacy and the throughput legitimacy.

Not achieving the desired outcomes with the chosen policies, leads to challenges to the EU's output legitimacy. This challenge, based on the ineffectiveness of its policy performance, can transform into a critique of the EU's undemocratic governance structures (*input* legitimacy). An inability to perform, linked to procedural incapacity to garner appropriate citizen participation, on its part suggests flawed *throughput* legitimacy.[238] Against such an image of EU legitimacy challenges, the working paper has identified a range of (democratic) legitimacy concerns that EU migration governance gives rise to.

The multilevel nature and the division of competences regarding the migration policy-making and governance is a source of legitimacy challenges, both internally and externally. The multilevel structure also raises challenges on both the EU and Member State levels. The national governments need to be responsive to citizens by fulfilling their electoral promises while acting responsibly at the EU level. Simultaneously, national referendums regarding migration issues challenge the EU institutions' policy-making as some Member States fail to accept the decisions made by EU institutions and thus, the Member States question the EU's authority to act on their behalf. For the EU to increase input legitimacy in migration policies, also national parliaments could be involved more directly, as a way of introducing external checks on what goes on within individual Member States but also at the EU level, and thus, enhance transparency.[239] But, at the national level, referendums are already challenging EU policies by claiming that demands arising from a direct democratic ballot enjoy greater legitimacy.[240] The EU cannot act in a manner that produces legitimate outcomes if the Member States do not agree on actions or fail to support EU policies. Or, to put it more precisely, as long

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[238] Murray, P. and Longo, M. 2018. Europe's wicked legitimacy crisis: the case of refugees, *Journal of European Integration*, 40(4): 411-425.

[239] Fossum J.E. 2015. Democracy and Differentiation in Europe. *Journal of European Public Policy,* 22(6): 799-815.

[240] Rose, R. 2019. Referendum challenges to the EU's policy legitimacy – and how the EU responds. *Journal of European Public Policy,* 26(2): 207-225.

as there is no agreement among Member States on migration policies, any attempts at imposing such policies can always be objected to by claiming illegitimacy.

The multilevel nature of migration governance also results in legitimacy challenges externally. External migration policies of individual Member States are occasionally competing with the EU's external policies, hereby undermining the EU's credibility in the international field.[241] The multitude of bilateral migration agreements risk eroding the regional migration agenda.[242] In addition to this, the externalization of migration policies to non-EU countries disregarding, for instance, international law and human rights has raised legitimacy concerns externally (and internally). Offshoring migration governance can be in direct contradiction with EU values of respecting human dignity, freedom and democracy promotion for example. Nonetheless, the EU has been wilfully ignoring unintended consequences of its migration policies, as it seeks to improve its output legitimacy by responding to a 'securitized' migration debate. As a consequence the EU runs the risk of losing normative power in the international system as an actor in support for values such as democracy, rule of law, and respect for human rights and fundamental freedoms.

To the extent that the EU and Member States depart from the values expressed in the EU treaties, a legitimacy gap is perceived both in terms of the EU's compound legitimacy and in terms of that of its Member States. As Member State governments have assumed implementation of migration policies, opposing further opening of borders, increases in refugee intake and burden-sharing, this overturns the EU's narrative of solidarity. EU legitimacy is not solely challenged by its incapacity to uphold core values, but likewise when domestic action sidelines the EU in upholding those same values. In either case, domestic policy-making affects the legitimacy of supranational decision-making and the normative power of EU law.[243] The situation is once again highlighted by the crisis at the Turkey/Greece border in 2020, which provoked wide discussions regarding the fundamental values of the Union.[244] The more irregular immigration is phrased as a risk and threat, the easier it also becomes to defend a politics of exception, with corresponding technicalization and securitization.[245] Solutions that propose further agencification run the risk of decreasing input legitimacy even further.

Threats to democratic deliberation also follow from a polarization of the migration debate, fuelled by a populist agenda. Populists commonly picture the EU at large as an actor threatening the domestic sovereignty and cultural identity of Member States. In the context of migration, a populist rhetoric at worst picture 'the others' as the cause for any societal problems. Populism typically wishes either to suppress deliberation, and/or to polarize the debate. For this reason,

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[241] Reslow, N. 2019. Horizontal and vertical diversity: unintended consequences of EU external migration policy. *The International Spectator,* 54(1): 31-44.

[242] Bisong, A. 2019. Trans-regional institutional cooperation as multilevel governance: ECOWAS migration policy and the EU. *Journal of Ethnic and Migration Studies,* 45(8): 1294-1309.

[243] Thym, D. 2016. The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy. *Common Market Law Review,* 53(6): 1545-1573 (p. 1565-1566).

[244] See e.g. Clapp, A. Europe Turns Its Back on Refugees—and Its Own Values: Clashes on the Greek Border With Turkey Reveal the EU's Failings, *Foreign Affairs*, 17 March 2020.

[245] Engström, V. and Heikkilä, M. 2014. *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice. Fostering Human Rights among European Policies*. Work Package No. 11 – Deliverable No. 1, doi.org/20.500.11825/74, at 150-154 for an overview.

post-truth politics could be called the antithesis of deliberative democracy.[246] But the populist challenge runs even deeper, as it imposes a particular understanding of fundamental EU values such as human rights and solidarity.

Reforming EU migration governance has become nearly impossible due to the contestation and polarization of the debate. At the time of finalizing this working paper, the European Commission has just launched a proposal on a New Pact on Migration and Asylum.[247] While the aim of the pact is to remedy some of the shortcomings of current migration governance, the initial reception has been mixed. It remains to be seen whether reform this time can survive debate in Parliament and Council.

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[246] Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. 2018. Deliberative Democracy: An Introduction. In: *The Oxford Handbook of Deliberative Democracy*. Bächtiger, A., Dryzek, J.S., Mansbridge, J., and Warren, M. (eds). Oxford University Press, Oxford.
[247] Commission Communication COM/2020/609 final (23 September 2020).

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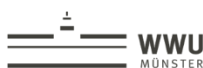
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