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People on the Move. Migrants, Refugees, and Citizenship Rights. A Paper for the History and Future of The European Union Class

ABSTRACT – A conference was held in Tallinn, Estonia, at the Tallinn University (Tallinn Ülikool) on 7-8.2.2019. The conference, "People on the Move. Migrants, Refugees, and Citizenship Rights, "discussion consisted of presentation by various prestiged European scholars. A paper was asked to be submitted over the conference content by one of the chairmen and a speaker of the panel discussion Massimo La Torre, a Professor in Philosophy of Law at the Law School of Magna Graecia University in Catanzaro, Italy, and a Visiting Professor of European Law at the Tallinn University. This paper is trying to fulfill those requirements. Instead, a general narrative over the topical issues discussed by the panelists and seeks to reflect those ideas against the writers own understanding of the issues.

KEYWORDS – Theory of Law, International Law, Philosophy of law, discussion, migrants, refugees, citizenship rights

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The panel started with a discussion of how refugees with different origins should be regarded as. While some refugees have fled their country of origin due to a distress and life-threatening circumstances, others are climate refugess or economic refugees. Often the refugees is distress have trumped over the „voluntary" refugee seekers. Professor Pereira Countinho claimed the institutional procedure requires documentation to categorize or label an individual upon its entry into the state apparatus. But what is the case with refugees who do not have any paper work with them? Somehow these people need to be processed as well. Perhaps there is an exception made with these people in distress due to wars or other life-threatening reasons, but it stands only to say the 'impossibilities' mentioned by Pereira Countinho are only formal and procedural and not impossibilities per se. Pereira Countinho regards human dignity as the foundation of human rights it is still preceded by valid documentation. Yet, a war refugee does not undergo the same process as a climate refugee. In other words, it is a lack of resources (will!) to process these migrants the hard way. Pereira Countinho views the immigrants not as 'subjects' of law but, at best, 'objects' of UN law – a very Kafkaskian viewpoint. Professor La Torre noted that before the First World War there were no passports (=documentation) but traveling was not nevertheless impossible. Tony Jodt[1] described as public insensitivity among different interest groups. A

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[1] T. JODT, *I'll Fares The Land*, Penguin Books, 2010, 126-129.

seemingly common phenomenon of our era. The private needs trump over collective needs (preserving fundamental human rights). A dangerous path to take as Jodt goes on explaining that after abandoning the common interest it becomes evident the laws do not reflect the private needs precisely enough and thus it is reasonable to resort to force. In his time Alexis de Tocqueville warned of this phenomenon after the collapse of aristocracy in Europe when equality among men brought seemingly unlimited prospects to everyone's reach[2].

For Professor Chwaszczca the decision-making ought to be more utilitarian via democratic process. Individual rights must step aside to make room for the communal values. The individual rights, Chwaszczca is referring to, were not those bestowed upon the migrants but the communities within the given society.

Chwaszczca argues the States should be able to decide upon individual appliers on the entry level, whether they suit the State's purpose sketched for the immigration. This „forum-shopping“ among immigrants skills obviously leads to wealthier member states to offer better packages for „better people“ who satisfy the skill- and documentation requirement set by the host state. In other words, a poorer member state must satisfy itself with the problems resulting from the „unwanted“, as common ethics described in Kantian cosmopolitan laws for hospitality require to welcome everyone in distress or otherwise mobilized.[3] This becomes, indeed, a very grave issue, as professor Menéndez explains, the freedom of movement inside the EU is only formal. This in effect means that an immigrant is being 'ear-marked' in the first member state he enters and becomes *de iure* migrant of that state. Therefore, another member state may return the person back to the first member state in case it finds the immigrant

[2] A. DE TOCQUEVILLE, *Democracy in America*, vol. II, 1835, Vintage Books, Edit. Richard D. Hefner, 1945, 293.

[3] I. KANT, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, 2006, 82.

unwanted. The justification for denial of access can be based on the state's sovereignty secured right to exclude anti-democratic ideas and, as Menéndez points out, due to being economically inactive. These exclusions run contradictory with the Article 78 TFEU[4] provisions on granting common policy for third-party asylum seekers within the Union borders. The practiced treatment seems to serve as a good excuse to stamp a *persona non grata* label on anyone on the entry level with insufficient skill-set or documentation.

Both, Chwaszczca and Pereira Countinho, agree the rights of immigrants need to be re-negotiated via democratic process. Interestingly, the Universal Declaration of Human Rights or the UN Charter or the TFEU, nor TEU[5] (Article 2), do not seem suffice the requirement in order to reach an agreement what is to be done with a human being in distress. Instead, the privately motivated electorate is to be summoned on the polls to decide anonymously the correct procedure for faceless misfits not enjoying human dignity due to a lack of documentation of their physical existence. Menéndez finds this as an outrage against, not only the international law, but also the Treaty-based legislation set down in the EU's own legislation. The way the immigration crises eventually escalated has made Europe perhaps more human but less social at the same time. Menéndez defends this stand by arguing that even when the cosmopolitan law requirement was satisfied by providing 'hospitality', the process faced abandonment of the humanitarian principles stated in the Treaties. It is to say we have become a less solidar as a society. This leads to the “Paradox of Institutions” referred to by professor Saada. Equal consideration should be received despite of backgrounds, since hospitality is ethics that concerns us as human beings. A private virtue. But it depends on the arbitrariness of individuals, which makes it hard to institutionalize and redistribute equally. During the crises the resources were not made

[4] Treaty of Functioning of The European Union.

[5] Treaty of European Union.

available making the redistribution of them impossible. A question whether it is a choice or is there an obligation to render aid needs to be answered.

One might argue that calling the European immigration crises the "worst refugee crises since the Second World War" is a gross understatement, as the Second World War saw some 60 million people being mobilized compared to the 2 million people between 2015 and 2016. This lays a base for the "million-dollar question" asked by professor Menéndez: "why Europe is incapable of opening in a way as it did after the Second World War?". As it seems the economical duress differs from a political one when it comes to asylum seekers. Another point, Menéndez concludes about the crises, is that while the Union has managed to eliminate the physical borders between the member states, it has created new socio-economic borders, which have become impassable, whether or not one has the valid documentation.

The new borders are arising not only between the member states but also individuals. Professor Sakkeus referred to foreseeable problems in the future. The freedom of movement ought to allow pursuing a career within the member states and even if the new socio-economic borders, as described by Menéndez. When the movement to occurs, it raises new social problems. The citizens must abandon their traditional roots and become "Europeans" in search of employment, if they wish to play according to the rules and use the advantages created upon them in the competitive job market. This creates several problem scenarios. Firstly, the mobility requirement not only means abandoning the traditional community unit, but also creates a problem with citizenship and social cohesion due to rootlessness. Secondly, it promotes the insensitivity towards the peril of others, whose background supports the traditional family-unit. And thirdly, as Saada interprets the Neo-Westphalian doctrine has created a right for an individual to be a part of a given country (individual *kompetenz-kompetenz*). This right is running parallel with the

freedom of movement, which has become more of an obligation in the job market instead of a free choice. How should one establish his roots in another member state? Sakkeus proposes that residency ought to equal citizenship. But the question of social rootlessness in the traditional sense is left open. If the socio-economic border patrols seize mobility of the whole family unit a job-seeker becomes dependent on the hospitality of another member state materializing the "Paradox of Equality". In other words, humans are all equal, but hospitality is only triggered by inequality. Lastly, it is interesting to point out a rising trend in Germany, discussed over a coffee pause with professor Menéndez, of sending the elderly to receive care in another member state away from their families. Paradoxically the freedom of movement feels less 'free' when citizens are moved around involuntarily in search of the cheapest service provider. The coffee pause left a question in the air: who does the freedom of movement eventually serve?

Citizen is considered as a member of a political society. It carries a medieval birthright attribution with it – a form of categorical inequality, as claimed by Professor Gutmann.

The answer to a question if it is special is easy: surely. Citizenship comes in a bundle of rights in a given society. Gutmann's thesis is if there are there functional reasons in doing so? Citizenship is often claimed "neutral", but as Gutmann pointed out, it is obviously it is not. Allocation of citizenship is decided arbitrarily by chances of being born within a certain set of borders. Are these borders necessary for deciding the citizenship in a globalized world?

As today's society subsystems increasingly project global horizons for their operations (thanks to globalized capitalism), Gutmann is asking for establishment of a "global citizenship". The request is based on Niklas Luhmann's argument stating that in a functionally differentiated society categorical discrimination is structurally dysfunctional; it is sand in the

engine. In a truly global society the distinction between internal and external mobility is dissolved. Therefore, restrictions to it only made sense if the territorial boundaries of the state were more or less coextensive with the boundaries of society's systemic operations.

Some criticism is in order. As Professor Pfordten pointed out at the start of he's presentation it has been the state's sovereign right to decide on the abstract surrounding its citizenship. Like a restaurant can choose its customers, a state has been able to validate its citizens somehow. This makes sense from a nationality perspective. A difference should be made between a 'national' and a 'citizen'. The issue was briefly touched by Gutmann creating a differentiation for 'nationality' in a linguistic sense. If one compares several European languages it is easy to perceive the words are rather similar (fr. Nationalité; it. Nazionalità), but there are also dissimilarities. In German “Staatsangehörigkeit”, which has a lot more state-related echo in it, indicates also a bundle of negative-rights and obligations coming together with the presumed rights. Another great example is in Estonian *rahvus*, which is very close to the equivalent for “folk” (*rahva*), carrying a much more ethnocentric resonance. Even if the citizenship might be on discount in France or Italy, the Estonians might find it a lot dearer item to sell. Therefore, it is not as black and white as Pfordten put it when he explained the citizenship to hold only “instrumental value” for an individual and that the rights of non-citizens create a right for a citizenship. Pfordten may secure a point, but it may be extremely hard to convince the demos. Therefore, a closer look at the “nation(al)” and a “citizen” needs to be taken.

According to Abbé Sieyés a nation is a body of associations living under a common law and represented by the same legislature. Cicero provides two distinctive elements for a nation. A citizen of a nation is *de facto* citizen of two different nations *patria naturae* and *patria iuris*. For Kant a state is the “union of a number of men under juridical laws”.

What Sieyés is referring to with *associations* is that the association is expressing the performative acts of individuals in coming together to *form* a nation. Therefore, a nation is an artificial construct postulated by the (equal) association of its members (in comparison of being substantial - ever existing). Equality in the sense of being able to legitimately 'postulate' a nation is essential, for it generates the authority (*pouvoir constituant*) for the nations *demos* to postulate a constitution. Without the equality, the nation does not satisfy democratic legitimacy requirement.

Professor Günther explains that after forming the nation the *constituant* becomes "a citizen of two worlds". On one hand, it has been formed on the universal cosmopolitan association deriving from the association's 'tradition', often having a religious background. On the other hand, it is a legal association under a common law in that specific social context (the nation). Thus, it may be said a constitution is *constituted* from the laws of the nation, as positive law, and of universal cosmopolitan laws, the manifestation of the association's tradition. The outcome ought to be the Kantian union under juridical laws – a social contract.

In Günther's words, this union is in fact a fight for the "infinite realization of human rights" against the positive 'man-made' law. An important notion when considered again from a linguistic point of view. In English a 'constitution' already refers to a construct of parts (variables) but already in Finnish (*perustuslaki*) the allusion is much more founding and solid.

For Cicero the variables in the form are very similar. A citizen carries with him the patria naturae (tradition) and patria iuris (allegiance for the state). Therefore, Günther argues the citizen retains the right to fight against the patria iuris in case of a violation of the cosmopolitan laws (i.e. human rights).

A question is left open until what extend the citizen is merely enjoying a right to fight against the perpetrator, and not a duty. After all, the citizen is within the sphere of the social contract of the nation and should carry at

least a partial contractual liability. Such was the case in the Judge's Trial (*Juristenprozess, 1947*) after the Second World War, where several German judges were seen to be liable for participating in the actions of the *de iure* authority of the state. Naturally, the fact that the contractual liability origins via birthright received citizenship and an automated inclusion within the sphere cannot be entirely bypassed.

Another, more abstract, question arises over the inclusion of third-parties into the sphere of the social contract. The third-parties are mainly divided in two groups: the *bourgeois* and environmental entities. By "environmental" I refer to an entity whose re-location is set in motion by environmental reasons, not dependent on the individual. Now, where the bourgeois on the move holds a natural desire to adapt itself with the social contract in the nation to practice trade and accumulate additional profits, the environmental entity is often forced to move within the next sphere. Therefore, there may not be a natural interest in accustoming one's self with the tradition of the nation. A counter-argument may be provided that the universal cosmopolitan laws, common to all men, provide enough background for adapting one's self into the new tradition. It should be noted, however, that also theology talks about a tradition – the story of the people. The legal orders are often based on the tradition derived from the theological origin, reducing the patria iure to derive from the patria naturae of the association. Where the traditions, in their theological sense, do not have a large common surface, it should be considered whether they still constitute cosmopolitan law in regarding one-another. As it was discussed above, for the association to take place, and for a nation to be formed, the common story is essential for all members in the nation. It should not be perceived as discriminating in its *ratione* but instead to set the basis for equality within the nation. Bearing in mind Günther's words, the nation is an artificial construct constituted by its associates from the same tradition. It is not substantial in the sense that it has always existed and always included all its citizens. A nation is shaped accordingly to its

associates. If the story is different for a minority within that nation it becomes easily unequal, as the citizenship bears with it not only the right to have rights but also obligations. And if the fulfillment of these obligations becomes distasteful, due to the lack of competence to comprehend the story behind, the minority becomes biased in the sphere of the social contract. However, this problem was attested by professor Günther. In his wisdom he proposed a solution where certain turning points in history have offered a chance for upheavals with shaping the tradition. Such turning points might have been the women's right to vote, sexual violence becoming a crime against humanity or equal rights for blacks and whites. Therefore, it appears the tradition can be changed posthumously. It should be borne in mind though that citizenship is political. Thus, meaning the political system can be applied to a citizen but it also grants the bundle of rights. A right to speak within that political system. The women's right to vote is a great example of this. Nevertheless, the equal voting rights were constituted for a segment of people sharing the *volkgeist* within the tradition, thus understanding the story. The newly given rights and obligations did not invoke confusion. For an entity unfamiliar with the contents of the bestowed bundle it is reasonable assume confusion. If the obligations are not explained carefully enough a rational individual will resort to its patria naturae right to fight against the experienced injustice. A cosmopolitan, and a very human and a justified, reaction, which ought to be kept in mind when extending the citizenry.

Conclusion

The paper started by introducing certain procedural errors concerning the lack of documentation among the refugees claimed by Professor Pereira Countinho and backed up with professor Chwaszczca. The proposals were met with severe resistance from professors Menéndez and

La Torre. Menéndez introduced his “million-dollar question” concerning the incapability of the modern European to understand a human being in distress. La Torre noted that prior to First World War it was common to travel without documentation. The growing phenomenon of insensitivity among European people was proposed as a reason for the conduct. The discussion turned to the freedom of movement and its unequal distribution among economically active and inactive citizens and the four issues resulting from the requirement to move: (1) the disappearance of the traditional family unit, (2) the growing insensitivity due to seemingly limitless individual *kompetenz,* which (3) has resulted in turning the freedom of movement into an obligation of movement. Finally, (4) the growing trend in Germany to force the elderly to receive care in another country was introduced as a materialized element of the afore described phenomenon. At the end of the first part the paper introduced a question the Writer thought to be on everybody's lips by the end of the panel discussion: who does the freedom of movement eventually serve?

The second part opened with by defining 'citizenship' and 'nationality' based on the panel discussion. The etymological viewpoints offered the Reader another aspect for comprehending the merely “instrumental value” of citizenship, as claimed by professor Pfordten. It appeared many of the panelists thought citizenship to be an outdated birthright, which value should be reconsidered. The discussion was carried on to a more philosophical level during professor Günther's presentation. The Writer formed his understanding with the help of Cicero, Kant and professor Günther's narrative. This culminated in the importance of the 'tradition', the story, upheld within a given association of people. A right to point out the Writer's error in interpreting professor Günther's thesis is reserved for the professor. Hopefully the paper, despite its reservations, managed to invoke the Reader's interest towards the subject of democratic legitimacy of a nation based on its associative story equally common to its whole

demos. At the end the Writer wishes to express his gratitude towards the organizers of the Conference and the speakers taking part in it.