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THE CHALLENGE OF TODAY'S AREA OF FREEDOM, SECURITY AND JUSTICE: A RE-APPROPRIATION OF THE BALANCE BETWEEN CLAIMS OF NATIONAL SECURITY AND FUNDAMENTAL RIGHTS

Roila Mavrouli*

1. Introduction

This paper will argue the construction of a European public order and its limitations and the relationship between the area of freedom, security and justice (AFSJ) and the Common European Asylum System. Do the migration and refugee waves consider a threat to the European public order? The European Court of Justice does not cease to affirm that migration is not a crime per se[1]. However, the recent derogations of the Schengen Borders Code and the reintroduction of internal border controls reveal a certain

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[1] See Court of Justice of the European Union, judgment of 7 June 2016, *Sélina Affum contre Préfet du Pas-de-Calais et Procureur général de la cour d'appel de Douai*, case C-47/15, ECLI:EU:C:2016:408.

relativisation of the AFSJ[2]. In this sense, does the European public order only equal security? Has freedom been left aside? The question raised is whether the securitisation of member states as part of unilateral action (as, for example, with the reintroduction of internal border controls) can shatter the ideal of a Europe without internal borders. The proliferation of security against freedom points to a further relativisation more profound in its nature: the relativisation of freedom as part of a fundamental rights protection. Does the securitisation of the European public order operate to the disadvantage of fundamental rights? Does the merger of criminal control with migration control, the so-called "*crimmigration"* phenomena, operate on the disadvantage of fundamental rights?[3] The challenge of today's AFSJ is to confront the derogations concerning fundamental rights on behalf of the protection of national security and public order as a matter of high importance.[4] In this way, the balance between nations' claims of national security and public order will not override freedom and fundamental rights. The question is whether migrants and asylum seekers fail to access to meaningful protection within Europe, does the migration crisis, left in the hands of Europe, threaten to jeopardise the European project as a whole?[5]

The area of freedom, security and justice (AFSJ) is defined according to Article 3(2) of the TEU as "without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime". The first attempt to create a common European area coincides with the EU's first attempt for a common asylum policy in the Amsterdam Treaty in 1999. The question this paper will raise is whether the asylum crisis comes to shatter the emergence of the common area of freedom, security and justice, making security prevailing over freedom. The role of justice in rebalancing security and freedom appears to be extremely difficult when it comes to asylum law where the criteria are rather ambiguous and improvised. In addition, the constant mutability of borders and the high surveillance interrogates the fundamental application of rights within the European territory. Nevertheless, the recent phenomenon of externalisation of the European borders increases the complexity of the application of fundamental rights, as European jurisdiction no longer exists following the EU-Turkey Agreement.

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[2] Commission Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code), C(2015) 7100 final. See also Council Decision implementing decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk.

[3] M. VAN DER WOUDE, J. VAN DER LEUN, *Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters*, in *European Journal of Criminology*, 2017, n. 1, pp. 27-45.

[4] Court of Justice of the European Union, Grand Chamber, judgment of 2 May 2018, *K. v Staatssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, Joined cases C-331/16 and C-366/16, ECLI: EU:C:2017:680. See also Judgment of 26 July 2017, Grand Chamber, *Council v. Hamas*, Case C-79/15 P, ECLI:EU:C:2017:584 and judgment of 26 July 2017, Grand Chamber, *Council v. LTTE*, case C-599/14 P, ECLI: EU:C:2017:583.

[5] T. SPIJKERBOER, *Minimalist Reflections on Europe, Refugees and Law*, in *European Papers*, 2016, n. 2, pp. 533-558.

This can be justified as an asylum crisis due to an EU legitimacy crisis. It is not a European crisis per se but rather the EU's failure to execute a fair and effective asylum processing system. And this is also because the gap widens between the values embedded within the founding treaties and the policies which appear to give effect to them. In this way, the EU loses legitimacy because the asylum procedures do not seem to be fair regardless of where the applicant sought asylum. The promise of fairness as concerns the asylum procedures has never been realised as such, because unequal burdens have been promoted among member states. The disproportionate accommodation of the flow of asylum seekers to frontier states such as Italy, Greece and Malta has created a problem of responsibility-sharing which has still not fostered a coordinated-burden approach. Does this inequality in the responsibility-sharing effectively fragment the area of freedom, security and justice?

In June 2017, the Commission instituted infringement procedures against Poland, Hungary and the Czech Republic for their failure to take 'the necessary action' under the 2015 plan. These states have proven an intention to withdraw from coordinated-burden approaches and an intention to complicate the access for asylum-seekers to the asylum procedures and in general, their polities. Is this a general current tendency of the EU member states? Could this quasi-revocation of EU law explode the construction of the AFSJ? In order to answer to this question, we will firstly stress the concept of a European public order and the limits within as part of the project of the formation of a European identity. More specifically, we will elaborate the concept of a European public order and the more and more recurrent tautology of the notion of public order with security. However, the initial idea was to set an equal balance between these three principles of freedom, security and justice within the common AFSJ. Nevertheless, internal borders have become external in order to safeguard security versus freedom. But Europe without internal borders is at stake because of this blurring of the distinction between internal and external borders. What are the costs for Europe and the AFSJ?

Secondly, we will analyse the securitisation of the European public order to the disadvantage of fundamental rights. To do so, we will use the example of the French legal framework (CESEDA) concerning illegal entry and facilitation to illegal entry and their qualification as offences. And this, in order to question the fundamental derogations of rights by the AFSJ based on a repeated and oft-invoked claim of national security and public order by the member states against any third country national or asylum seeker entry. Furthermore, the incorporation within the EU technological fingerprint systems of both categories of criminals and asylum-seekers fractures the differentiation of these two categories and finishes by assimilating asylum-seekers to criminals. After the November 2015 terrorist attacks in France, the extended prolongation of the emergency state resulted in the repeated claim of derogation from the Schengen Borders Code for reasons of public security. Several other countries requested the same derogation. However, the derogation from the Schengen Code cannot be extended for a more than a six-month period, and, according to the SBC, only for exceptional reasons. Have these derogations from the SBC

transformed the AFSJ by rebalancing the force ratios between freedom and security? And can justice counterbalance the "lost" freedom and fundamental rights within the AFSJ?

The European Union projects its identity on a common destiny despite the heteronomy of its past and legacy. The question of migration contradicts the concept of a European identity by triggering notions as plural identity, the abolition of internal frontiers and the identification to a specific territory. The question of asylum protection interrogates the pre-established area of free movement of goods and people and shatters traditional concepts of state and sovereignty. Nevertheless, if the frontline countries are the only ones affected by the "refugee crisis", conforming to the DUBLIN regulation, concepts such as protection of public order, struggle against the abusive free movement and against social tourism do not cease to reappear. Considering that we attend a transition from the traditional form of government to the form of European governance characterised by a strong use of soft law, one cannot help but wonder if the so-called "refugee crisis" is not a European crisis where bifurcation of mobility becomes bifurcation of law.[6]

The aim of this contribution is to address the question of a securitisation approach within the EU is on the detriment of freedom and fundamental rights of migrants, and ergo at the founding principles of the EU. Is the perpetuation of securitising measures the solution to the migration crisis? If the securitisation of migration policies has had some serious implications in eroding the rights of migrants and refugees within the EU, are fundamental rights still the cornerstone of the EU project? And among those who believe that the EU suffers from a legitimacy crisis, one cannot help but wonder whether European migratory policies confirm a insufficient output legitimacy[7] of the EU that shatters the concept of European identity by reproducing national schemes and diving people into citizens and non-citizens, nationals and aliens and authorised and unauthorised migrants. The reflexion to be done is whether the transition from the traditional model of government to the model of European governance can be achieved through gains of freedom and fundamental rights or through increasing fragmentation and division as a result of securitisation measures.

In order to analyse the above argument, in the first section, before making a claim on the discursive enunciation of migrants as threats, we will analyse the concept of securitisation and its impact on the AFSJ. In the second section, we will use the example of the French legal framework of illegal entry in order to highlight the tension between EU policies and national practices with regard to illegal migration and more specifically the national securitisation against migration through the systematisation of detention practices. In the third section, the article will address the question of securitisation relevant to the theoretical equality between security and freedom within the AFSJ, the security becoming the dominant value; the freedom as an expression of fundamental

[6] T. SPIJKERBOER, *Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice*, in *Journal of Refugee Studies*, 2018, pp. 216-239.

[7] See F. SCHARPF, *Problem-Solving Effectiveness and Democratic Accountability in the EU*, in *MPIfG Working Paper 3/1*, 2003. See also ID., *Legitimacy in the multilevel European polity*, in *European Political Science Review*, 2009, n. 2, pp. 173-204.

rights becomes freedom only for legal migrants. In the fourth section, the article will claim the close relationship between securitisation and national borders, member states willing to derogate from the Schengen code invoking reasons of national security and public order. However, derogating from the Schengen area corresponds to a minimisation of the AFSJ, where the significance of security trivialises the guarantee of freedom as an expression of fundamental rights.

2. The concept of securitisation

2.1 Theorizing the apparatus of security

Before moving to exposing the legal framework of securitisation, it seems relevant to highlight the general background of the term securitisation, as it will give us more concrete hints as to the relationship between securitisation and migration. Security concerns have marked the Western political agenda following the September 11 attacks in the United States. Western governments have resurrected the Cold War argument that security should also entail fighting against non-military threats. However, is migration to be considered a non-military threat? The terrorist attacks of November 2015 in Paris have fostered the idea of perceiving migration as a non-military threat, following the declaration of French president François Hollande that France is at war in his speech to the French general assembly on 16 November 2015. In this sense, migration is considered as non-military threat, whereas terrorism associated to migration had declared the famous "state of emergency" in France.

Behind the rationale that links migration to securitisation, and therefore, to the securitisation of the EU, stands the idea that liberal migration regimes facilitate cross-border risks, while more restrictive ones minimise the threats issued by migration – such as terrorism and human trafficking – and contribute to national security. Even if, according to some scholars, there is no direct and explicit link between migration and terrorism,[8] these issues have been tackled more effectively through increased cooperation among member states.[9] However, associational links between migration and terrorism have recently appeared with European policies where migrants are constituted as 'culpable' or 'threatening' subjects.[10] Anti-terrorist measures have been invested in with the aim of controlling and governing migration. This is characterised by the abandonment of the earlier, traditional methods of migration control through the coast guards at the state coastlines. The traditional migration control has been replaced by the FRONTEX

[8] On the arguments against the increase of securitisation see C. BOSWELL, *Migration control in Europe after 9/11: explaining the absence of securitisation,* in *Journal of Common Market Studies*, 2007, n. 3, pp. 589-610. See also C. BOSWELL, *Theorizing migration policy: is there a third way ?,* in *International Migration Review*, 2007, n. 1, pp. 75-100.

[9] Council of the European Union, 2004, *Operational programme of the council for 2005*, submitted by the incoming Luxembourg and United Kingdom Presidencies » in *POLGEN 57*, http://register.consilium.europa.eu/doc/srv?1=EN&f=ST%2016299%202004%20INIT.

[10] V. SQUIRE, *The exclusionary politics of asylum*, Basingstoke, 2009.

border intervention teams and intensified surveillance and databases.[11] In this way, the securitising narratives and practices have entailed the production of migrant as a 'threat'[12]. The example of 'illegal migrants' – that we will see next in our paper – deemed as culpable of crossing borders without authorisation[13] does not always constitute the category of migrant as a threat but also establishes a conducting wire of combatting this threat within the EU[14]. However, how does the concept of securitisation coincide with the creation of the EU as an area of freedom, security and justice? This article stresses the compatibility of securitisation of migration policy with reference to the AFSJ. It has been argued that the principle of freedom justifies the free movement in order to realise the European project. Nevertheless, who is the subject of this freedom? Some scholars have stressed the fact that freedom has been exercised by autonomous individuals who can govern themselves[15] in contrast to 'deviant', irresponsible forms of exercising freedom through the monitoring of populations. The question to be asked is: what is the relationship of freedom with the forms of unauthorised migration within the area of freedom, security and justice?

The forms of unauthorised migration such as asylum-seeking, irregular migration, smuggling and trafficking challenge the regulated exercise of mobility as an expression of freedom.[16] However, if ensuring security within the EU guarantees the conditions for the exercise of freedom, security becomes a prerequisite of freedom. In this sense, securitisation can deprive other individuals – such as third-country nationals, illegal migrants, and asylum seekers – from the actual exercise of their freedom. In other words, security hinders freedom and results in the dispossession of freedom for a certain category of individuals. This is why in the next section of our paper will discuss the creation of Europe as a security community and its impact on the AFSJ.

2.2 Europe as a security community: is there a space for the area of freedom, security and justice?

2.2.1. Europe as a security community

[11] A. NEAL, *Governing border zones of mobility through e-borders: the politics of embodied mobility*, in V. SQUIRE (ed.) *The contested politics of mobility: border zones and irregularity*, Abingdon, 2009, pp. 143-168.
[12] V. SQUIRE, *The securitisation of migration: an absent presence?*, in G. LAZARIDIS, K. WADIA (eds.), *The securitisation of migration in the EU, debates since 9/11, The European Union in International affairs*, 2015, Basingstoke, pp. 19-36.
[13] V. SQUIRE, *op. cit.*
[14] Squire notices that the ways in which policy problems are engaged do not only constitute migration as a threat but they also shift the burden of insecurity onto migrants in ways that foreclose different understandings of such issues. V. SQUIRE, *op. cit.*, p. 30.
[15] VAN MUNSTER, *Securitising migration: the politics of risk in the EU*, Basingstoke, 2009. Also J. HUYSMANS, *The politics of insecurity: fear, migration and asylum in the EU*, London, 2006.
[16] *Idem.*

This section will make a claim on the transformation of the EU to a security community[17] and the contradiction between the former with an AFSJ. Before making this argument we need to explain historically the origin of the European project after the collapse of two world wars. The project of European integration comes into question by the migration crisis which has an ontological relationship with the concept of Europe and the freedom of movement of populations, ergo the AFSJ. The question to be stressed here is whether this internal contradiction of Europe reappears with the migration flows creating new schemes of survival. Is the securitisation process – being one of the schemes chosen by the EU – a sign of decline and fragmentation of the common area of freedom, security and justice? How can the securitisation process be compatible with a common AFSJ?

Europe at the end of the Second World War needed to be perceived in realistic terms, namely in political terms. The fundamental need for Europe to build a political pedestal as a counterpart to the absurdity of the war and the atrocities of totalitarianism led to the transition of a condemned Europe to a purely political Europe. If the contradiction of Europe forms an integral part of its history, its spirit and its substance, this confirms the permanent crisis and the tension between the particular and the universal, which reappear once again with the migration and asylum crisis and the role of Europe in general. On one hand, nationalism crushes the living regional particularities on the grounds of unification; on the other hand, it obstructs the constitution of a European Union maintaining the core of national sovereignty. This tension does not cease to appear in different forms, and more specifically today through the form of migration and asylum crisis. Nevertheless, what needs to be clarified is whether this inherent contradiction of Europe in its past and legacy can be palliated by an area of freedom, security and justice, expected to guarantee fundamental rights and the right to asylum; or, if the common area of freedom, security and justice has been transformed to a European security community. The term security community refers to "a group of states that are integrated to the point that there is no doubt they will handle any conflicts between them peacefully, without resort to force".[18]

The EU today plays a different role in terms of security from that played by its predecessors. During the Cold War, European security had been promoted through political and economic integration in Western Europe. It is only after the Treaty of Maastricht (1993) and the Treaty of Amsterdam (1999) that a cooperation on civil and criminal matters ensued, including on migration, border surveillance, police cooperation, civil protection and counter-terrorism, marking an expansion[19]. However, the affirmation of Article 3 TEU that all of its citizens will be provided with an 'area of freedom, security

[17] The term *security community* was first introduced by RICHARD W. VAN WAGENEN in 1952. See R. VAN WAGENEN, *Research in the international organization field : some notes on a possible focus*, Princeton, Center for Research on world political institutions, 1952.

[18] N. BREMBERG, *The EU and the European security community: history and current challenges*, in *The European Union. Facing the challenge of multiple security threats*, European Security and Justice Critiques, Edward Elgar Publishing, 2018, pp. 18-41.

[19] F. TRAUNER, A. RIPOLL SERVENT (eds.), *Policy change in the Area of Freedom, Security and Justice: How EU institutions matter*, London, 2015.

and justice without internal frontiers, in which the free movement persons is ensured'[20] has been compromised by the recent re-introduction of border controls within the Schengen area that we will analyse in our next section. The argument of having a European security community rather than an area of freedom, security and justice is founded on the recent examples of reintroduction of internal border controls among the member states and the increasing securitisation processes such as the military capabilities of the EU within the framework of the Common Foreign and Security Policy[21] and the normalisation of the FRONTEX border control regime[22]. On one hand, the new military capacities of the EU are considered to manage international crises leaving behind the initial obstacle of the member states denial to have a European Defence community,[23] meaning that, in this sense, the migration crisis constitutes an international crisis.[24] On the other hand, the normalisation of the FRONTEX borders control demonstrates the creation of a fortress-like Europe, with FRONTEX being the agent securing its borders from external threats of irregular migration[25].

Even if the European Commission underlines the significance of the respect for fundamental rights[26] inherent to the FRONTEX operations, the compatibility of such methods with the fundamental rights of migrants and refuges is called into question. This is because FRONTEX's efforts to prevent illegal migrants from arriving to the European territory enact their discursive designation as security threats and associate irregular migration with preventing cross-border crime[27]. Furthermore, the deployment of rapid border intervention teams undermine the principles of respect for human rights and

[20] Article 3 TEU «1. *The Union's aim is to promote peace, its values and the well-being of its peoples.* 2. *The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*».

[21] F. TRAUNER, A. RIPOLL SERVENT (eds.), *Policy change in the Area of Freedom, Security and Justice*, cit. The jurisdiction of the Court of Justice of the European Union is excluded from the Common Foreign and Security Policy according to Article 24(1) TEU. However, if the EU would access the European Convention on Human Rights, the European Court of Human Rights would have jurisdiction over the Common Foreign and Security Policy. This was one of the problems identified in the opinion 2/2013 of the Court of Justice of the European Union. However, if the European Court of Human Rights were given jurisdiction over the Union's foreign and security policy, then many military operations by EU bodies would be doomed from a human rights perspective. This meaning that the EU could eventually be found responsible for human rights abuses for actions of its personnel under an EU mandate within the Common Foreign and Security Policy.

[22] See the EU Regulation EC2007/2004 establishing FRONTEX as an independent agency charged with the task of more efficiently protecting the borders of the Union, amended by the EU Regulation EC863/2007 and the EU Regulation EU1168/2011.

[23] The project of a European Defence Community (EDC) failed in 1954.

[24] J. HOWARTH, *Security and defense policy in the European Union*, Basingstoke, 2014.

[25] L. KARAMANIDOU, *The securitisation of European Migration Policies: Perceptions of Threat and Management of risk*, in G. LAZARIDIS, K. WADIA (eds.), *The securitisation of migration in Europe*, cit., pp. 37-61.

[26] European Commission 2005, *Franco Frattini and Luc Frieden visit the external borders agency (FRONTEX) in Warsaw*, available at: http://europa.eu/rapid/press-release_IP-05-821_en.htm?locale=en

[27] L. KARAMANIDOU, *The securitisation of European Migration Policies*, op. cit., pp. 37-61. See also L. WEBER, S. PICKERING, *Globalisation and borders: death at the global frontier*, Basingstoke, 2011.

adherence to asylum protection as included in its establishing documents[28]. This leads us to the initial reflection of how an area of freedom, security and justice can use instruments that are not – or not sufficiently – compatible with the founding principles of the EU. Is a European security community prevailing the area of freedom, security and justice? In order to address these problems, we will proceed to the next section, which analyses the EU as an area of freedom, security and justice.

2.2.2. Europe as an area of freedom, security and justice

The establishment of the European Union as an area of freedom, security and justice after the Treaty of Amsterdam points to the significance of the security question as stressed in the text of the Treaty, to: "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combatting of crime"[29]. The Treaty of Amsterdam marked the opening pathway of the EU to the values of freedom, security and justice. However, it seems like these values are conditional to migration and security policies[30]. Following the 1999 Tampere conclusions that "this freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our citizens and also offer guarantees to those who seek protection in or access to the European Union"[31]. According to the conclusion of the Tampere European Council meeting, the condition of freedom in the EU appears to be a reason for seeking asylum in the European territory. However, this freedom has been conditioned later to a continuum of security measures that override the rationale of seeking asylum in the European territory. The fight against illegal migration seems to take over the freedom of asylum seekers by establishing the Hague Programme, which merges migration policies with the security objectives of

[28] FRONTEX, *Mission and tasks*, 2014, http://frontex.europa.eu/about-frontex/mission-and-tasks. See also E. PAPASTAVRIDIS, *Fortress Europe and FRONTEX : within or without international law ?*, in *Nordic Journal of International Law*, 2010, n. 1, pp. 75-111.

[29] Treaty of Amsterdam amending the Treaty of the European Union, the treaties establishing the European Communities and certain related acts, 1997, European Communities, available at: http://www.europaparl.europa.eu/topics/treaty/pdf/amst-en.pdf.

[30] L. KARAMANIDOU, *The securitisation of European Migration Policies*, op. cit., pp. 37-61.

[31] European Council, *Tampere European Council 15 and 16 October 1999: presidency conclusions*, Brussels, available at: http://www.europarl.europa.eu/summits/tam_en.htm.

preventing crime and terrorism[32]. The question remains whether the Hague Programme foregrounds the shift of an EU discourse where security concerns take over freedom and fundamental rights[33]. And, if the answer is affirmative, where does this leave the AFSJ?

The legal instruments following Tampere such as the Lisbon Treaty (2007) and the Stockholm Programme (2010) highlight the need for appropriate measures with respect to external border controls, asylum and immigration; trafficking and smuggling are treated as internal security threats and necessary to be confronted by crime prevention measures[34]. However, the above instruments, even if invented for the maintenance of the area of freedom, security and justice, we can see that the security becomes a priority objective. The security objective seems to contradict the development of parallel legal frameworks relevant to human rights and refugee obligations of the member states. The Charter for fundamental rights of the EU (2000) and the asylum directives on minimum standards,[35] on the refugee status qualification,[36] on reception[37] and on return[38] are legal instruments deemed to ensure protection of migrants' and refugees' fundamental rights. However, if the commitment of the EU and its member states to "absolute respect of the right to seek asylum"[39] and the improvement "of the common capability of the EU and its member states to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees,"[40] we are wondering if this commitment is still active today, twenty years after Tampere. This article will stress the lack of improvement with regard to these

[32] See the Hague Programme, 2004, European Council, available at: http://ec.europa.eu/home-affairs/doc_centre/docs/hague_programme_en.pdf.

[33] E. GUILD, S. CARRERA, D. BIGO, *The changing dynamics of security in an enlarged European Union*, in *CEPS Challenge Research paper 12*, 2008.

[34] European Council, 'The Stockholm Programme – an open and secure Europe serving and protecting citizens', Brussels, 2010, Official Journal of the European Union, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN.

[35] Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status, Brussels, Official Journal of the European Union.

[36] Directive 2004/83/EC of the Council of 29 April 2004 *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Brussels, Official Journal of the European Union and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 *on 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*, Brussels, Official Journal of the European Union.

[37] EU Receptions Condition Directive 2003/9/EC of the Council laying down minimum standards for the reception of asylum seekers, Brussels, Official Journal of the European Union and 2013b/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, Brussels, Official Journal of the European Union.

[38] 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*.

[39] European Council, Tampere Conclusions du 15 and 16 October 1999, *op. cit*.

[40] European Council, The Hague Programme of 4 and 5 November 2004. See the Communication from the Commission to the Council and the European Parliament of 10 May 2005, The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final – Official Journal C 236 of 24.9.2005.

commitments by analysing how the area of freedom, security and justice has been transformed to an area of security, freedom for EU citizens and relative justice.

3. European Union and unwanted migrants: security versus freedom?

3.1. A common area of freedom, security and justice: security takes it all?

The migration crisis is the opposite side of a European identity crisis. As Jean Marc Ferry outlines, we have to deal with a triple crisis which includes a "telos" (finality) crisis, an ethical crisis of political co-responsibility and a historical crisis of legitimation of the European project. In a national context, we see all types of legitimate coercion such as criminalisation of illegal migrant, detention measures, reintroduction of the Schengen control, whereas in the European context we see a legitimate coordination and cooperation and a multilevel governance. If sovereignty tends to take over pluralism, the plural identity takes a step behind to reestablish the relationship between member states and the common European destiny. If the plural identity appears to be slowly deconstructed by the migration crisis, which provokes strong sovereign decisions, we should question if this resurgence of national borders jeopardises the threshold of European identity.

The politicisation of the European Union has resulted its main role of general control of the migration crisis. However, the migration control has been transformed to migration management through various operations. One of these operations is the externalisation of European migratory policy. Externalisation of migratory policy has a meaning of moving the borders and jurisdiction of Europe to countries outside Europe, as for example the EU-Turkey Agreement. The externalisation of migratory policy has been criticised as being part of the de-democratisation of Europe and its crisis. This is because the uncertainty of the alleged safe third countries such as Turkey and all measures of migration control taken by the European Union place migration in the realm of security. This means that the main concern may not be the protection of migrants' fundamental rights but the protection of member states from unwanted migrants. Nevertheless, if the European Union has been founded on the values of democracy, rule of law and fundamental rights, we should be asking whether the politicisation of the European Union takes into account migrants' fundamental rights or escapes any discussion of dealing with the migration issue. Either way, the European Union can not avoid the risk of division.

On one hand, by taking into account migrants' fundamental rights, it will be extremely difficult to realise this objective as many member states have serious systemic deficiencies. On the other hand, by not dealing with the migration crisis head-on, member states will go for national measures that can be rather offensive to fundamental rights, creating fragmentation within Europe. For example, measures against smuggling of migrants and trafficking in human beings pursue a dual objective of fighting against crime and protecting fundamental rights of the victims; notwithstanding, fighting criminality

precedes protecting fundamental rights. Once more, the technical rationale of migration policies seems not to be purely of fundamental rights' protection but of national security. And this does not leave without consequences the effectivity of fundamental rights of migrants because it settles a hierarchy of an overall national security and a coming-next protection of fundamental rights. This means that fundamental rights become negotiable and relative depending on the most important reason of national security as part of a member state's public interest. And, once more, the contestation of the European migratory policies by the member states clashes the very hard core of the European identity.[41] The concerns voiced about fundamental rights' violations in Turkey did not change anything on the application of the EU-Turkey statement of 18 March 2016. The contestation of this agreement by the asylum seekers and the ECHR's denial to pronounce on the legitimacy of the agreement illustrates the political priority given to the reduction of migration flows into Europe. This assessment brings to light the fact that migration is still perceived as a security threat, something that we will analyse in the last part of our paper.

Among other measures, the emergency relocation of 160,000 refugees from Greece, Hungary and Italy, the creation of permanent relocation mechanism for all the member states, the creation of a common European list of safe countries of origin did not address additional safeguards of the rights of the asylum seekers while waiting for the procedures to be completed. On the contrary, it was a provisional solution to decrease the number of asylum seekers within the European Union and logistical redistribution of people.[42] This is what remains contradictory to the aspiration of the European Union to be an organisation of fundamental rights' protection, as stated in Articles 2 and 3 of the TEU. As indicated in the report of Human Rights Watch "European Union and its member states struggled to develop an effective and principled response to the hundreds of thousands of asylum seekers and migrants who reached Europe. Narrow government interests too often displaced sound policy responses, delaying protection and shelter for vulnerable people and raising questions about the union's purpose and limits".[43] Since no EU solution was provided, member states took the matter into their own hands. Different approaches from the member states have been adopted, sometimes extra-protectionist in order to limit the reception of asylum-seekers from member states as Hungary and Czech Republic[44].

In the specific case of Hungary, a wall was built on its borders, whereas the Czech Republic declared to perform a permanent violation of asylum seekers' fundamental rights as systematisation and extension of detention practices, omission to provide

[41] On the question of appropriate balance between migration control and the protection of migrants' fundamental rights within the EU see C. BRIERE, *Balancing Fundamental Rights and Migration Management in the External Dimension of the EU Migration Policy*, in *CELCOS Strengthening the rule of law in the EU - conference papers*, http://books.lexonomica.press.

[42] S. GRIGONIS, *EU in the face of migrant crisis: Reasons for ineffective human rights protection*, in *International Comparative Jurisprudence*, 2016, n. 2, pp. 93-98.

[43] Human Rights Watch World Report, 2016: European Union Events of, 2015.

[44] S. GRIGONIS, *EU in the face of migrant crisis*, op. cit.

information for free legal aid, strip-searching and confiscation of money for the mandatory payment per day of their involuntary stay in the detention centres. These voluntary violations of fundamental rights raise a more crucial question on the actual democratic character of Europe. According to the TEU, member states and the EU collaborate to promote human and rights and democracy. But are fundamental rights and democracy reserved exclusively only for what and whom qualifies as European? Which is to say, can member states diverge from the EU directives by applying a national legislation when this is in evident harm of fundamental rights of migrants? The deprivation of rights of freedom of movement, freedom of liberty, right to family life[45], access to justice means also violation of the Charter of the EU. In the case of Czech Republic's violation of the right to information and the free of charge legal assistance, asylum seekers could not go to court because of the ignorance of their basic rights of defence, protected in Article 47 of the Charter of the EU[46]. In this sense, an *a priori* effective mechanism of applicability exists but member states avoid to take measures to actually make it being used by the asylum seekers. The above unilateral decisions of several member states when it comes to migration shows an internal tension of what is European and what is national. And this tension results to a revocation of EU law but most importantly to the relativisation of fundamental rights becoming an issue of secondary importance.

3.2. National securitisation against migration: systematisation of detention practices

In a quite similar approach to the above decisions of Hungary and Czech Republic, practices of detention in the national legal orders foster the argument of seeing migration as a threat. This idea of 'migration as a threat' leads to a normalisation of detention practices by member states, whereas the prolongation of detention operates a pure violation of fundamental rights of migrants and asylum seekers. This confirms the claim of our paper insisting on the increased securitisation of the European territory and the contradiction laying behind the values of security and freedom of the common area. This to say that detention of migrants and or asylum seekers on the national order has become institutionalised despite the non qualification of migration as a crime per se. However, hardly any empirical research has been undertaken about the way in which national police officers should interpret EU legislation[47]. This means that the national operational criteria

[45] There have been cases of children separated from their parents. See more in: European Union Agency for Fundamental Rights, *Current migration situation in the EU: separated children - December 2016*, available at: http://fra.europa.eu/en/publication/2016/december-monthly-migration-focus-separated-children.

[46] See more in: European Union Agency for Fundamental Rights, *Fine-tuning EU's migration approach to better safeguard rights*, 2016, available at: http://fra.europa.eu/en/news/2016/fine-tuning-eus-migration-approach-better-safeguard-rights.

[47] M. DER BOER, *Police cooperation. A reluctant dance with the supranational EU institutions*, in *Policy change in the Area of Freedom, Security ans Justice. How EU institutions matter*, op. cit., pp. 114-132.

for the characterisation of illegal entry is the description of circumstances: the regular or irregular entry determines the final category of a legal or illegal migrant.[48]

Nevertheless, even if these operational criteria of regularity or irregularity determine the legality of a migrant within a member state, the European Court of Justice on 7 June 2016, applying the Return Directive 2008/115[49], ruled that third-country nationals who illegally entered the territory of a member state cannot be imprisoned merely on account of illegal entry across an internal border. The example of an illegal third-country national who was in transit from Belgium to United Kingdom and who was apprehended in France by the police, it was affirmed by the European Court of Justice to be crossing "internal borders" (Belgium-France). In the relevant *Affum* case[50], the French allegations defended that the illegal third-country national was crossing external borders (France-United Kingdom) and therefore they were competent to apply their national legislation and didn't fall under the scope of the Return Directive. The importance of the characterisation of internal or external borders lays on the possibility of the member state to apply its national legislation regarding migration flow control, namely stricter detention measures. On the contrary, the preclusion of national legislation at the case of crossing internal borders and the application of the Return Directive admits the use of detention only as a measure of last resort.

Which is to say, European Union through the Court of Justice tends to minimise the tensions between irregular migrant and crime. The deprivation of liberty in the light of the Return Directive allows detention as a measure of last resort[51]. Only the procedures for return and removal justify deprivation of liberty and in the case of Ms. Affum no

[48] However, from a migratory perspective the operational criteria would be the « wish to establish himself» and not the «regularity» or «irregularity» of his/her entry and stay. These legal categories deal with an expression of public interest in which the individual is the object of the legal category and not the origin. In other words, this artificial creation of legal categories is independent of the actual needs or realities of these individuals. This method facilitates the exclusion of certain categories from the territory of a certain state. The legal category of migrant is an artificial category produced by the State. Two poles seem to emerge with an urge for conciliation: on one side, the sovereign legal categories of migrants and, on the other side, the European endeavor to disqualify migration as a crime. The categorization of the legal concept of migrant by national laws works as an instrument of rationalization and control of the migratory reality by public national authorities. This categorization allows the internalization of the migration reality which is external to the identity of the State. However, migration is an internal European reality as Europe is the number one migratory destination. How is it possible to palliate these two opposite poles without weakening the common European objectives? The compromise has been achieved by national legislation that gives the member states the power to admit, to deny entry or to return migrants, but by also having an obligation to respect the human rights of all migrants in the process. Yet, while irregular migration is not considered to be a crime per se according to the European Court of Justice, it may constitute an administrative offence. See S. BARBOU DES PLACES, *Les étrangers "saisis" par le droit: Enjeux de l'édification des catégories juridiques de migrants*, in *Migrations Société*, 2010, n. 2, pp. 33-49.

[49] Court of Justice of the EU, *Affum*, cit.

[50] *Idem*.

[51] See Court of Justice of the European Union, judgment of 28 July 2016, *JZ v. Prokuratura Rejonowa Eods – Scrodmies*, Case C-294/16 PPU, on the concept detention and the measures involving a restriction of liberty other than imprisonment. See also Court of Justice of the EU, Judgment of 5 April 2016, *Pal Aranyosi and Robert Caldaran v. General staatsanwaltschaft Bremen*, case C-404/15 and C-659/15 PPU on the conditions of detention in the issuing member state (European arrest warrant and prohibition of degrading treatment).

return procedure had been applied against her. The penalisation of illegal entry in French law seems to contradict the decision of the Court, mostly based on the French allegations, which pretend that the third-country national in illegal entry has to be kept in detention during the period of the return decision. The Court did not accept the French allegations issuing that persons in Ms. Affum's case cannot be imprisoned solely on the ground that they are staying illegally in France. It goes without saying that the above practices which tend to a generalisation within national contexts show the contrary. Even if detention is included in "the adoption of measures to fight illegal immigration" in the Schengen Agreement[52], the EU Return Directive,[53] the EU Receptions Condition Directive[54] and the Asylum Procedures Directive[55] have provided a formal regime of regulating detention; the maximum detention length is six months to eighteen months according to Article 15(5) of the Return Directive.

However, despite the European disqualification of migration as a crime, national measures continue to criminalise irregular migration and persons that assist migrants by using excessive and disproportionate force during migration control operations and by establishing a systematic detention of migrants in an irregular situation without an individualised cause[56]. In Italy for example, illegal entry and illegal stay would constitute

[52] European Commission, *Commission Communication on the development of a common policy on illegal migration, smuggling and trafficking of human beings, external borders and the return of illegal residents*, 2003, available at : http://europa.eu/rapid/press-release_IP-03-794_en.htm?locale=en.

[53] Return 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.*

[54] Receptions Condition Directive 2003/9/EC of the Council *laying down minimum standards for the reception of asylum seekers.*

[55] Asylum Procedures Directive 2005/85/EC of 1 December 2005 *on munimum standards on procedures in member states for granting and withdrawing refugee status.*

For example, another factor of endorsement of the institutionalisation of detention practices and encouraging the idea of 'migration as a threat' is the 'offense of solidarity' within the French legal context. The French Ceseda still includes what is called the "offense of solidarity" and only extends the number of categories of people who are protected against prosecution in this domain. The offense stated by the Article L.622-1 of the CESEDA concerns "*anyone who is providing direct or indirect assistance in order to facilitate illegal entry, transit or illegal residence of a foreigner in France*". This is used essentially to prosecute people who, given the inhuman conditions of the illegal migrants, are helping them out but without considering their administrative status. However, the French legislation doesn't make enough distinction between the smugglers who organise the illegal crossing of the migrants, in exchange of significant amount of money, and "acts of solidarity" from social organisations, NGOs, and anyone in general who is trying to help this population in a condition of deprivation. The paradox lays on keeping the "solidarity crime"[56] where the decriminalization of illegal stay introduced by the regulation of 31 December 2012 could have been the occasion in order to abrogate easily the Article L. 622-1 of the Ceseda or at least its component relative to the facilitation to illegal stay. Article L.622-4 of the CESEDA – which is the "Code of Entry and Residence of foreigners and the Asylum Law" – amended by the Article of the 12th December 2012 states: "Without prejudice to the application of the Articles L.621-1, L.621-2, L.621-3, the assistance to illegal stay of a foreigner cannot be followed by penal proceedings as stated by the Articles L.622-1 and L.622-2 in the following cases: 1)When the assistance is from any relatives of the foreigner, from any relatives of the spouse/ husband / partner of the foreigner, from the sisters and brothers of the foreigner or from the sisters and brothers of the foreigner' spouse/ husband/ partner. 2) When the assistance is directly from the spouse/ husband / partner of the foreigner, or from the person who is in marital situation with the foreigner under common-law marriage or from any relatives/ brothers/ sisters of the person who is in marital situation with the foreigner under common-law marriage. 3) When the assistance has not been followed by any direct or indirect retribution and when the illegal act was to provide legal advice, housing

a criminal offence punishable by a fine of between five-thousand and ten-thousand euros according to the Italian law *Legge Sicurezza*. The provision of the relevant Italian law has a clear goal to avoid the implementation of the Return Directive[57]. The *El Dridi* case following the deportation order of an Algerian national by the Prefect of Turin in May 2004 who had received a removal order because there were no available places to accommodate him in a detention centre. After the refusal of *El Dridi* to leave the country, he was sentenced to one year's imprisonment. His appeal and the preliminary reference asking the Court of Justice of the European Union whether the imprisonment of a third country national in case of non-compliance with a removal order was in line with the provisions of the directive in detention resulted the ruling of the CJEU in *El Dridi*'s favour. The CJEU found that the Italian authorities have breached the Directive's provisions relevant to the lack of provision for a period of voluntary return[58]. On the one hand, the above judgments of the Court demonstrate the EU effort to apply fundamental rights of migrants in terms of arbitrary detention; on the other hand, the national measures of systematising detention of migrants and the non-compliance to EU directives reveal a form of unilateral securitisation from the part of member states. This relativisation of the area of freedom security and justice is built on a dipole between national penalisation practices such as the transformation of 'illegal entry' from an administrative offence to a criminal offence and an effort to reconstruct the European identity based on its pluralistic creation[59]. However, this tension between national practices and EU endeavours does not cease to reemerge by associating migrants to criminals or using a wide range of reasons to justify the detention of migrants – such as for reasons of national security and public order – as we will see in the next sections.

3.3. Fundamental rights only for legal migrants?

If human rights are considered to be universal, a permanent tension will not cease to emerge when it comes to discussions of migration. This tension reveals the construction

to the person, food, or medical treatment in order to ensure adequate and decent living conditions, or any help likely to preserve the dignity or the integrity of the illegal foreigner". The above articles are not applicable when the illegal foreigner who is benefiting from the help of someone is practising polygamy or when the spouse/ husband/ partner of the illegal foreigner is practising polygamy while living in France.

[57] D. ACOSTA ARCARAZO, A. GEDDES, *The development, application and implications of an EU rule of law in the Area of migration policy*, in *Journal of Common Market Studies*, 2013, n. 2, pp. 179-193.

[58] See also the Achughbadian case, European Court of Justice, Grand Chamber, judgment of 6 December 2011, *Alexandre Achughbabian v. Préfet du Val-de-Marne*, case C-329/11, ECLI:EU:C:2011:807.

[59] See also on the «postnational identity» or «identité cosmopolitique» J.M. FERRY, *La question de l'Etat européen*, Gallimard, 2000 et ID., *Europe, la voie kantienne. Essai sur l'identité nationale*, Ed. du Cerf, 2005, pp. 51-156. See also See K. GEORG, *L'émergence de la notion d'«identité» dans la politique de la Communauté européenne. Quelques réflexions autour de la Déclaration du sommet de Copenhague de 1973*, in *Relations internationales*, 2009/4, n.140, pp. 53-72, https://www.cairn.info/revue-relations-internationales-2009-4-page-53.htm. See also on national constitutional identity D. ROUSEAU, *L'identité constitutionnelle, bouclier de l'identité nationale ou branche de l'étoile européenne?*, in L. BURGORGUE-LARSEN (ed.), *L'identité constitutionnelle saisie par les juges en Europe*, in *Cahiers Européens*, 2011, n. 1, pp. 9-100.

of legal categories of migrants eligible to a legal stay within a national legal order according to specific states' entitlements and limitations. The migrants' human rights actually become the subject of state sovereign decisions qualifying the third-country nationals' rights according to procedures and limitations embedded in the instruments of legal categorisation of migrants. In other words, the migrants who are eligible to a legal stay because they fulfil all the criteria of the national legislation have fundamental rights. However, migrants who do not fulfil these criteria are considered to be "illegal", "unauthorised" or "irregular" and for this reason deprived of fundamental rights. If, in today's Europe, human rights have become a battlefield between a sovereign nation's claims to control borders and migrants' claims to access a territory, we cannot help but question how can fundamental rights overcome this tension. If, as a result of sovereignty claims, human rights determine only the authorised or eligible to a legal stay third-country nationals, their legal content becomes less neutral and universal, or an "attempt by states to empty the categories of all human rights' content so that the 'illegal', [is the one] as defined and designated by their authorities"[60].

At this point, the question of the rule of law in Europe rises sombrely: which rule of law within a Europe in crisis? At the era of European governance, fundamental rights in terms of migration escape normality and become exceptional within a common area built upon the values of free movement, security and justice. Rule of law and its two constitutive elements, separation of powers and human rights' guarantees, seem to be compromised within Europe in crisis. The dialectic tension between rule of law and states of exception[61] leads to a reflexion on the origin of the crisis in Europe, which is closely associated, to the foundation model of its identity: the rule of law. Nevertheless, the crisis in Europe (identity crisis, economic crisis, migration crisis, asylum crisis, security crisis) of which the rule of law consists a paradoxical demonstration, accomplishes the dipole rule of law-state of exception[62]. In these terms, how can we conceive the rule of law within the Europe of migration crisis and exception of fundamental rights? How can the rule of law and migration policies be articulated in order to achieve optimal efficacy of fundamental rights, of freedom and security? Because, as we showed before, member states correlate fundamental rights to legal migrants, whereas "illegal" or "irregular" or "unauthorised" migrants have nothing to do with fundamental rights, no applicability and ignorance of their fundamental rights. Migrants' rights are subject to the condition of a stay permit. In the absence of the stay permit, migrants are subdued to a situation of legal vacuum, namely in the cases of hotspots which are still not legally defined. For example, hotspots or camps is a mechanism creating derogations on fundamental rights' protection making this protection random and selective or hazardous. In this sense, asylum seekers' camps are to be seen as spaces of exceptionality. These spaces of exceptionality are present within the AFSJ, a sign of a contradiction of its own appellation as an area of

[60] C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2016.
[61] M.L. BASILIEN-GAINCHE, *Etat de droit et états d'exception. Une conception de l'Etat*, PUF, 2013, p. 23.
[62] *Ibidem.*

freedom, security and justice where security is guaranteed for the member states and freedom is subject to the security criteria.

If the protection of fundamental rights is either random either externalised out of the jurisdiction of the European territory, we cannot avoid to ask the question whether Europe becomes the accomplice of the "crime" of migration. Notwithstanding, the European Court of Justice does not cease to reaffirm that migration is not a crime on its own, not a crime per se.[63] If the mechanisms of derogation and exception are multiplied on behalf of the battle against clandestine immigration, which effectivity of fundamental rights can be guaranteed within Europe in crisis. At the same time, if we accept the advent of a certain relativism of values within the democratic praxis, we can ask if fundamental rights form democracy or if it is democracy that sets out fundamental rights. And if the second hypothesis occurs and democracy establishes its own fundamental rights, then the rule of law becomes random and relative.

The contradictions of the mondialisation have resulted to a transformation of the right to mobility, of the *ius migrandi* to a fabrication of international migrations control of immigrant populations at the name of a security and sovereignty model[64]. The FRONTEX mechanism asserts a vision of migration as an invasion[65]. During the last two decades, we can see a broad criminalisation of migrants characterised by arrests and detentions, something which transforms a Europe without borders to a "fortress Europe"[66]. After the atrocities of the Second World War, Europe has proscribed the return of the inhuman treatment by protecting human rights. Human rights understood to be the imprescriptible, inalienable, non-derogable rights of the person express the intangible character of the human irreducible. Human rights prohibit any inhuman treatment in all spheres of life, such as slavery, servitude and retroactive criminal laws. The fundamental core of human rights can be found in the notions of liberty and inherent dignity of the human person. Notwithstanding, the logic of the market has been integrated to the notions of liberty and individual autonomy making the risk of a social disruption to be evoked under the principle of loyalty and equity. However, the conditional violation of the principle of human dignity, is hardly mentioned and tacitly distorted. The same goes without saying as concerns the fundamental rights of migrants.

In other words, if the European model of governance is based upon the contradictions of inclusion and exclusion, built upon a public sphere of bureaucracy, this is where democracy risks marginalisation. And once again, the impossibility of the European unification and the lack of *demos* become more obvious, accelerated by the technological nature of the transition to the model of governance. And this leads us to the last reflexion of our paper where borders become anti-democratic; because in a way they segment the

[63] See Court of Justice of the European Union, *Affum*, cit.
[64] M. DELMAS-MARTY, *Résister, Responsabiliser, Anticiper ou comment humaniser la mondialisation*, Seuil, 2013.
[65] On the FRONTEX accountability problem see R. PARKES, *Frontex: an accountability problem*, Polish Institute of International Affairs (PISM), Bulletin 144, 2013. See also J. RIJPMA, *Frontex: successful blame shifting of the member states? Analysis of the Real Instituto Elcano 69*, 2010.
[66] *Ibidem.*

effectivity of fundamental rights transforming a democracy to a bureaucracy. Borders become at the same time pathways and walls to Europe depending on the desirability of migrants that could potentially contribute to the culture, economy, sports of Europe[67]. The technological nature of this purpose not only deters a fundamental perspective of rights but is actually fortified by the extensive use of soft law. The model of European governance developing a migration management policy through an extended use of soft law leads to the loss of effectivity of fundamental rights of migrants. The inefficacy of fundamental rights of migrants is not only one of the consequences of the migration management policies but it has never been a crucial objective, remaining always hierarchically inferior to public security or externalisation of borders. With regard to migration, we cannot help but wonder if the human rights of *others* are fundamental elements of a European identity. Notably, if we can view the construction of Europe through a historical perspective of movement of people as "the concept of the public beyond its national borders and opening it up to an emerging European space"[68].

4. Europe and borders: public order and securitisation over fundamental rights?

4.1. De-democratization of borders: an extreme securitisation of internal and external borders

If Europe's distinctive character is based also on promoting human rights, the massive migratory wave comes to confirm the opposite. The constant European denial of any sense of obligation, from agreeing on the distribution quotas of refugees on the basis of each country's population and resources to the determination of internal or external borders, illustrates a Europe at the edge of losing its legitimation. Just because Europe does not have a unique identification when it comes to territory, the migratory reality explodes this concept by recalling national borders. This is where member states revoke European law in order to protect their sovereignty. Even if they have given up sovereignty in favour of the European project, migration comes to remind them that they cannot accept an intrusion of something which is not European. The non-democratic character of borders illustrates the return of the citizen status to the condition of a "subject"[69]. In the specific case of migrants, the gap between sovereign decisions of democratic states and European policies grows within the persistently nation-centric framework of most public institutions. Rethinking the meaning and function of borders results the redefinition of

[67] M. L. BASILIEN-GAINCHE, *The EU External Edges: Borders as Walls or Ways*?, in *Journal of Territorial and Maritime Studies*, North Asian History Foundation, 2015, n. 1, pp. 97-117.
[68] A. PETERS, *Soft law as a new mode of governance*, in *The Dynamics of Change in EU governance*, U. DIEDRICHS, W. REINERS, W. WESSELS (eds.), in *EU Reform and Enlargement*, Edward Elgar, 2011, pp. 21-51.
[69] E. BALIBAR, *Borderland Europe and the challenge of migration*, 8 September 2015, available at: https://www.opendemocracy.net/can-europe-make-it/etienne-balibar/borderland-europe-and-challenge-of-migration.

terms like sovereignty, citizenship and community. This leads us to the question of a need to invent new institutions for the public sphere because "a border is not what a state 'decides' it is in terms of power relations and negotiations with other states but what the global context dictates. No gesticulation (Manuel Valls in Ventimiglia), no coastal guards (Frontex) and no barbed wire (at the Hungarian border) will change this"[70].

However, why do borders have become anti-democratic? A first answer appears to be that there is no clear application of fundamental rights for those crossing them. Even if member states remain responsible for the effectivity of fundamental rights within their territory, the parallel action of international organisations within the territory creates a confusion regarding the responsibilities of each actor[71]. And if one member state is declared to be deficient, how can it still be responsible for the effectivity of fundamental rights in spite of the involvement of other actors in the hard core sovereignty of the state? Another element of the anti-democratic character of the borders is that they stress the exclusion that should be made from the national sovereign to that what is not national or European. At the same time, this creates a segmentation not only between national sovereigns and migrants but also between different European member states because "the "external borders" of Europe cut right through it and fragment it into several superimposed slices. In consequence, Europe, though officially belonging to the "North", eventually turns into nothing more than another field to enact the division of the world into a "North" and a "South". But this delineation is not really definable anymore. It becomes clear why some member states are tempted to 'amputate' other states from the European Union so as to better protect themselves from what these represent or give way to[72]. Borders can be democratic when this delineation between national and alien, European and non-European becomes communicational, where the confrontation with the enemy will transform to a communication with civilisations.

The de-democratisation of borders is highly related to migration control through the Return Directive and the qualification of borders as internal or external in order to apply European or national legislation.[73] The example of *Affum* case[74] showed the national tendencies to qualify more and more borders as external ones as to apply national legislation, thus systematise the detention practices. On the other hand, in case of internal borders, the EU Return Directive stresses that fact that detention is only to be used as a measure of last resort[75]. This is to say that borders have to do with fundamental rights of

[70] E. BALIBAR, *op. cit.*

[71] See on the transformation of the state sphere to public sphere, D. GRIMM, *The achievement of constitutionalism and its prospects in a changed world*, in *The Twilight of Constitutionalism?*, Petra Dobner and Martin Loughlin, 2010, p. 14.

[72] *Ibidem.*

[73] See Return Directive, 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.*

[74] See Court of Justice of the European Union, *Sélina Affum contre Préfet du Pas-de-Calais et Procureur général de la cour d'appel de Douai*, op. cit.

[75] Article 1 of the Return Directive 2008/115/EC «[…] Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence».

migrants, and more specifically their right to free movement and respect of their dignity. The systematisation of detention practices within member states does not seem to be heading to the same direction, creating tensions between sovereignty and human rights that claim to be universal. But still member states are responsible for the application of fundamental rights within their territory. And that's why the question of borders extrapolates this responsibility either to another member states either leaves a legal vacuum. In this case, how can fundamental rights be effective within the AFSJ? Considering that the democratic *praxis* tends to introduce a certain relativism of values, we need to say that it's the fundamental rights of the human person that establish democracy and not the other way round. Otherwise, everything would become negotiable, namely democracy[76].

At the same time, member states cannot deny responsibility within their national borders. This is another challenge of their sovereignty with a negative aspect, where denying responsibility questions the hard core of sovereignty. Nevertheless, EU member states are not always willing to be accountable for human rights violations during the FRONTEX operations of border surveillance. These operations performed with the cooperation of the police authorities of the states in order to apprehend and localise migrants before their arrival at the European territory are full of legal gaps concerning the application of fundamental rights[77]. Notwithstanding, the European community considers member states responsible for tragedies of lives lost in the Mediterranean sea and the ECHR has also pronounced on the responsibility of Italy in violation of its extra-territorial human rights' obligations for omitting to exercise jurisdiction over a vessel flying its flag and receiving shipwreck victims on the high seas[78].

Another reason why borders can become anti-democratic within the EU is the example of Italian authorities issuing temporary residence permits for humanitarian reasons to undocumented North African immigrants coming from Tunisia, who arrived on their national territory before 5 April 2011. These residence permits granted them an automatic right to move freely within the Schengen area. Some EU member states, such as Austria, Belgium, and Germany, expressed concerns about the Italian measures; and France reintroduced controls at its border with Italy and returned hundreds of migrants trying to enter from Italy. That also shows that only the frontline countries are those immediately effected by the "refugee crisis", so concepts like protection of public order, struggles against the abusive free movement or against social tourism reappear in order to exclude immigrants from the other member states. There was actually a proposition (a Dutch proposal) of the creation of a mini-Schengen area to exclude States unable to manage the

[76] J.L. CHABOT, *La fonction médiatrice du droit*, in *Figures de la médiation et lien social*, L'Harmattan, 2006, pp. 143-159.
[77] S. CARRERA, *Frontex and the EU's integrated border management strategy*, in Juliet Lodge (ed.), *Are you who you say you are*?: *The EU and biometric borders*, Nijmegen, 2007. See also M. L. BASILIEN-GAINCHE, *The EU External Edges: Borders as Walls or Ways?*, in *Journal of Territorial and Maritime Studies*, North Asian History Foundation, 2015, n. 1, pp. 97-117.
[78] European Court of Human Rights, Grand Chamber, judgment of 23 February 2012, *Hirsi Jamaa v. Italie*, Req. n. 27765/09.

migratory flow, or even the construction of walls within Europe itself. In this way we can ask whether EU external borders are "pathways" that promote the movement of desirable third country nationals from the outside to the inside in order to stimulate economic trade, scientific projects, cultural development, family reunification and refugees' international protection as we see it in the conditions of issuing a residence card within the French Code[79] all the eligible categories for a legal stay or actually "walls", barriers that prevent the undesirable third-country nationals from entering the territory of EU member states[80]. In this sense, the common area of freedom, security and justice acts either as a wall either as a pathway depending on the suitability of the incoming migrant or asylum seeker.

4.2. The *Schengen acquis* versus the fundamental rights of migrants and asylum seekers

The challenge of Europe's borders is their fluidity because of their technological implementation. Their increased fluidity and malleability strengthens the process of categorisation of migrants. The anti-democratic element is the denial of effective and clear application of fundamental rights of migrants within and without these borders that consists at the normative gaps of European migratory polices and the fragmentation effects that result from the member states' sovereign decisions regarding migration. For example, since "irregular" migrants are violating a nation's law by settling and working without authorisation, should the state grant any legal rights at all? Unlike medieval regimes, modern democratic states do not make criminals into outlaws – people entirely outside the pale of the law's protection[81]. However, within Europe irregular migration is not a crime per se, so democratic states themselves often do not even regard irregular migrants as criminals. Democratic states are compatible with the idea that people should possess legal rights simply in virtue of the fact that they are within the jurisdiction of the state. Such rights are general human rights for all people whether they have the permission to be present in the state or not[82]. This means that democratic states treat violations of immigration laws as administrative matters and not as criminal offences. Such fundamental rights would be the right to life, the right to a fair trial, the right to defend themselves in court, access to legal counsel, rules of evidence, rights of appeal etc. However, "Human beings do not forfeit their right to be secure in their persons and their possessions simply in virtue of being present without authorisation"[83]. At the same time,

[79] See Article L.313-11-4° of the Ceseda Code (French Code of Entry and Residence of Aliens and the Right of Asylum), which issues a residence card to a husband/wife of French Citizen doesn't include the case of polygamy. See also Article L.313-11-6° (residence card to a parent of French child), Article L.315-1 (residence card « Competences and talents ») and Article L.311-9 demanding proof of integration into French society.
[80] M. L. BASILIEN-GAINCHE, *The EU External Edges: Borders as Walls or Ways?*, op. cit.
[81] See J. CARENS, *The ethics of migration*, OUP USA, Oxford Political Theory, 2013, p. 130.
[82] *Ibidem.*
[83] *Ibidem.*

detention and deportation are not criminal penalties. However, this distinction can be abused in practice, where detention can exceed the maximum limit and actually become a longterm prison. In that case, do migrants still constitute subjects under the jurisdiction of the law? The fact that people are legally entitled to certain rights does not mean that they are actually able to make use of those rights. This is where the contradiction begins: democratic states are balancing between the enforcement of immigration law, on the one hand, and the protection of fundamental rights of migrants, on the other. This means that a potential effectivity of fundamental rights of migrants would be achieved if migrants were able to pursue their human rights without exposing themselves to arrest and expulsion within the common AFSJ. However, the way Europe seems to be functioning now is to be characterised by a certain utility of migrants where, useful migrants use borders as ways to Europe and unwanted migrants see borders as walls towards Europe. This is to say that fundamental rights are working only for migrants whose presence is desired, leaving the unwanted migrants without rights at all, waiting out determination of their status in "provisionally permanent" detention camps of transit.

The above exclusion or inclusion criteria for the entry to the European territory are added to the security reasons denying admission to people perceived to be threats to national security. The UN Security Council Resolution 2240 of October 2015 confirms the militarisation of the external borders of the EU in order to intensify securitisation against migration[84]. If national security is the fundamental responsibility of every state, the state should prevent people who pose a threat to national security. The sovereign decision of denying admission to terrorists or enemy agents is totally justifiable, however this category is pretty easily being abused or expansive. For example, after the September 11th, Muslims had a lot of difficulty to entry in Europe and the United States. And even if this national security rationale seems to have been limited in practice through the effort of NGO's and other actors, we attest a come-back of the exclusion for security reason, more specifically the derogation from the Schengen Borders Code within the EU. The category of dangerous migrants is too easily constructed and the French example of "emergency state" integrates the assumption of danger within the legal norm[85]. What threatens state security cannot be construed under any plausible definition of that term. Which is completely different from when states prohibit people with significant criminal records from entering as migrants. In the latter case, there is clearly a matter of public interest even if public safety lies behind through the maintenance of law and order rather than national security.

It has been clear since the 1985 and 1990 Schengen agreements that there is a link between internal security and threats posed by migration. The Schengen *acquis* was characterised by "the need for effective external border controls" given the "risks in the

[84] UN Security Council, Resolution 2240 of October 2015 UN doc S/RES/2240 (2015). See also T. SPIJKERBOER, *Minimalist Reflections on Europe, Refugees and Law*, op. cit.

[85] See more on the decision of the French Council of State, S. PLATON, *30 days, six months… forever? Border control and the French Council of State*, 9/1/2018, available at: https://verfassungsblog.de/30-days-six-months-forever-border-control-and-the-french-council-of-state/

fields of security and illegal migration"[86]. However, today, member states such as Austria and Germany derogate from the Schengen Borders Code and reintroduce the Schengen borders' police control.[87] The construction of the Schengen area implies the disappearance of internal borders, yet the migratory crisis and terrorism have given grounds to certain states to re-establish these borders. This is permitted when public order or internal security requires by the European legislation under Article 23 of the Schengen Borders Code. Article 2 of the Schengen Agreement states that "internal borders may be crossed at any point without any checks on persons carried out." In this sense, is security a necessary precondition for the establishment of the free movement within the European Union?[88]. Considering that the nature of security is inherently subjective and unstable, the security disposals become repressive jeopardising the protection of fundamental rights and migrants' liberties. At a first glance, it appears that the security issue aims to seal off Europe from potential dangers. However, do migrants pose potential threats to Europe? Does the potential threat seem to be enough to penalise migrants? Which is to say, the question at hand deals with the legal perspective of controlled migrants. At which point, can intrusive technologies and digitally enacted controls be compatible with migrants' fundamental rights when crossing borders? Is the technological enforcement of borders an alleged "exception state" according to which fundamental rights are legitimately set aside in the case of supposedly dangerous migrants?[89].

The example of merging two different objectives, the one objective of management of asylum and migration and the other objective of fight against crime and terrorism has led to an identification of the internal and external dimensions of national security. The use of technology for collecting, processing and sharing information in order to reinforce external border controls is not clear if it is used for the first or the second purpose. Using the same database for asylum seekers and for criminals and terrorists raises several questions regarding the European Union's (de-)democratisation, more specifically with regard to the AFSJ. Does the presence of a migrant or asylum-seeker in the European territory without authorisation entail the loss of his or her security and freedom? As a result, the implicit link between third-country nationals and terrorists by the Schengen Information System entails the parallel investigation for identification of migrants and for criminal activities. The access to the database of asylum-seekers' fingerprints can be pursued by national and European authorities when invoking the fight against organised crime and terrorism according to the Eurodac Regulation (Article 1.2)[90]. The above measures are neither necessary nor suitable, nor are they consistent with EU data

[86] European Communities, The Schengen *acquis*, Brussels, 2001, available at : http://consilium.europa.eu/uedocs/cmsUpload/SCH.ACQUIS-EN.pdf.
[87] Council Decision implementing decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk.
[88] M. L. BASILIEN-GAINCHE, *The EU External Edges: Borders as Walls or Ways*?, op. cit. See also S. CARRERA, T. BALZACQ, *Security versus freedom? A challenge for Europe's future*, Hampshire, 2013.
[89] M. L. BASILIEN-GAINCHE, *Etat de droit et Etats d'Exception*, Paris, 2013, pp. 263-288.
[90] M. L. BASILIEN-GAINCHE, *The EU External Edges: Borders as Walls or Ways*?, op. cit.

protection rules, fundamental rights and the principle of proportionality.[91] It has been argued that the relation between freedom and security has undermined the legitimacy of the EU AFSJ[92]. And if freedom has been subject to limitations without individualised cause, as with the extension of detention for migrants, we can see that this has an impact on democracy and fundamental rights. And even if the priority of freedom in the form of free movement of persons has been established by the EU treaties over coercive security claims, an exception to that rule can only be found on grounds of public security, public policy or public health.

At the same time, even if most of the EU's normative instruments include explicit references to human rights protections, they are only "minimum standards" and "lowest common denominators". This means that member states are alone in determining how to apply the necessary measures relevant to fundamental rights. Nevertheless, this legal technique exempts the EU from a normative global decision regarding migration and fundamental rights and actually "allows for the existence of a dispersed and fragmented response in relation to the degree of 'liberty' that the individual enjoys within the Union".[93] If we give another look to the process of categorisation of legal and illegal migrants when crossing an external border, the Schengen Borders Code operates a major distinction between EU citizens and third-country nationals. EU citizens go through a minimum control of identity travel documents, whereas third-country nationals are subject to thorough checks, not only of identity, but also of potentiality of risk to national security. This division between EU citizens and third country nationals, based on the EU external borders surveillance regime, illustrates a new division between safe and potentially "risky" individuals that is added to the division between citizens and non-citizens of the EU[94].

This is to say that within the fight against terrorism and illegal immigration, the borders between suitable, ergo, legal migrants and potentially dangerous, ergo, illegal migrants are not completely clear and normatively certain. Implicitly associating migrants with criminals is a result of treating the existence of third-country nationals as a security threat and not as a human-rights issue.[95] Consequently, codifying third country nationals as a political construction of potential threat and not as a subject in possession of fundamental rights, deforms the rule of law in Europe or establishes a rather selective rule of law only for desirable migrants. And if this is not a migration crisis but a rather European policy crisis it could "also be seized as an opportunity for re-thinking and re-inventing border

[91] E. GUILD, S. CARRERA, T. BALZACQ, *The changing dynamics of security in an enlarged European Union*, in *Challenge Paper n. 12*, 24 October 2008.
[92] *Ibidem.*
[93] *Ibidem.*
[94] R. HANSEN, D. PAPADEMETRIOU, *Securing borders: The intended, unintended, and perverse consequences*, in *Migration Policy Institute Working papers series*, 2014.
[95] The 1992 Edinburgh European Council conclusions highlighted the need for « common endeavours to combat illegal migration » and preventing «the misuse of the right to asylum in order to safefuard the principle itself», European Council (1992) :47, Conclusion of the Presidency, Edinburgh, 11-12 December 1992, Brussels, availablet at: http://www.europaparl.europa.eu/summits/edinburgh/a0_en.pdf.

struggles toward the ends of reinforcing and enhancing the elementary human freedom of movement."[96].

4.3. The claims of national security and public order versus European policies: democratisation or fragmentation?

As stated above, restricting rights on grounds of public security puts the AFSJ into perspective and undermines its legitimacy. With regard to EU citizens, until recently, the European Court of Justice has struck a balance between the individual's right to free movement within the European Union and the legitimate prerogative of member states to combat threats to public policy. This compromise has been institutionalised in Article 28 of Directive 2004/38/EC, which states that an expulsion decision may be authorised only on imperative grounds of public security[97]. Several decisions of the European Court of Justice had to challenge the status of EU citizens under the directive and their integration, on the one hand, and the value of security as a cornerstone of the AFSJ, on the other hand. The interaction of the notion pf public security with the notion of European Union citizenship raises questions relevant to the definition of public security. According to the Tsakouridis case, the Court defined public security as a protection against a heightened threat to underlying values of society[98]. In this sense, public security is not identified with the institutions or the components of the state but rather to a social vision of public security[99].

However the Court with regard to the P.I. judgment seems to weaken its previous interpretation regarding Article 28§3 of Directive 2004/38/EC[100]. In the P.I. case, the Court has blurred the distinction public security and public policy and has undermined

[96] N. DE GENOVA, E. FONTANARI, F. PICOZZA, L. S. BERMANT, A. SPATHOPOULOU, M. STIERL, Z. SUFFEE, M. TAZZIOLI, H. VAN BAAR, C. YILDIZ, *Europe/Crisis: New Keywords of "the Crisis" in and of "Europe"*, in *zone books near futures online*, available at: http://nearfuturesonline.org/europecrisis-new-keywords-of-crisis-in-and-of-europe-part-3/.

[97] Article 28 of Directive 2004/38/EC (Protection against expulsion): «1.Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin. 2. The host member state may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security. 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by member states, if they: a) have resided in the host member State for the previous next years; or b) are a minor except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on their Rights of the Child of 20 November 1989».

[98] Court of Justice of the European Union, judgment of 23 November 2010, *Land Baden-Württemberg v. P. Tsakouridis*, case C-145/09, ECLI:EU:C:2010:708.

[99] L. AZOULAI, *Restricitng Union citizens' residence rights on grounds of public security. Where Union citizenshio and the ASFJ meet:P.I.*, in *Common Market Law Review 50*, 2013.

[100] Court of Justice of the European Union, Grand Chamber, judgment of 22 May 2012, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, case C-348/09, ECLI:EU:C:2012:300.

the enhanced protection of Article 28§3. This leads us to say that the Union's citizen is reaffirmed as a non-national by gradually reestablishing the difference between Union citizens and nationals[101]. This interpretation holds for a schema of fragmentation between nationals and non-nationals where it should be all Europeans without any distinction. The above reflexion brings up again the issue of exclusion and inclusion criteria that we saw before with regard to third country nationals. The exclusion criteria reproduces the same pattern when it comes to talk about nationals and non-nationals. This is to say that "Territory and the right to territory remain one of the key distinctions between nationals and non-nationals both symbolically and literally. For nationals, there is a permanent and unconditional right to access and reside in the national territory, whereas the presence of non-nationals is necessarily conditional"[102].

The above analysis demonstrates the fragmentation between nationals and non-nationals within the territory of a unified European Union and its component the AFSJ. A further question reveals the degree of fragmentation due to the reintroduction of the Schengen Borders control. Taking in mind that the Schengen Borders legislation prohibits border controls at internal borders, the reintroduction of border controls at the internal borders discloses the relativisation of the Schengen Borders Code by using criteria of emergency. The example of France exposes the need to reintroduce border controls on grounds of Articles 25 and 27 of the Schengen Borders Code for reasons of public security. The terrorist attacks in France in 2015 have disrupted the homogeneous disappearance of internal border controls within the EU and have resulted the derogation from the Schengen Borders Code. The French Council of State invoking the so-called emergency state[103] has supported the government's wish to reintroduce, for the ninth time in a row, document control at its internal borders[104]. This decision of the French Council of State, based on an EU Recommendation[105] which is not a legally binding instrument, disregards the time limit set by the Schengen Borders Code.

More specifically, since Article 25(4) of the Schengen Borders Code explicitly states that "the total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months", we can see that the French Council of State circumvents or tends to circumvent the Schengen Code. In addition, the French Council State does not invoke Article 29 which conditions the derogation from the Schengen Code only in case of exceptional circumstances threatening the overall functioning of the Schengen area. At

[101] L. AZOULAI, *Restricitng Union citizens' residence rights on grounds of public security*, cit.
[102] *Ibidem.*
[103] «*Etat d'urgence*» in French.
[104] Council of State, 28 December 2017, *Association nationale d'assistance aux frontières pour les étrangers et autres*. Available at: http://www.conseil-etat.fr/Decisions-Avis. Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/Conseil-d-Etat-28-decembre-2017-Association-nationale-d-assistance-aux-frontieres-pour-les-etrangers-et-autres.
[105] Commission Opinion of 23.10.2015 *on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)*, C(2015) 7100 final.

this point we need to stress out that in case of applying Article 29, the extension can be made for maximum two years. We must say that the relative EU Opinion was not addressed to France but to some other countries such as Austria, Germany, Sweden, Denmark and Norway. We need to mention that the example of the Dutch government, which has already formalised the Schengen-proof police checks by introducing the Mobile Security Monitor, proves that in border areas, Dutch officers are allowed to stop any vehicle or person to check their ID and legal status under the Dutch Aliens Act. This means that the control operates without any reasonable suspicion of any criminal activity or unauthorised entry or stay[106]. In this case, there is no claim of exceptional circumstances or emergency state that highlights the need of a security claim. On the contrary, the police control becomes the norm of something that used to be exceptional within the common area of freedom, security and justice.

Even if Commission acknowledged that the "Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another",[107] a certain disjuncture between rhetoric and EU practice cannot be denied[108]. And the question remains whether the Schengen Borders Code will survive or whether it will be condemned to quasi-unilateral permanent derogation. And if the unilateral permanent derogations from the member states become the rule, we cannot help but wonder whether the common area of freedom, security and justice will become a common area of dispersed fragments of some freedom, some security and some justice.

5. Conclusion. A European area of freedom, security and justice as a European security community: rationalising migration by dismantling fundamental rights

The suggestion to view Europe in a dialectical way will help us understand the inherent contradiction that reappears as a crisis today, and, more specifically, the political concept of Europe through its concretisation in the AFSJ of the EU. The question stressed by this paper is whether the increasing securitisation of the EU policies will lead to an increasing fragmentation and division as regards fundamental rights, and, more specifically, to the relativisation of a common area which is supposed to be an area of freedom, security and justice. Our paper tends to analyse this aspect from the migration and asylum crisis perspective, which implies a fragmentation of the European common asylum area. The criteria for this underlying fragmentation and division are based on the emerging reasons of public order and national security in order to refuse the entry to immigrants by the EU member states. To the use of reasons of public order and national security by the EU member states can be added the resulting antidemocratic character of borders, which

[106] M. VAN DER WOUDE, J. VAN DER LEUN, *Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters*, in *European Journal of Criminology*, 2017, n. 1, pp. 27-45.
[107] Commission, "*Action Plan implementing the Stockholm Programme"* (Communication) COM (2010)171 final.
[108] PH. MURRAY, M. LONGO, *Europe's wicked legitimacy crisis: the case of refugees*, in *Journal of European Integration*, 2018, n. 4, pp. 411-425.

create Europe mainly as a borderland.[109] The reintroduction of the borders control and the derogation from the Schengen Borders Code highlights the sovereign competence of member states to invoke reasons of public order and interior security in order to stop the free movement of persons within the Area of Freedom, Security and Justice. This is not without consequences to an area supposed to be a European territory of liberty of movement.

The increasingly securitising EU migration policies have associated the framework of illegal migration to criminal activities and terrorist threats. The securitising discourses articulated by EU institutions construct migration as a security problem and a threat to the European *polity*. The so-called area of freedom, security and justice becomes a solely European security community where security conquers all, and justice justifies the freedom of EU citizens. Nevertheless, the AFSJ comes together with the protection of fundamental rights and the European ideal of democracy and rule of law. The suggestion would be to reverse the predominant rationale of security in order to re-appropriate the balance with an area of freedom, security and justice expected to be a European territory of fundamental rights and rule of law. That does not leave behind the value of security but only reconciles the founding values of the EU. The AFSJ needs to defend itself against external threats, but not necessarily by ignoring migrants' and refugees' fundamental rights. The re-appropriation of the balance between security and freedom is the answer to the contradiction of EU normative commitment to fundamental rights and policies aimed at their protection. Securitisation cannot be the ultimate purpose in the face of such a significant objective as fundamental rights.

ABSTRACT: The twentieth anniversary of the area of freedom, security and justice (AFSJ) brings to light several transformations with regard to border management, and also several concerns that did not cease to reemerge twenty years after its creation. The term is understood to concern external borders and the reintroduction of internal controls within the common European territory. The attacks of September 11, 2001 consolidated the recognition of transnational security threats to be countered at a supranational level, considering that a national level administration would not be sufficient. The idea behind the construction of a common management administration of security threats relied on the protection of the entire single market. This is to say, an inadequate national external border control could undermine the collective trust and the free movement. The above-named fear of jeopardising the common market, enthusiastically advanced by France and Germany, became true in recent years following the apex of the migration crisis and the terror attacks in France in 2015. The reintroduction of internal border controls in several countries, the derogation from the Schengen Code for reasons of public security and the extension of the minimum period of internal border controls demonstrates a need of re-appropriation of the AFSJ. The

[109] E. BALIBAR, *Europe as Borderland*, in *Environment and Planning D: Society and Space*, 2009, n. 2, pp. 190-215.

reason for this stands behind the rationale of free movement within the area of freedom, security and justice, which has created a Common European Asylum System. This re-appropriation has to do with balancing freedom and security so that security does not take precedence over freedom. If policing internal borders is a matter dependent upon discretionary power, we cannot help but wonder whether migration flips between "*crimmigration*" and unilateral derogatory regimes to the disadvantage of fundamental rights. When it comes to internal borders, does this discretionary power of policing create grey zones of uncertainty?

KEYWORDS: Area of freedom, security and justice – Security claims – Fundamental Rights – Balance – Crimmigration.