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for Migrants and Refugees in the Mediterranean Territory*

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# *The Great Distance between the Written and the Living Constitution for Migrants and Refugees in the Mediterranean Territory<sup>1</sup>*

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## **Abstract**

Constitutional rights are rarely addressed for the protection of migrants and refugees. In the past few years, the number of migrants and among those seeking asylum has been growing increasingly. A crisis has emerged and even though some nations showed empathy when the refugee inflow began to increase, throughout time those good deeds haven't been done as expected. Long standing periods in refugee camps awaiting bureaucratic decisions, reception quotas not being met and new entrance barriers that have been build up. The present document aims to review the principles instated in the Constitutional Rights from European Mediterranean countries, to compare those proclamations with the current reality and the developed political tools installed by the European Union in response to the refugee crisis. It is expected to be able to raise a critical speech towards welcome mechanisms and to pursue the integration of the voices of the unheard when proposing new legal solutions.

**Keywords:** Human Rights, Refugees, Law, Constitution.

## *Introduction*

A wider perspective is to be settled when trying to understand what migration and asylum seeking is. Different organizations, whose duty is to understand the phenomena and pursue a better development of it, have

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tried to give definitions. The International Organization for Migration refers to the term migration as

the movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes, it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification (IOM, 2018).

The United Nations Educational, Scientific and Cultural Organization refers to it as “the crossing of the boundary of a political or administrative unit for a certain minimum period of time” (UNESCO, 2018). Therefore, a migrant is someone who freely decides to change its current living conditions towards the acquisition of better ways of living after making a conscious decision, which leads to the change of territory.

Considerably different is the situation of an asylum seeker. According to the Refugee Convention of 1951, this denomination is to be applied to a person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UNHCR, 2018).

Fear of losing the life of oneself and from the beloved, instead of a freely made decision, is the corresponding feeling when a Refugee begins the journey.

As for the Open Society Foundations, the difference between Migrant and Refugee is that

a migrant is a person who leaves home to seek a new life in another region or country. This includes all those who move across borders, including those doing so with government permission, i.e., with a visa or a work permit, as well as those doing so without it, i.e., irregular or undocumented migrants...a refugee is someone fleeing war, persecution, or natural disaster. Refugee status is defined in international law, which requires states to protect refugees and not send anyone to a place where they risk being persecuted or

seriously harmed. States hold primary responsibility for the protection of refugees (Open Society Foundations, 2018).

In this last definition, the term *home* is used for the first time and the importance of it shall not be overseen.

It is then a social paradox what occurs, not only from the economic point of view, but from the perspective of integration and life quality. According to Ciurlo, the transnational displacement involves complex incidences in the personal field and the implications are plural in all aspects of the economic, social, cultural and psychological sphere (Ciurlo, 2013). As stated by De Alencar Rodríguez, Cantera and Strey, there's a breakdown in the sphere of family and friends, and it translates into a lack of social networks and support; additionally, there's a work precariousness and economic difficulties. A social isolation environment is forged, and it is almost as if people became imprisoned (de Alencar Rodríguez, Cantera, & Strey, 2013). Utilitarianism of the person is also given, since they become welcome only when needed to pursue unwanted Jobs or to fulfill the lack of certain type of workforce.

Even though we claim to live in a globalized world where no barriers are build, truth is governments create mechanism to stop migration inflows (Aruj, 2008), and the norms that respond to the situation only prioritize the development of economic models which do not consider the wellbeing of the person and as holder of rights. A person then becomes a tool with purpose of boosting commercial growth (Sánchez Mojica, 2014).

None of the definitions mentioned, encompass the true implication of what migrating and seeking asylum is. The movement to which is referred to above, does not only comply with a physical situation, but foremost and principally, to the internal changes that occur when a human being leaves behind all what is known as *Home*, and enters an unknown territory. Both situations are to be understood as a social phenomenon, which comprise a series of factors in both the origin and reception countries which serve more as obstacles than as welcome or integration mechanisms like they are supposed to be.

In 1951 the Refugee Convention was signed, and member states agreed to welcome those who feared for its life into their territories. According to the available data, in the year 1994 figures show that Germany hosted a refugee population of 1.354.600 persons, Greece 240 persons, Italy

recognized around 12.500 asylum seekers and France registered 152.300 refugees (UNHCR, 1994). By 2012 statistics showed that worldwide there were 45.2 million people forcibly displaced (The Guardian, 2012). By 2018, according to the United Nations Refugee Agency, UNHCR, the figure has gone up to 68.5 million persons who have been forcibly displaced worldwide (UNHCR, 2018).

Today, the distribution within the host countries is becoming a problem and the Dublin Regulation<sup>2</sup> which was thought as a tool to fairly distribute people and the administrative work which derives from the asylum-seeking applications, has turned into a mechanism for hindering the entrance of refugees into the western countries from the European Union.

### 1. *Getting to know the Constitutions*

The Constitution of a nation is understood as the main establishment of the recognition of rights within a determined territory. Its definition has ranged widely having for example that it is understood as a combination of *gubernaculum* and *jurisdiction*, power and its control (Maddox, 1982). It is also understood as the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it (Merriam Webster Dictionary, 2018).

In Europe it is said that the Constitution should reflect the definition of the values, fundamental objectives and spheres of action of the European Union and puts in place the machinery whereby its institutions can operate (European Parliament, 2005). It is the written manifest of the will of a nation in regards to the compliance of rights and laws, and which needs to meet as a requisite the establishment of a territory, the division of its

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<sup>2</sup>The purpose of the regulation, adopted in 2003, is to determine which State is responsible for examining an asylum application – normally the State where asylum seeker first entered the EU – and to make sure that each claim gets fair examination in one Member State.

The “Dublin” system operates on the assumption that, as the asylum laws and practices of the EU States are based on the same common standards, they allow asylum seekers to enjoy similar levels of protection in all EU Member States. In reality, however, asylum legislation and practice still vary widely from country to country, causing asylum-seekers to receive different treatment across Europe.

powers and the perpetuation of boundaries. It also has to meet certain characteristics and factors: 1) territory, 2) population, 3) order, 4) recognized sovereignty (Caballero Sierra & Anzola Gil, 1995).

No matter which definition is given to it, every Constitution in their peculiarity recognizes that the wellbeing of every human in its widest comprehension, is to be set as the reason why a Constitution exists. The preamble of the Constitution of France states that

the French people solemnly proclaim their attachment to the Rights of Man and principles of national sovereignty as defined by the Declaration of 1789.

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development (French Government, 1958).

In Italy, the second article of the Constitution of 1947

recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled (Italian Government, 1947).

Other countries make clearer statements about how those rights are to be respected. For example, Malta recognizes to be a democratic republic, who has its foundations in the respect of the fundamental rights and the freedoms of the individuals (Republic of Malta, 1964).

Perpetuating the same arguments, Slovenia declares on the fifth article of its Constitution that within their territory,

the state shall protect human rights and fundamental freedoms. It shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities. It shall maintain concern for autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland. It shall provide for the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia. Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law (Republic of Slovenia, 1991).

This Constitution makes a special recognition for the nationals who have the necessity of encountering another country as working migrants underlying that way that those who are in the situation of being migrants have special needs. Nevertheless, nothing is said about those who might enter the territory as migrants and the recognition of rights is based on citizenship.

Some other Constitutions of European Mediterranean countries state as follows:

#### Croatia:

Respecting the will of the Croatian nation and all citizens so unwaveringly expressed in free elections, the Republic of Croatia is hereby established and shall further develop as a sovereign and democratic state in which equality, freedom and human and civil rights are guaranteed and secured, and economic and cultural advancement and social welfare are promoted.

Article 3: Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia(Croatian Parliament, 1990).

#### Bosnia and Herzegovina:

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments.

Human Rights Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina (Parliamentary Assembly of Bosnia and Herzegovina, 1996).

#### Montenegro:

Article 6: Montenegro shall guarantee and protect rights and liberties. The rights and liberties shall be inviolable. Everyone shall be obliged to respect the rights and liberties of others (Constitutional Parliament of Montenegro , 2007)

#### Albania:

We, the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and/or other universal values, with determination to build a social and democratic state based on the rule of law, and to guarantee the fundamental human rights and freedoms, with a spirit of tolerance and religious coexistence, with the pledge for the protection of human dignity and personhood, as well as for the prosperity of



the whole nation, for peace, well-being, culture and social solidarity, with the centuries-old aspiration of the Albanian people for national identity and unity, with a deep conviction that justice, peace, harmony and cooperation among nations are among the highest values of humanity.

Article 3: The independence of the state and the integrity of its territory, dignity of the individual, human rights and freedoms, social justice, constitutional order, pluralism, national identity and inheritance, religious coexistence, as well as coexistence with, and understanding of Albanians (Albanian Parliament, 1998)

#### Greece:

Article 2. Respect and protection of the value of the human being constitute the primary obligations of the State.(The Constitution of Greece, 1975)

#### Portugal:

Article 1 (Portuguese Republic): Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society.

Article 2 (Democratic state based on the rule of law): The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy (Constituent Assembly of Portugal, 1974).

Making common affirmations such as commitment to building a solidary society, having deep convictions of cooperation among nations and declaring that above all the respect for human dignity shall prevail, shows the spirit under which the nations thought to build their foundations.

Some authors stated that a Constitution only came to life once it was written down and presented on a paper. Sartori said the emphasis is laid on the *letter* so much more than on the *spirit* of the law of the constitution (Sartori, 1962). But would it then be right to say as Jennings declared that since Great Britain has no written constitution, there is no special protection for fundamental rights(Jennings, 1959)? Truth is, it can be written down on stone but if there is no will to act in a certain direction, there is also no way a declaration of good will is going to work.

## *2. The Lawless Migration and the Alarming Disconnection between Theory and Practice*

A lands Constitution is meant to be the written statement of a nation's principles. Respect for all mankind from the Human Rights point of view, is the core affirmation on those written Agendas. Nevertheless, in foreign country relations sometimes it seems to be as if those who belong to a different territory aren't to be part of manhood and therefore not considered subjects to be treated as equals.

According to Humphrey when criticizing Ravenstein, the "conclusion that migration was rather distinguished for its lawlessness than for having any definite law" (Humphrey, 1889) is what was though when referring to regulatory norms regarding migration. That affirmation is not outdated and the situation has been developing similarly in the past one hundred years. Not because there aren't any laws, because in fact, there are. But because those laws don't comply with the real needs of the people.

The particular situation of Europe being a common territory might even make it more difficult for individuals seeking asylum to understand the undergoing. It is not only necessary to comprehend what is regulated by each individual State, but also to meet the European binding core principles.

Unknowing the legal system of the host country, translates into unrecognizing the way one's rights are to be respected and promoted. And if that wasn't enough, the European Union in order protect to the wellbeing of their nationals and permanent citizens, developed regulations which allowed for them to legally bounce refugees from one place to another.

It is said that the European Union is founded first and foremost on values. The preamble and the opening articles of the Constitution set the tone: the Union "draws inspiration from the cultural, religious and humanist inheritance of Europe" and thus defends universal values: the rights of the human person, freedom, democracy, equality and the rule of law. It aspires to be "united in diversity" and open to all European States which respect its values (European Parliament, 2005). It is hard then to understand the logic behind the Dublin regulation, which redounds in a wider vulnerability of human rights.

The regulation justifies itself in considering that not all member states are able to guarantee fair hearings of asylum claims, that some of the states decide to detain persons in order to transfer them to another country under the grant given by the Dublin Regulation, and that EU is hardly capable of tracing such conducts. To date, it has been proved that over 10,000 migrant children have disappeared after arriving in the E.U (Sigona & Allsopp, 2016).

In recent years, the world has witnessed what has been described as an unforgivable genocide. According to official figures from the Agency of the United Nations for Refugees, as of June 2017, the highest point in decades had been reached in terms of the number of people who have been forced to move. The unprecedented figure was 65.6 million in 2017, and 68.5 million in 2018 people uprooted from their homes, for reasons attributable to the conflict (UNHCR, 2018). From that great total of almost 69 million, it is possible to affirm that more than 30% hold the status of Refugee. Numbers of course are considerably higher than the ones reached after historic events like World War II, when the movement of people began to be a constant and the UN Refugee Agency was first created. Furthermore, 51% of those numbers are to be endowed to refugees under the age of 18.

The fleeing is the result of the more than 40 armed conflicts which exist in the world today and whose development has focused within the countries of Syria, Nigeria, Iraq, South Sudan, Libya, Afghanistan, Palestine and Yemen. The second country which presents the largest number of refugees is the South American country of Colombia with 7,7 million of refugees.

Conflict is always accompanied by poverty, inequalities, hunger, and lack of opportunities. It is also accompanied by international indifference and the selfishness of the world community that, under the excuse of not having enough or suited welcome mechanisms, decides to close borders bypassing superior international treaties that in theory would prevent it. This situation reflects itself in the thousands of refugee camps reminiscent of the labor concentration camps that prevailed during World War II, and that now have been placed in the Mediterranean borders, for example in Greece where more than 50.000 persons have been held back unable to advance or retreat; or in Hungary, where fences have been erected to prevent migrants of entering into Europe. Poland and Czech Republic are also in this position or denying the entrance of refugees into EU lands (AFP

Bruselas, 2017). Strong statements have been heard from leaders. Viktor Orban, Prime Minister of Hungary has even claimed that receiving migrating population is undesirable because it would lead the nation into losing its Christian identity into a spiritual suicide (Visegrad Post, 2017).

Table 1: European infringement of the refugees welcome

Country	Total # of welcomed Refugees	Total # of Refugees that should have been welcomed	Agreement Compliance
Germany	7.852	27.536	28.52%
Austria	15	1.953	0.77%
Belgium	2.357	5.947	39.63%
Bulgary	50	1.302	3.84%
Chipre	130	320	40.63%
Croacia	78	968	8.06%
Eslovaquia	16	902	1.77%
Eslovenia	217	567	38.27%
Spain	1.257	9.323	13.48%
Estonia	141	329	42.86%
Finland	1.951	2.078	93.89%
France	4.278	19.714	21.7%
Hungary	0	1.294	Didn't comply
Ireland	487	It is not required to host refugees	
Letonia	321	481	66.74%
Lituania	382	671	56.93%
Luxemburg	382	557	68.58%
Malta	148	131	112.98%
Norway	1.508	It is not required to host refugees	
Netherlands	2.357	5.947	39.63%
Poland	0	6.182	Didn't comply
Portugal	1.415	2.951	47.95%
Czech Rep.	12	2.691	0.45%
Sweden	1.903	3.766	50.53%
Switzerland	1.122	It is not required to host refugees	
TOTAL	28.397	95.610	29,7% fulfilled

Source: *El Mundo*, 26 September 2017

The European Union had agreed to distribute and receive a certain number of refugees according to their possibilities and one might even think, according to their welcome and integration plan. On the following

table, it is possible to see the collected data in regards to how many refugees have actually been able to legally enter the territory under the Refugee status; as well as the number of refugee that should have already entered but haven't been able to do it, given the different obstructions.

The present figures are the awareness of a devastating reality, a reality that would be inhumane to ignore. According to Gilberto Ramírez Huertas, and his work *Human Rights in debate, perspectives of international law*, quoting Levi: the collective indifference to the massive violation of Human Rights, poses a punishable attitude; vileness without which would not have reached the greatest atrocities, Europe and the world today would be different (Ramírez Huertas, 2017). The affirmation is made regarding the Second World War, and how the indifference that occurred then, the lack of claims, and the distant witnessing of atrocities, made the common citizens allies of the regime. Being in silence, and not being able to conduct acts of opposition can be as reprehensible as the acts perpetrated by the regime.

Given this scenario, it is pertinent to ask how is the European Union prepared to meet the needs of thousands of people who seek asylum in that territory, under the belief that it is the only possible way to survive. That survival comes along with the need of having a decent and steady job, access to education according to the last level of education that had been able to be pursued in the home country; it means timely attention to health issues and encountering a place within the host society. It means to feel welcome and able to pursue a life plan and not only to survive.

It is important then to know the statistics of the current possibilities that the European citizens have regarding those same issues. The job market in the European Union was able to offer 71, 1% of the people between the ages of 20 and 64, a decent place to work or job opportunity (Eurostat, 2017). Looking at those same statistics country by country, results concerning the nations with the least coverage of working spaces would be Yugoslavia-Macedonia, 53,3%; Turkey, 54,4% and Greece 56,2%. At the other end, countries with the most capacity to offer a decent working space and its coverage are: Sweden with 81,2%, Switzerland, 82% and Iceland with 87,8% of labour force participation and employed people.

In regards to access to health, most countries in Europe have what is known as a universal access system in health issues. That, in terms of the World Health Organization (WHO), means that there is a guaranteed

access for all, to the essential health services. Being those of the best quality and procuring the people with the needed medicines, vaccines, effective and affordable insurances and special protection against possible financial risks due to health issues. It means people are able to comfortably count on medical health services, without having to face financial hardships to cover them, and that the facilities include preventive processes, treatments, rehabilitation and palliative care (World Health Organization, 2017).

The possibility to access to quality education, represents in the same way, one of the most important requirements to be considered within the holistic welcome mechanism of any person and of course of a migrant. It is core for the development of a human being to be able to learn and improve knowledge. The Universal Primary Education that was raised in one of the Millennium Development Goals, was a longing for many; but a reality within Europe. For over 100 years Europe has been meeting the quota of universal primary education for all. The subject here would be, how it can be assured that this education mirrors the special needs of a diverse society with different cultural backgrounds, which involves different languages, religious traditions and general believes.

The previous figures show that Europe should be in a position to provide if not definite, a transitional solution to the persons who have been asking for asylum. For example, by granting a basic access to the health system. This could be seen as a double sided benefit, for the hosts countries into preventing the proliferation of diseases that might come from the foreign territories and for the refugees into being able to make a consultation.

Also, by recognizing the professional knowledge of those who arrive and the previous education acquired by them. All of which should be seen as an opportunity of adding up, instead of breaking down. Their figures are much more positive than for example the ones in Latin American countries. An approach based on assistance giving is not what it is expected, but a respect to the constitutional paradigm of each country would be the minimum.

### 3. *The mistaken policies*

Since 2015 the number of asylum seekers was triggered due to the Syrian civil war. The countries who are set in the southern borders of the continent have been the ones receiving the population and a decision to make restrictions to the entrance of more refugees is opposed to the ideals behind Human Rights declaration, fundamental to the creation of every nation. Humanitarian assistance is being hindered, the new barriers creates more disorganization and sponsors human trafficking as well as occupational exploitation amid transnational organized crime networks, increasing the vulnerability of migrants and obstructing the work of the authorities (Reyes Betancourt, 2018).

What has been perceived as a burden for most countries, has been posing heavier weights to some. Greece for example, where simultaneously the euro crisis and the inflows of people happened. In Italy the situation is no better, it has been difficult to set up deals with the neighbors such as Libya where illicit migration, people smuggling, and a lawless society, contribute to a destabilization of a regular status (The Economist, 2017). But also in the strong nations where due to as what has been perceived as naïve for openly declaring a welcome to all, some have made a profit by delegating the responsibility of hosting the population in need by shoveling that responsibility to the wealthiest neighbor.

It is completely understandable that every application for a person seeking asylum is to be examined, what is not conceivable is that it takes more time to determine who's responsibility is it to handle the request, than giving it an answer. It is stated that it should not take more than 11 months to process a solicitation (European Commission, 2018), truth is, throughout such a time lapse without having an official recognition, the vulnerability of the refugee community is greater.

Refugees and migrants, as of being part of the community formed by every human being deserve to have a proper recognition of the Fundamental Rights instated within the Constitutions from the first moment after arriving into the welcoming destination. The people migrate

under difficult legal conditions; their qualifications are devalued in the destination countries and, as a result, they are forced to accept positions in the low-income segments of the labour

market including the informal sector, although this does not fit the status to which they legitimately could aspire in their countries of origin with reference to their education, their family background and/or their professional experiences (Nieswand, 2012).

Policy making which implies the recognition of previous studies, free access to minimum health services, providing incentives to possible employment givers and contributing to the generation of economically productive activities, could set a better new beginning.

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