

CHALLENGING THE “PASSPORT PRIVILEGE”

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ABSTRACT

The paper examines the legal complexities and its implications surrounding the concept of “passport privilege” that exists among individuals from the Global North and places those from the Global South in underprivileged, undermined and discriminatory conditions. The study analyzes the practical challenges faced by third-country nationals in the European Union and argues that the discriminatory attitudes towards them are not adequately addressed locally and internationally. Two main aspects discussed are the restricted access to freedom of movement and race discrimination. These issues are explored through an analysis of the colonial history and legal dimensions of the European Union, Council of Europe and United Nations. In addition, the paper touches on the idea of Universal Citizenship and assesses its practical applicability to the issue of “passport privilege” on the example of Ecuador. While the research shows that the current policies restricting third-country nationals are introduced for specific and partly legitimate reasons, the study claims that these measures are based on stereotypical assumptions and, as a solution, it provides seemingly radical, but not impossible, individualized ways of screening third-country nationals in Europe that is less discriminatory and more consistent with universal human rights standards.

INTRODUCTION

Categorization is an ordinary habit of people to structurally comprehend their surroundings. As the American Psychological Association reports, human beings tend to put labels on individuals, based on their different characteristics, to understand the world.¹ This phenomenon would not be an issue if it stood in isolation. The classification of flowers, birds or animals in various families has no detrimental consequences as we do not add our value judgements in the categorization process and thereupon, do not implement social norms, laws or policies to reinforce our appraisals. Any categorization becomes an issue when it leads *inter alia* to discrimination on the grounds of sex, race, color, religion, gender, language, social status, etc.

The prohibition of discrimination is included in every international and regional human rights treaty and it is part of national legislations. The right to be protected from discrimination entails that people must be treated equally.

There have been numerous steps taken towards changing the discriminatory attitudes among people and encouraging the idea of appreciating diversity rather than suppressing it. Multiple government-funded informative campaigns have been launched² for this cause. Additionally, media outlets from different parts of the world have also contributed towards social change through diversified representation on their weekly programs.³ These measures made some positive changes over time. For instance, in the early 2000s, no country had same-

¹ American Psychological Association. "Discrimination: what it is, and how to cope". Oct. 31, 2019. Accessed at <https://www.apa.org/topics/discrimination#:~:text=What%20is%20discrimination%3F-.Discrimination%20is%20the%20unfair%20or%20prejudicial%20treatment%20of%20people%20and,gender%2C%20age%20or%20sexual%20orientation>.

² The Tolerance and Non-Discrimination Information System (TANDIS). "The 'For Diversity. Against Discrimination.' information campaign". Accessed at <https://tandis.odhr.pl/bitstream/20.500.12389/20469/1/05424.pdf>.

³ Griffin, R. and Meyer, M. "Adventures in Shondaland: Identity Politics and the Power of Representation". *Rutgers University Press*. 2018. P.2.

sex marriage legalized. Twenty years later, over 30 countries recognized the constitutional right of same-sex couples to marry.⁴

Even though we see a slow progress with abolishing discrimination against some features of human beings, the collective input of governmental and non-governmental actors is changing the discriminatory environment worldwide. Yet, there is still one aspect of discrimination that is disregarded by many, including the world governments whose direct obligation is to eliminate and prevent human rights violations. This aspect is the discrimination of people based on what passports they possess. I refer to this as “passport privilege.” This term has recently gained popularity as individuals from the Global South became conscious of missed opportunities and additional challenges due to their nationality. They named “passport privilege” as an issue that “stacks the deck against them.”⁵

Most of the time, citizens of developed countries have more freedom of movement than citizens of developing countries.⁶ For instance, according to the data provided by the Passport Index, German citizens do not need a visa for 99 countries, and they get a visa on arrival in 35 countries. A visa-free regime for German nationals is provided by states like Iceland, France, Canada or the United States. Moreover, Germans are required to go through visa-acquiring procedures to visit countries like Cuba, Bhutan or Algeria.⁷ On the other hand, nationals of Syria have one of the ‘weakest’ passports in the world and they can freely move to only six countries for 90 days or less.⁸ The movement of Germans and Syrians to countries where they are offered free movement for over three months varies as well. While German nationals, as the European Union (EU) citizens, can legally visit other EU countries for work or study

⁴ Ospina, E. and Roser, M. “Marriages and Divorces”. *Our World in Data*. Accessed at <https://ourworldindata.org/marriages-and-divorces>.

⁵ Albayrak-Aydemir, N. “The hidden costs of being a scholar from the Global South”. *LSE Higher Education Blog*. Feb. 20, 2020. Accessed at <https://blogs.lse.ac.uk/highereducation/2020/02/20/the-hidden-costs-of-being-a-scholar-from-the-global-south/>

⁶ Matthews, L. “Germany Now Has the Most Powerful Passport in the World”. *Afar*. Jan. 12, 2021. Accessed at <https://www.afar.com/magazine/worlds-most-powerful-passports>.

⁷ Passport Index. “Germany – Passport Dashboard”. Accessed at <https://www.passportindex.org/passport/germany/>.

⁸ Passport Index. “Syria – Passport Dashboard”. Accessed at <https://www.passportindex.org/passport/syria/>.

purposes during the first three months (they might be just required to report this to local migration offices),⁹ Syrian nationals cannot work or study in one of their visa-free countries, for instance, in Iran. They would need to apply for a working visa. In fact, obtaining a work visa for Syrians might be even more complex, as they need to find employers who are willing to sponsor their stay.¹⁰ Additionally, there is a difference in opportunities given to Syrian and German nationals. While Iran has a better functioning economy, higher quality education, and stronger state institutions, in general, than Syria,¹¹ it is still less developed and safe than other Western countries to which German nationals have unrestricted or less complicated access.

Other factors such as lengthy, costly and bureaucratic visa processes make it hard for Syrian citizens to visit developed countries. For instance, as described by the Danish Refugee Council, Syrians face “tightly controlled land borders, strict visa requirements”¹² even to countries like Turkey that claimed to launch the ‘open-door policy’ for Syrian nationals.¹³

As described above, many citizens of Syria cannot enjoy their freedom of movement because of the country they were born in and the passport they hold. Although international human rights documents and national legislations protect individuals from discrimination on any grounds, some people are still being treated inferiorly. This could be considered as an unfair and disproportionate situation that discriminates against humans based on their nationality. It creates the concept of otherness and deprives people of many opportunities due to political reasons and existing stereotypes.

⁹ Your Europe. “Residence rights”. Nov. 17, 2020. Accessed at https://europa.eu/youreurope/citizens/residence/residence-rights/index_en.htm#:~:text=As%20an%20EU%20citizen%2C%20you,national%20identity%20card%20or%20passport.

¹⁰ Ministry of Foreign Affairs in the Islamic Republic of Iran. “Electronic visa - Visa Categories Directory”. Accessed at https://evisatraveller.mfa.ir/ar/request/visa_types/.

¹¹ CountryEconomy. “Country comparison Iran vs. Syria”. Accessed at <https://countryeconomy.com/countries/compare/iran/syria>.

¹² Danish Refugee Council. “Closing Borders, Shifting Routes: Summary of Regional Migration Trends – Middle East”. May 2016. Accessed at <https://reliefweb.int/sites/reliefweb.int/files/resources/DRC%20-%20ME%20Migration%20Trends%20May.pdf>.

¹³ Düz, Z. “Turkey remains committed to open-door policy”. *Anadolu Agency*. Aug. 24, 2019. Accessed at <https://www.aa.com.tr/en/middle-east/turkey-remains-committed-to-open-door-policy-/1563793>.

The passport power communicates the political, social, economic or military strength of a country that issues it. Those holding powerful passports are mostly citizens of the developed states of the Global North, “and the bad, questionable passport [holders], largely from the Global South and ‘those who are most unlike us.’”¹⁴

This paper discusses two aspects of the discrimination concerning third-country nationals in Europe – restricted right to the freedom of movement across borders and bureaucratic, expensive and discriminatory procedures to obtain residency or work permits for non-white individuals. These issues are analyzed through the legal dimensions established at the EU, the Council of Europe (CoE) and the United Nations (UN) levels. Furthermore, the paper points out the reasons behind these matters and aims to explore possible solutions. These chapters start with the ‘least radical’ ideas that could remedy the nationality-based discrimination, such as loosening up border control mechanisms and expanding the scope of freedom of movement as they seem more feasible to implement. This study concludes with the ‘most radical’, cosmopolitan and ‘utopian’ idea, namely the concept of Universal Citizenship that goes beyond the usual political or legal frameworks of the EU; It aims to get rid of the borders for migrants and eliminate all other restrictions that are imposed on underprivileged passport holders.

¹⁴ Gardner, K. “Travel Restrictions during COVID-19: How Are They Changing ‘Passport Privilege?’”. *American University in Washington, DC*. Aug. 12, 2020. Accessed at <https://www.american.edu/sis/news/20200812-travel-restrictions-during-covid19-how-are-they-changing-passport-privilege.cfm#:~:text=The%20concept%20of%20E2%80%9Cpassport%20privilege,in%20light%20of%20COVID%2D19>.

FREEDOM OF MOVEMENT AND NATIONALITY-BASED DISCRIMINATION

There are different ways a person can become a citizen of a country:

- by right of blood – when a person’s parents or ancestors are/were citizens of a given country (*jus sanguinis*);¹⁵
- when an individual is born within a given country (*jus soli*);¹⁶
- Getting citizenship through marriage (*jus matrimonii*);¹⁷
- Buying government bonds, investing in a different country and receiving citizenship;¹⁸
- Naturalization. For instance, asking for political asylum, getting a refugee status and receiving citizenship after several years of living in a given country.¹⁹

It is evident that *jus sanguinis* and *jus soli* options cannot be controlled unless pregnant individuals choose to deliberately embark on the ‘birth tourism’ to a country where the granting of citizenship to newborns is constitutionally permitted. Taking advantage of this opportunity has recently forced the United States to tighten its visa services for pregnant women since about 33,000 children were born to individuals who were on a non-immigrant visa between 2016 and 2017.²⁰

¹⁵ Bande, N. “Citizenship – By Right or Choice”. *Fragomen*. Accessed at <https://www.fragomen.com/insights/blog/citizenship-right-or-choice>.

¹⁶ Scott, J. “Nationality: *Jus Soli* or *Jus Sanguinis*”. *The American Journal of International Law*. Jan. 1930. Vol. 24, No. 1. Cambridge University Press. Pp. 58-64. Accessed at <https://www.jstor.org/stable/pdf/2189299.pdf>

¹⁷ Stokke, K. “Politics of citizenship: Towards an analytical framework”. *Norwegian Journal of Geography*, 71:4, pp. 193-207. Accessed at <https://doi.org/10.1080/00291951.2017.1369454>.

¹⁸ Hudson’s Global Residence Index. “What are the differences between the various citizenship by investment programs?”. Accessed at <https://globalresidenceindex.com/news-what-is-citizenship-investment/>.

¹⁹ U.S. Citizenship and Immigration Services. “USCIS Welcomes Refugees and Asylees”. M-1186 (11/19). P. 7. Accessed at https://www.uscis.gov/sites/default/files/document/brochures/USCIS_Welcomes_Refugees_and_Asylees.pdf.

²⁰ BBC News. “Birth tourism’: US steps up scrutiny of pregnant visa applicants”. Jan. 23, 2020. Accessed at <https://www.bbc.com/news/world-us-canada-51213186>.

Apart from this, one is unable to pick where and in which family to be born. The option of marriage is also limited since one cannot purposefully aim to marry a foreigner or cannot predict to fall in love with someone who is a foreign resident. However, marriage for citizenship has become a way to get around the immigration laws. It is a lavish service to afford and therefore, participation in a fake marriage for immigration is considered a deceitful act that results in criminal charges.²¹ The EU has tightened its regulations regarding the marriage between an EU national and a foreign resident to ensure that the marriage is honest. The new set of rules require the primary resident to prove a legal residence of five to eight years, the existence of income equal to 70% of the national minimum income, an employment contract of at least one year, the proof of an appropriate size of the couple's future or current home, the evidence of a quality relationship that is based on "affection and love, thereby introducing the romantically idealized love-marriage as a yardstick of legality."²² In Germany, if a resident passes away or a marriage dissolves within three years of wedlock, a non-EU national spouse does not fall under §28 of the German Residency Act. Therefore, there might be some difficulties, such as not granting a non-national spouse an extension to stay if their resident permit is not backed up by other means, namely working or studying.²³

"Passport Trade"²⁴ is also not an option for many. Typically, people leave their countries "in search of a safer, better life."²⁵ People who are rich enough to invest in another country's economy, do not usually want to leave their countries, unless they would like to travel for business or leisure. In this case, freedom of movement might affect them too, depending on

²¹ U.S. Immigration and Customs Enforcement. "US Army sergeant sentenced to 8 months for marriage fraud scheme". May 28, 2020. Accessed at <https://www.ice.gov/news/releases/us-army-sergeant-sentenced-8-months-marriage-fraud-scheme>.

²² Lutz, H. "The Limits of European-ness: Immigrant women in Fortress Europe". *Feminist Review* 57, Autumn 1997, pp.93-111. Accessed at <https://link.springer.com/content/pdf/10.1080/014177897339678.pdf>.

²³ Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory – Residence Act. "Section 28 – Subsequent immigration of dependants to join a German national". Accessed at http://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p0628.

²⁴ D. Kochenov, "Passport Trade": The Vicious Circle of Nonsense in the Netherlands, *Verfassungsblog*, 8 June 2020, <https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands/>.

²⁵ Amnesty International. "Refugees, Asylum – Seekers and Migrants". Accessed at <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>.

which country they come from and where they plan to travel. As Dimitry Kochenov writes – “...investment migration unquestionably underlines citizenship’s absurdity, by allowing those who emerged as losers in the global ‘birth right lottery’ [...] to buy what others got assigned to them for free by blood, but at once also to be singled out as having uniquely undeservedly acquired this status.”²⁶

Although Article 67 of the Treaty on the Functioning of the European Union (TFEU) states that the EU “... shall frame a common policy on asylum, immigration and external border control, based on solidarity between the Member States, which is fair towards third-country nationals,”²⁷ lengthy procedures for asylum seekers (waiting about eleven months to two years to receive the results of their asylum claims), lack of integration mechanisms, delays to grant access to health care, education or labor market²⁸ are weaknesses of the naturalization option that is available only to those “fleeing persecution or serious harm in their country of origin.”

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From these numerous examples, it is clear that getting citizenship is either out of our control or expensive to afford.

- **LEGAL ASPECTS AT THE EU LEVEL;**

Article 21 of the TFEU guarantees freedom of movement but only for the citizens of the EU countries, which is “subject to the limitations and conditions.”³⁰ As outlined in Directive 2004/38/EC of 29 April 2004, EU citizens can stay in a different EU country “for a period not

²⁶ Kochenov, D. “Policing the Genuine Purity of Blood: The EU Commission’s Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union”. *Studia Europejskie-Studies in European Affairs* 2021. P. 38. April 12, 2021. Accessed at <https://www.ce.uw.edu.pl/pliki/pw/1-2021-Kochenov.pdf>.

²⁷ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU). “Title V – Area of Freedom, Security and Justice. Chapter 1 – General Provisions. Article 67”. Accessed at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

²⁸ Beirens, H. “Cracked Foundation, Uncertain Future – Structural weaknesses in the Common European Asylum System”. *Migration Policy Institute Europe*. March 2018. P.13.

https://www.migrationpolicy.org/sites/default/files/publications/CEAS-StructuralWeaknesses_Final.pdf.

²⁹ European Commission. “Common European Asylum System”. Accessed at https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

³⁰ TFEU. “Part 2 – Non-Discrimination and Citizenship of the Union. Article 21”. Accessed at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

exceeding three months without being subject to any conditions.”³¹ As long as an EU national proves that they have sufficient resources to support themselves without being a burden to the host state, they can prolong their residence and even obtain a permanent residence permit if they reside in that EU country for five years.

The EU law and its application in real life prove that the idea behind the free movement of people is possible. All 26 countries – most of them with different traditions, historical backgrounds, languages, cultures and values made it possible to agree on the Schengen area, a zone where internal borders do not exist for EU passport holders.³² Even though EU nationals can move without being subject to any conditions for three months, it is easy for them to obtain permits to prolong their stay. They are not subject to strict border controls, they do not need to go through complex bureaucratic processes to work, study or travel in another EU country. On the other hand, the EU is very selective when it comes to granting access to other nationals onto its territory even for a limited amount of time. Citizens from only 62 countries can enjoy their right to free movement across the EU for leisure or business over 90 days. Such countries are either developing or developed states, i.e., the United States, United Arab Emirates, New Zealand, Japan, Israel, Ukraine, Canada, Argentina, etc. On the other hand, nationals of other countries like Sri Lanka, Nigeria or Bangladesh even need to obtain a visa to transit through an airport in the Schengen area.³³

Even though Article 18 of the TFEU and Article 21 (2) of the Charter of Fundamental Rights prohibit discrimination based on nationality, it is obvious that individuals are treated differently because of their nationalities. According to the case-law of *Vatsouras* and

³¹ Directive 2004/38/EC. *Official Journal of the European Communities*. Accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038>.

³² European Union. “The 27 member countries of the EU”. Accessed at https://europa.eu/european-union/about-eu/countries_en.

³³ Schengen Visa Info. “Who Needs and Who Doesn’t Need a Schengen Visa to Travel to Europe?”. Accessed at <https://www.schengenvisainfo.com/who-needs-schengen-visa/>.

*Koupatantze*³⁴, the European Court of Justice (ECJ) specified that Article 18 of the TFEU “is not intended to apply to cases of a possible difference in treatment between nationals of the Member States and nationals of non-member countries.”³⁵ Third-country nationals could enjoy the same right to non-discriminatory treatment as EU nationals if they fulfill certain conditions, such as being lawfully present in any EU country for over five years. This way, they could qualify as ‘long term residents’ under the Third-Country Nationals Directive.³⁶

- LEGAL ASPECTS AT THE CoE LEVEL;

The prohibition of discrimination on any grounds, including “...race, national or social origin, birth or other status,”³⁷ is also guaranteed by Article 14 of the European Convention on Human Rights (ECHR). The ECHR has better non-discriminatory protection than the EU law as it protects all individuals, regardless of their national origins, who are present within the jurisdiction of their 47 Contracting States (includes all EU countries). However, the European Court of Human Rights (ECtHR) is not so effective in protecting third-country nationals from discrimination within the EU. As it is mentioned in *Moustaquim v. Belgium*,³⁸ “...there is objective and reasonable justification [for preferential treatment between foreigners and EU nationals] for it as Belgium belongs, together with those States, to a special legal order.”³⁹ As the EU constitutes a ‘special legal order’, it also “established its own citizenship”⁴⁰ that justifies the discriminatory approach to non-nationals of the EU. It practically nullifies the human rights of “those who are most unlike us”⁴¹ and feeds the power of the “passport privilege.” While the

³⁴ Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, EU:C:2009:344.

³⁵ *Ibid.*

³⁶ Directive 2003/109/EC of 25 November 2003. *Official Journal of the European Union*. P. 44. Accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0109&from=en>.

³⁷ European Convention on Human Rights (ECHR). Accessed at https://www.echr.coe.int/documents/convention_eng.pdf.

³⁸ ECtHR, *Moustaquim v. Belgium*, Appl. No. 12313/86, judgment of Feb. 18, 1991.

³⁹ *Ibid.* § 49.

⁴⁰ ECtHR, *C. v. Belgium*, Appl. No. 21794/93, judgment of Aug. 7, 1996. § 38.

⁴¹ *Supra* note 14.

ECtHR acknowledges that the ECHR is “...a living instrument which must be interpreted in the light of present-day conditions”⁴² that aligns with the social, political and cultural evolution – it cannot fully protect the rights of all individuals as it is bound by the States’ margin of appreciation which, “in implementing social and economic policies should be a wide one.”⁴³

- **LEGAL ASPECTS AT THE UN LEVEL;**

According to Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), signatory countries to this document undertake a responsibility to ensure that individuals can enjoy “the right to freedom of movement and residence within the border of the State”⁴⁴ regardless of their national or ethnic origins.

Even though this provision ensures that individuals can enjoy the freedom of movement in the Contracting States regardless of their citizenship or national origins, Article 1(2)(3) of the Convention contradicts this right. Article 1(2) of the Convention does not “apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”⁴⁵ This provision allows signatory states to make distinctions between citizens and non-citizens as long as non-citizens are treated similarly. Based on the Convention, such a distinction is not considered a discriminatory act. According to General Recommendation 30 of the CERD Committee, Article 1 (2) must be interpreted in a way to “avoid undermining the basic prohibition of discrimination.”⁴⁶ As a fact, Article 1 (2) of the Convention legitimizes the right of states to make differentiations and thus, to discriminate against non-citizens in their countries.

⁴² ECtHR, *TYRER v. THE UNITED KINGDOM*, Appl. No. 5856/72, judgment of Apr. 25, 1978. § 31.

⁴³ ECtHR, *JAMES AND OTHERS v. THE UNITED KINGDOM*, Appl. No. 8793/79, judgment of Feb. 21, 1986. § 46.

⁴⁴ International Convention on the Elimination of All Forms of Racial Discrimination. Accessed at <https://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>.

⁴⁵ *Ibid.*

⁴⁶ Committee on the Elimination of Racial Discrimination. “General Recommendation 30”. CERD/C/64/Misc.11/rev.3. Feb. 23 – Mar. 12, 2004. Accessed at <http://www2.ohchr.org/english/bodies/cerd/docs/cerd-gc30.doc>.

Furthermore, Article 1 (3) of the Convention states that this treaty does not affect in any way “legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”⁴⁷ As a result of this provision, the Convention does not affect states and their right to grant citizenship to individuals.

As affirmed by the CERD Committee in the General Recommendation 30, Contracting States should treat citizens and non-citizens equally under international law and national legislation should not “have a discriminatory effect on non-citizens.”⁴⁸ Such an approach of the Committee proves that ICERD is a living instrument⁴⁹ that should be changed in line with the current global situations. As society becomes more tolerant of accepting and appreciating human rights, as human rights become more protected and as globalization expands in terms of its capacity, legislators from various states need to comprehend that discriminatory treatment of non-citizens should no longer be accepted. Furthermore, the Committee claimed that while the distinction between citizen/non-citizen may apply when it comes to specific rights such as the right to vote, it “clearly cannot be sustained across the full ambit of ICERD obligations”⁵⁰ because of the general human rights environment and all provisions outlined in the ICERD.

The CERD Committee issued this recommendation in the year of 2004. The situation has not changed since then. For instance, Portugal is a signatory country of the ICERD. Although it is a liberal and progressive state respecting personal freedoms of individuals (fully legalizing and/or decriminalizing some of the most controversial aspects of human lives – euthanasia,⁵¹

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, p. 104.

⁵⁰ Keane, D. "Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument". *Human Rights Law Review*. June 17, 2020. Accessed at https://www.academia.edu/43637453/Mapping_the_International_Convention_on_the_Elimination_of_All_Forms_of_Racial_Discrimination_as_a_Living_Instrument.

⁵¹ Euronews. "Portugal's constitutional court blocks law decriminalizing euthanasia". March 16, 2021. Accessed at <https://www.euronews.com/2021/03/16/portugal-s-constitutional-court-blocks-law-decriminalising-euthanasia>.

same-sex marriage,⁵² incest,⁵³ and psychedelic drugs⁵⁴), it still prohibits the free movement of third-country nationals. Thus, they disregard ICERD and the General Recommendation of the Committee.

Additionally, according to Article 13 of the Universal Declaration of Human Rights (UDHR), every individual is entitled to have “the right to freedom of movement and residence within the borders of each State.”⁵⁵ The UDHR by its nature is a customary international law. Even though it has influenced many national legislations, policies and laws,⁵⁶ it is not legally binding and therefore, none of the world’s countries abide by it.

- POSSIBLE CAUSES & SOLUTIONS;

There are a few reasons why governments would want to get away with human rights violations such as restricting the movement of world citizens because of their passports. Avoiding overpopulation is one of them. The basic underlying fear or idea is that the more open the country, the more people would like to move in, especially if a given country has a strong economy and better living conditions. If more people move in, there will not be enough resources to provide to these immigrants and their families, such as accommodation, jobs, educational opportunities or social services that are usually scarce or accessible only to those third-country nationals, as equally as citizens, who established profound ties with the state.⁵⁷ Furthermore, the host country will need to implement programs to integrate these immigrants

⁵² Equaldex. “LGBT Rights in Portugal”. Accessed at <https://www.equaldex.com/region/portugal>.

⁵³ Sokol, D. “Incest: legal in Portugal, illegal in Germany”. *The Guardian*. Apr. 16, 2012. Accessed at <https://www.theguardian.com/law/2012/apr/16/incest-legality-ethics>.

⁵⁴ Ferreira, S. “Portugal’s radical drugs policy is working. Why hasn’t the world copied it?”. *The Guardian*. Dec. 5, 2017. Accessed at <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>.

⁵⁵ Universal Declaration of Human Rights. “Article 13”. Accessed at https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf.

⁵⁶ Hannum, H. “The Status of the Universal Declaration of Human Rights in National and International Law”. *GA. J. INT’L & COMP. L.* Vol 25: 287. P. 299. Accessed at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1396&context=gjicl#:~:text=The%20Universal%20Declaration%20has%20served,that%20protect%20fundamental%20human%20rights.&text=Many%20of%20the%20Universal%20Declaration's,is%20binding%20on%20all%20states>.

⁵⁷ Case C-571/10, *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233.

into the society since culture, morals and customs in a given country are different from theirs. If a country fails to do so, it will end up having a high rate of unemployment, an uneducated population, a conflict between inhabitants and immigrants, etc. These could be some of the reasons for imposing such restrictions. Governments prefer self-sufficient individuals: skilled, educated, resourceful and whoever has the willingness to adapt to a new country's cultural, political and social environment. While this reason is legitimate, it has never been proven in practice that such a thing would truly happen due to lack of empirical proofs. Partly for this reason but also out of principle, I believe it is still wrong to put a general ban on the right to freedom of movement as it creates barriers and harms many who are skilled, educated, resourceful and ready to adjust to new environments.

RACE DISCRIMINATION

This chapter discusses race discrimination within a host country, once a third-country national manages to enter its territories and argues that different characteristics, namely the presumed race of a third-country national imposes additional barriers on them in the immigration process.

Attempts to define concepts of racial and ethnic origins in the European context lead to “joined, compared and juxtaposed [usage of these terms], as in *Timishev v. Russia*.”⁵⁸ Typically, ‘ethnic origin’ refers to the nationality/citizenship of a person and encompasses much broader aspects than ‘ethnicity’, which includes cultural characteristics of a group of individuals. On the other hand, ‘racial origin’ is linked to the classification of people based on morphological and/or biological characteristics, namely skin color and facial features.⁵⁹

According to Eurostat, over 23 million non-EU citizens (5.1% of the EU population) were living in the territory of the EU as of January 1, 2020.⁶⁰ No specific statistics exist to show where most immigrants come from. However, some preliminary assumptions can be made based on information retrieved from different EU states. According to the 2019 data, three EU countries that accept the most immigrants are Germany, Spain and France.⁶¹ In Germany, the majority of immigrants come from Turkey, Syria and Afghanistan.⁶² In Spain, they come from Morocco⁶³ and in France, from Algeria and Morocco.⁶⁴ Immigrants from the

⁵⁸ Farkas, L. “The meaning of racial or ethnic origin in EU law: between stereotypes and identities”. *European Commission*. January 2017. P. 58. Accessed at <https://ec.europa.eu/newsroom/just/redirection/document/43228>.

⁵⁹ *Ibid*.

⁶⁰ Eurostat. “Migration and migrant population statistics”. Accessed at https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migrant_population: 23_million_non-EU_citizens_living_in_the_EU_on_1_January_2020.

⁶¹ Eurostat. “2021 Migration and migrant population statistics”. Accessed at <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf>.

⁶² Koptuyug, E. “Number of foreigners in Germany 2018-2020, by country of origin”. *Statista*. Apr. 22, 2021. Accessed at <https://www.statista.com/statistics/890277/foreigner-numbers-by-country-of-origin-germany/>.

⁶³ Forte, F. “Foreign population Spain 2020, by nationality”. *Statista*. Accessed at <https://www.statista.com/statistics/445784/foreign-population-in-spain-by-nationality/>.

⁶⁴ Alix, E. “Débat sur l’immigration : combien y-a-t-il d’immigrés en France et d’où viennent-ils ?”. *Ouest France*. Accessed at [https://www.ouest-france.fr/societe/immigration/debat-sur-l-immigration-combien-d-immigres-en-france-et-d-ou-viennent-ils-6553625#:~:text=de%20nationalit%C3%A9%20%C3%A9trang%C3%A8re,-D'o%C3%B9viennent%20ils%203F,du%20Portugal%20\(622%20000\)](https://www.ouest-france.fr/societe/immigration/debat-sur-l-immigration-combien-d-immigres-en-france-et-d-ou-viennent-ils-6553625#:~:text=de%20nationalit%C3%A9%20%C3%A9trang%C3%A8re,-D'o%C3%B9viennent%20ils%203F,du%20Portugal%20(622%20000)).

MENA region and Turkey come to Europe “in search of economic opportunities, to study, to join family members or to seek refuge.”⁶⁵ However, the discrimination against these ethnic minorities serves as an additional barrier to already pre-existing disadvantages that third-country nationals experience in the EU.

A collaborative report of EuroFound-ILO states that over 2% of workers in the EU face work-related discrimination “linked to each of the following: race, ethnic background, colour and nationality.”⁶⁶ The European Network Against Racism’s (ENAR) Shadow Reports suggests that job seekers with “foreign-sounding names have 30% less chances”⁶⁷ of even being invited to a job interview in Belgium, for instance. Most of the recruitment agencies in the Netherlands “agreed to recruit only white employees for a fictive festival named ‘Holland Dances’”⁶⁸ in 2015. In Germany, people of African descent are represented in the “lowest rungs of society”⁶⁹ as their monthly income is approximately 25% less than the average national monthly net income. In France, women of color have higher rates of “unemployment due to their education and their social and ethnic background.”⁷⁰

- LEGAL ASPECTS AT THE EU LEVEL;

According to the EU’s Race Equality Directive (RED), direct race discrimination occurs when a person “is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.”⁷¹ Justifying the direct racial discrimination of third-country nationals is limited in scope as several legal instruments,

⁶⁵ Bommers, M., Fassmann, H. and Sievers, W. “Migration from the middle East and North Africa to Europe”. *Amsterdam University Press*. p.146. Accessed at <https://library.oapen.org/bitstream/handle/20.500.12657/33374/496763.pdf?sequence=1&isAllowed=y>. p.146.

⁶⁶ Gallinat, A. “Racial discrimination is not a thing of the past in the EU”. *Eurofound*. Accessed at <https://www.eurofound.europa.eu/publications/blog/racial-discrimination-is-not-a-thing-of-the-past-in-the-eu>.

⁶⁷ European Network Against Racism. “Racism & Discrimination in Employment in Europe 2013-2017”. Accessed at <https://ec.europa.eu/migrant-integration/?action=media.download&uuid=F613A27D-A960-4FB3-FD3AD6A629C8FBE7>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ European Commission. “Direct Discrimination”. Accessed at https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/direct-discrimination_en.

namely Directive 2000/78/EC of 27 November 2000 (reinforces the idea of equal employment treatment) and Directive 2000/43/EC of 29 June 2000 (establishes the principle of equal treatment regardless of race or ethnic origins) prohibit such instances. However, indirect racial discrimination is much harder to prove as a victim has to provide evidence that they suffer “a disadvantage compared with other persons in a comparable situation that do not have the same particular and protected characteristic.”⁷² The notion of indirect discrimination (so-called ‘disparate impact’) first appeared in the 1971 US Supreme Court judgment of *Griggs v. Duke Power Co.*⁷³ In the European context, discriminatory “intent or motive are not necessarily a distinguishing criterion”⁷⁴ between direct and indirect forms of discrimination, whereas in the United States, discriminatory motive is the key to distinction between these two.

Indirect discrimination is usually linked to neutral measures, e.g., provision, criterion or practice. It can be justified if that measure serves a legitimate aim and pursues “the means of achieving that aim [in] appropriate and necessary”⁷⁵ ways. For instance, in the context of race, “a requirement relating to shaving [might be] applied e.g. [all] employees of a company must be clean-shaven;”⁷⁶ Pseudofolliculitis barbae is a skin condition that might occur predominantly in black men and prevents them from shaving because of severe skin irritation.⁷⁷ This measure could, therefore, put Sikhs in disadvantageous positions as well because male Sikhs do not shave as “maintaining hair unshorn”⁷⁸ is a fundamental aspect of their faith and identity. In the context of nationality, a Member State must justify on objective grounds that

⁷² Eurofound. “Indirect Discrimination”. Feb. 22, 2019. Accessed at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/indirect-discrimination>.

⁷³ *Willie S. GRIGGS et al. v. DUKE POWER COMPANY*, 401 U.S. 424 (1971).

⁷⁴ Möschel, M. “The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain”. *The Modern Law Review*. Vol. 80, issue 1. Jan. 5, 2017. P. 124.

⁷⁵ Maliszewska-Nienartowicz, J. “Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?”. *International Journal of Social Sciences*. III(1), 2014. Accessed at https://www.iises.net/download/Soubory/soubory-puvodni/pp041-055_ijoss_2014v3n1.pdf.

⁷⁶ Tobler, C. “Limits and potential of the concept of indirect discrimination”. *TANDIS*. Sept. 2008. Accessed at <https://tandis.odhr.pl/retrieve/23274>.

⁷⁷ American Osteopathic College of Dermatology. “PSEUDOFOLLICULITIS BARBAE “. Accessed at <https://www.aocd.org/page/pseudofolliculitisb>.

⁷⁸ The Sikh Coalition. “Frequently Asked Questions”. Accessed at <https://www.sikhcoalition.org/about-sikhs/faq/>.

not allowing a job-seeker allowance to other nationals is not indirectly based on nationality discrimination.⁷⁹ Consequently, such measures can lead to indirect discrimination against non-white third-country nationals, “behind the cloak of a formally neutral criterion.”⁸⁰

One of the main reasons why racial discrimination is still an issue that shapes inequity among non-white third-country nationals is the colonial history of Europe. Although the current relationship between Europeans and Africans has been dramatically normalized in recent years, the legacy of colonialism is still having its effects on individuals. As the connection between Europeans and Africans was established on slavery and imperialism, Europeans have always viewed Africans through the “distorting veil of racism and racial theory”⁸¹ and perceived them as primitive barbarians who are not welcome in civilized Europe, so “colonialism was proposed as an answer to Africa’s retardation.”⁸²

The past most certainly has shaped the present. In Austria, “various stripes of racial minorities such as the Turkish and the blacks are perceived as the ‘other’”⁸³ because the country is predominantly populated with white people,⁸⁴ thus “whiteness has been synonymous with Austrian citizenship”⁸⁵ and citizenship, as well as whiteness, was created to make distinctions from non-whites.

The acknowledgement of the negative colonial legacy is relatively a new idea among the European decision-makers. For instance, the CoE has recently urged Portugal to “tackle

⁷⁹ Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, EU:C:2004:172.

⁸⁰ Möschel, M. p.127.

⁸¹ Olusoga, D. “The roots of European racism lie in the slave trade, colonialism – and Edward Long”. *The Guardian*. Sept. 8, 2015. Accessed at <https://www.theguardian.com/commentisfree/2015/sep/08/european-racism-africa-slavery>.

⁸² Jacques, C. “From Savages and Barbarians to Primitives: Africa, Social Typologies, and History in 18th century French Philosophy”. *Wiley for Wesleyan University*. Accessed at <https://www.jstor.org/stable/pdf/2505337.pdf?refreqid=excelsior%3A9bf7ed86d188c88febd2d10c6e1ffb38>.

⁸³ Lazarus, S. “Some Animals Are More Equal Than Others’: The Hierarchy of Citizenship in Austria”. *School of Humanities and Social Sciences, University of Greenwich*. July 16, 2019. Accessed at <https://www.mdpi.com/2075-471X/8/3/14/htm>.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

racist biases against people of African descent inherited from the colonial past and historical slave trade.”⁸⁶

Additionally, the European Parliament passed a Resolution on the Fundamental Rights of People of African Descent only in 2019. The Resolution calls on the Member States to recognize the colonial history and to tackle the “contemporary adverse effects on people of African descent.”⁸⁷

The fact that racism still exists and there is much to do to eliminate it is also manifested through the newly implemented EU Anti-Racism Action Plan that aims to “step up action against racism and achieve a Union of Equality”⁸⁸ by 2025. It is also worth noting that the Action Plan acknowledges that people of African descent, as well as individuals from other diverse backgrounds, suffer from intolerance. There are “unconscious bias[es]”⁸⁹ that result in racist, discriminatory and damaging behaviors against non-white third-country nationals, which is “often deeply embedded in our societies’ history, intertwined with its cultural roots and norms.”⁹⁰

Some rigid laws that colonialism brought to the contemporary world challenge foreign non-white individuals to settle down in the EU. For instance, seeking employment in one of the EU countries for non-EU nationals is complicated. If a country does not have an agreement with the EU or if an individual’s family members are not EU nationals, the employment in that EU state “mainly depends on the laws of that country.”⁹¹

⁸⁶ Council of Europe – Commissioner for Human Rights. “Portugal should act more resolutely to tackle racism and continue efforts to combat violence against women”. March 24, 2021. Accessed at <https://www.coe.int/en/web/commissioner/-/portugal-should-act-more-resolutely-to-tackle-racism-and-continue-efforts-to-combat-violence-against-women>.

⁸⁷ European Parliament resolution of 26 March 2019 on fundamental rights of people of African descent in Europe (2018/2899(RSP). Accessed at https://www.europarl.europa.eu/doceo/document/TA-8-2019-0239_EN.html.

⁸⁸ European Commission. EU Anti-racism Action Plan 2020-2025. Accessed at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en.

⁸⁹ European Commission. “A Union of equality : EU anti-racism action plan 2020-2025”. Sept. 18, 2020. Accessed at https://ec.europa.eu/info/sites/default/files/a_union_of_equality_eu_action_plan_against_racism_2020_-2025_en.pdf.

⁹⁰ *Ibid.*

⁹¹ European Commission. “Employment, Social Affairs & Inclusion: Non-EU nationals”. Accessed at <https://ec.europa.eu/social/main.jsp?catId=470&langId=en>.

There is no doubt that it is in the interest of states to accept those immigrants who are qualified and skilled enough to work, rather than those who do not have any qualifications, skills and who will eventually become the burden of the national economy. While this is a valid argument, it still is not a fair reasoning. It might rather be considered discriminatory at times as high requirements can *de facto* continue “to exclude [non-white immigrants] who *inter alia* due to education segregation and economic reasons often [do not] have such diplomas.”⁹² Since EU nationals or citizens from the Schengen area generally do not need to acquire residence permits (or their procedure of registration in another EU country, such as Austria is fairly easy⁹³), it creates unfair circumstances in relation to third-country nationals who, as described under the chapter of *Freedom of Movement* above, cannot choose what passports they can possess to ease their life struggles in the era of globalization.

The RED, which is “a key measure [...] as a framework for combating discrimination and giving effect to the principle of equal treatment,”⁹⁴ puts forward the idea of equal treatment. It ensures combatting discriminatory treatment on the grounds of racial and ethnic discrimination. According to Article 2 (2) of the Directive, it “does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals[...] on the territory of Member States, and to any treatment which arises from the legal status of the third-country [...].”⁹⁵

Although this part of the Directive is unfortunate since it creates a double level of nationality discrimination in the EU, there are still some advantages for the non-EU nationals. It is due to this Directive that if an employer publicly announces that they do not hire third-country nationals, this will be considered as an act of direct discrimination. This precedent was

⁹² Möschel, M. p.126.

⁹³ Federal Ministry of Austria. “Living and Working in Austria – Very Highly Qualified Workers”. Accessed at <https://www.migration.gv.at/en/types-of-immigration/permanent-immigration/very-highly-qualified-workers/>.

⁹⁴ European Union Agency for Fundamental Rights. “The Racial Equality Directive: application and challenges”. P.3. Accessed at https://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf.

⁹⁵ Directive 2000/43/EC of 29 June 2000. *Official Journal of the European Communities*. Accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>.

made in the case of *Feryn*.⁹⁶ The Court concluded that publicly denouncing to “recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.”⁹⁷ Even though this is considered to be an act of direct discrimination, employers can easily get around without breaching the provision by simply not mentioning that they are not willing to hire a non-EU national and point out different reasons, such as lack of qualification or work experience.

However, it is important to keep in mind that not all reasons or narrowly tailored requirements can be considered discriminatory. For instance, in *Maniero*,⁹⁸ the ECJ ruled that the foundation’s decision to award scholarships to candidates who successfully completed a law examination in that Member State is not an indirect discrimination since it was not proven that “persons belonging to a given ethnic group would be more affected by the requirement relating to the First State Law Examination than those belonging to other ethnic groups.”⁹⁹

Council’s Directive 2000/43/EC points out that discrimination is capable to undermine some of the core objectives of the EU, such as freedom, security and justice. Even though this Directive mentions that the prohibition of discrimination should be abolished in relation to third-country nationals, it also states that this legal document “does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of [foreigners] and their access to employment and to occupation.”¹⁰⁰ One could argue that as Directive 2000/43 excludes the application of nationality-based discrimination from its ambit of protection, it allows this form of intolerance towards non-EU nationals. In

⁹⁶ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, EU:C:2008:397.

⁹⁷ *Ibid.*

⁹⁸ Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV.*, EU:C:2018:912.

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* note 95.

Finans,¹⁰¹ the ECJ did not find direct or indirect discrimination in the policy that required individuals being born outside of the EU or EFTA (European Free Trade Association) to provide additional information for identity check. This is an example of the Directive's less progressive way of interpretation where there is less space "aside from discrimination based on ethnic origin."¹⁰²

- LEGAL ASPECTS AT THE CoE LEVEL;

As Article 2(a) of the CoE's Convention on Nationality and the rules of the public international law¹⁰³ state – nationality is a legal bond between an individual and a State. The ECHR recognizes that a lack of legal bond "runs together with the absence of factual connections to a particular State [e.g., paying taxes]. This, in turn, prevents the alleged victim from claiming to be in a comparable position to nationals."¹⁰⁴ On the other hand, the ECtHR considers that if a non-EU national has solely factual bonds with a particular state, it is less likely that discrimination towards that person due to their nationality will be justified. For instance, in *Dhahbi v. Italy*,¹⁰⁵ the Court concluded that not allowing a Tunisian national (who made his financial contributions to the National Institute for Social Security as Italian citizens and other EU nationals residing in Italy) to receive financial aid designated for large families with low income constituted a breach of the ECHR because "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention."¹⁰⁶

¹⁰¹ Case C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, EU:C:2017:278.

¹⁰² Atrey, S. "Race Discrimination in EU law after *Jyske Finans*". *Common Market Law Review*. 2018. P. 627. Accessed at <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2018039.pdf>.

¹⁰³ Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C. J. Reports 1955, p. 4. Accessed at <https://www.icj-cij.org/public/files/case-related/18/018-19550406-JUD-01-00-EN.pdf>.

¹⁰⁴ European Union Agency for Fundamental Rights. "Handbook on European non-discrimination law". 2018. Accessed at <https://publications.europa.eu/portal2012-portlet/html/downloadHandler.jsp?identifier=494aec98-2803-11e8-ac73-01aa75ed71a1&format=pdf&language=en&productionSystem=cellar&part=>.

¹⁰⁵ ECtHR, *DHAHBI v. ITALY*, Appl. No. 17120/09, judgment of Apr. 8, 2014.

¹⁰⁶ *Ibid.* §46.

In 2007, the ECtHR explicitly mentioned ‘indirect discrimination’ for the first time. The Court already implicitly referred to it in *Thlimmenos v. Greece*¹⁰⁷ and *Zarb Adami v. Malta*,¹⁰⁸ however, in the case of *DH and Others v. the Czech Republic*,¹⁰⁹ the Court used the concept under Article 14 of the Convention. It affirmed that “...In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.”¹¹⁰

Later, the notion was applied to different cases but all of them related to education segregation and still, “the distinction between direct and indirect discrimination was not always clear.”¹¹¹

In later cases, namely *Biao v. Denmark*,¹¹² the ECtHR made a distinction between direct and indirect forms of discrimination and “...finally applied the concept to the much broader area of immigration and citizenship”¹¹³ that served as a hopeful expectation to remedy those discriminatory issues surrounding non-white third-country nationals in Europe.

Mr. Biao, a Danish citizen from Togo, married a woman from Ghana and wanted to bring her to Denmark. The request for family reunification was rejected due to the ‘attachment requirement’ that permitted family reunions to those whose “aggregate ties to Denmark were stronger than the spouses’ attachment to any other country.”¹¹⁴ Individuals who held Danish citizenship for at least 28 years or who were born in Denmark (or arrived as small children) satisfied the requirement. The applicant argued that the Danish government exercised indirect discrimination against people of a different race or ethnic origins who were naturalized citizens. It is also worth mentioning that Mr. Biao would not be able to reunite with her Ghanaian wife

¹⁰⁷ ECtHR, *THLIMMENOS v. GREECE*, Appl. No. 34369/97, judgment of Apr. 6, 2000.

¹⁰⁸ ECtHR, *ZARB ADAMI v. MALTA*, Appl. No. 17209/02, judgment of Sept. 20, 2006.

¹⁰⁹ ECtHR, *D.H. AND OTHERS v. THE CZECH REPUBLIC*, Appl. No. 57325/00, judgment of Nov. 13, 2007.

¹¹⁰ *Ibid.* §186.

¹¹¹ Möschel, M. p.121.

¹¹² ECtHR, *Biao v. Denmark*, Appl. No. 38590/10, judgment of May 24, 2016.

¹¹³ *Supra* note 111.

¹¹⁴ *Supra* note 112.

any time soon because he acquired Danish citizenship at the age of 31 and “would be subject to the attachment requirement until he reached the age of 59.”¹¹⁵

The ECtHR decided that the ‘attachment requirement’ had an indirect and “disproportionately prejudicial”¹¹⁶ favoring effect of Danish nationals over individuals of a different race or ethnic origins and thus, the case was found to be in violation of Article 14 read in conjunction with Article 8 of the Convention. Therefore, the Court mentioned that the “EU law on family reunification [recognizes no distinction] between those who acquired citizenship by birth and those who acquired it by registration or naturalization.”¹¹⁷ Additionally, the Court challenged the Danish government’s arguments about ‘a special legal order’ and the EU’s ‘own citizenship,’ it pointed out that these arguments concern preferential treatments based on nationality and not favorable treatments of ‘nationals by acquisition’ or indirect discrimination of individuals due to their ethnic origins.¹¹⁸ Although the ECtHR has stated in numerous cases such as *Timishev v. Russia*¹¹⁹ that “... no difference in treatment [... due to] a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society [that is built on] respect for different cultures,”¹²⁰ the Court still analyzed the justifications of the differential treatment, “thus, contradicting itself.”¹²¹

- LEGAL ASPECTS AT THE UN LEVEL;

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) forbids discrimination against individuals based on their nationality.¹²² As General Comment 15 on

¹¹⁵ *Ibid.* §6.

¹¹⁶ *Ibid.* §91.

¹¹⁷ *Ibid.* §134.

¹¹⁸ *Ibid.*

¹¹⁹ ECtHR, *Timishev v. Russia*, Appl. No. 55762/00 and 55974/00, judgment of Dec. 13, 2005.

¹²⁰ *Ibid.* §58.

¹²¹ Möschel, M. p.129.

¹²² International Covenant on Civil and Political Rights (ICCPR). Accessed at <https://www.ohchr.org/documents/professionalinterest/ccpr.pdf>.

the Position of Aliens Under the Covenant (1986) states, the ICCPR provisions have to “be guaranteed without discrimination between citizens and aliens.”¹²³

In *Ibrahima Gueye et al v. France*, the UN Human Rights Committee concluded that not providing Senegalese nationals (serving in the French army before the independence of Senegal in 1960) with pension rights was in violation of Article 26 of the ICCPR because these soldiers served under the same conditions as French nationals for over 14 years and “a subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided.”¹²⁴ Thus, the approach of the UN is similar to the one of the ECtHR that a non-national is allowed to get a non-discriminatory treatment since they established particular legal or factual bonds with a given country.

However, Article 25 of the Covenant makes a distinction and states that in certain areas (the right to vote, the right to be elected, the right to have access to public service employment) non-nationals can be treated differently and this would not be discriminatory.¹²⁵ One would argue that not many individuals would be upset by the exceptions set out in Article 25 if non-EU nationals would not be discriminated against in their host states and would not have to deal with lengthy and bureaucratic procedures in other more important aspects of their lives such as obtaining resident or work permits.¹²⁶

Consequently, unless a person is exceptionally skilled who also qualifies with certain narrow criteria - there are many barriers imposed for third-country nationals who are discriminated against due to their race or ethnic origins. It is essential to create a certain policy that could ease the struggle of movement and establishment for all migrants, instead of

¹²³ UN Human Rights Committee. “CCPR General Comment No. 15”. Accessed at <https://www.refworld.org/docid/45139acfc.html>.

¹²⁴ UN Human Rights Committee. *Gueye et al. v. France*. Communication No. 196/1983. Apr. 3, 1989.

¹²⁵ *Supra* note 122.

¹²⁶ ACADEMICS. “How to obtain a visa or work permit in Austria”. Accessed at <https://www.academics.com/guide/visa-permit-austria>.

hierarchically picking and choosing passports by the economic, political or military power of the countries that issue them. One such policy could be the concept of Universal Citizenship. This idea might seem like a far-fetched policy, outside of the usual political and legal scope that would never succeed because it is against the orthodoxy of the public international law and sovereignty of states. However, as we move towards globalization, cooperation and unification to tackle different social or political matters together, it is worth discussing how Universal Citizenship could broadly be one of the direct solutions to end the “passport privilege” in Europe. There are many lessons to be learned from its application in Latin America that will be discussed in the next chapter of this paper.

UNIVERSAL CITIZENSHIP

“Until you see a place you’ve known your whole life reduced to ash, you don’t realise how much we crave familiarity. Do you see those flowers on that hillside, Ilse? I want to know their names in Japanese. I want to hear Japanese. I want tea that tastes the way tea should taste in my understanding of tea. I want to look like the people around me. I want people to disapprove when I break the rules and not simply to think that I don’t know better. I want doors to slide open instead of swinging open...”¹²⁷

This passage from Kamila Shamsie’s novel ‘Burnt Shadows’ reflects the struggle of migrants who are forced to leave their homes or who just simply want to explore cultures and be part of the global society. This leads me to introduce the concept of Universal Citizenship.

Before explaining this notion further, it is worth mentioning that Universal Citizenship is slightly different from the idea of global citizenship. The latter comes from Emmanuel Kant’s philosophical and political writings. According to Kant, this planet is a common ground, the ownership of which “should be extended to all individuals.”¹²⁸ Global citizenship is a cosmopolitan concept in which all individuals of this planet can move freely around the world with no restrictions.

On the other hand, Universal Citizenship, according to Jeffrey Pugh, is establishing a relationship between migrants and their host states in which the rights of immigrants are “attached to [them] by virtue of their humanity or their physical residence in a territory.”¹²⁹ This concept acknowledges that boundaries are created by political (and economic) reasons, selectively and it is not based on universal human rights or cosmopolitan perspectives. To sum

¹²⁷ Shamsie, K. “Burnt Shadows”. *Bloomsbury Publishing*. 2009. P. 99.

¹²⁸ Cabrera, L. “Global Citizenship as the Completion of Cosmopolitanism”. *Journal of International Political Theory*. Apr. 2008. P. 87. Accessed at <https://journals.sagepub.com/doi/10.3366/E1755088208000104>.

¹²⁹ Pugh, J. “Universal Citizenship Through the Discourse and Policy of Rafael Correa”. *Latin American Politics and Society*. Vol. 59, No. 3. Fall 2017. Accessed at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/laps.12028>.

it up, this concept acknowledges the borders of states imposed for individuals but pushes the idea of easing the restrictions on them for migrants who wish to settle down in host states.

Yasemin Soysal writes that the postwar period expanded the notion of human rights, it made these rights more universal, international and thus, “the expanse and intensity of concepts of personhood predicate a broadened, postnational constellation of membership in the postwar era.”¹³⁰ While the concept of Universal Citizenship might be considered as a continuation of globalization and as a result of extrapolating human rights, it is still not a widely accepted idea. Rather, for many - it is a far-fetched idea with no future.

The Ecuadorian government introduced this notion to its constitution in 2008.¹³¹ Article 416 of Title VIII [Chapter I] states that Ecuador “advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the equal relations between countries, especially those between North and South.”¹³² This amendment was introduced by Rafael Correa, a leftist former President of Ecuador. In his campaign speech of 2006, he mentioned that “we dream that all human beings can have universal citizenship.”¹³³ His initiative of introducing this concept implied protecting the universal human rights of migrants, establishing social justice, easing visa-related bureaucratic procedures introduced by previous governments of Ecuador and protecting Ecuadorians abroad. In another speech of 2009, he said: “We reject the hateful and xenophobic migratory policies of those Northern countries who defend the free circulation of goods and capital but who construct walls between human beings.”¹³⁴ As we can clearly see from these speeches, indeed, Correa advocated for free

¹³⁰ Soysal, Y. “Limits of Citizenship: Migrants and Postnational Membership in Europe”. *The University of Chicago Press*. 1994. P. 164.

¹³¹ Herrera, G., Müller, C. et al. “The Frontiers of Universal Citizenship: Transnational Social Spaces and the Legal Status of Migrants in Ecuador”. 2014. *Freia Universität Berlin*. Accessed at https://www.desigualdades.net/Working_Papers/Search-Working-Papers/working-paper-71-the-frontiers-of-universal-citizenship/index.html.

¹³² Ecuador’s Constitution of 2008 with Amendments through 2015. TITLE VIII, Chapter 1, Article 416. Accessed at https://www.constituteproject.org/constitution/Ecuador_2015.pdf?lang=en.

¹³³ *Supra* note 129.

¹³⁴ *Ibid*.

movement of individuals, regardless of their national affiliations and promoted the idea of de-nationalizing and de-politicizing the right of people to move freely.

However, Correa's approach was also political. When analyzing the speeches given during eight years of his presidency, it was noticed that he put more emphasis on Ecuadorian emigrants abroad, rather than foreign immigrants in Ecuador in the years of 2009 and 2013 when there were elections held in the country. Over 60% of his ideas expressed at meetings about migrants referred to Ecuadorians abroad and 27% to immigrants in Ecuador, the other 13% was about migration in general. His focus on Ecuadorians abroad was defined by the fact that they "represented an important electoral and economic resource"¹³⁵ for the country.

Ecuadorians protested in 2009 "against a perceived lax refugee reception process"¹³⁶ and as a result of it, Correa paid less attention to Universal Citizenship. Before the protests occurred, Correa's policies introduced some measures that would ease the process of migration in the country. In 2007, Correa canceled the requirement for Colombian immigrants to provide the border control police with their criminal records. The reason is that a majority of those did not possess such documents as they were fleeing out of the country to seek refuge and to avoid imminent danger. However, "in the face of constituent pressure about national security concerns and potential delinquency,"¹³⁷ Correa had to put this requirement back in place that made it harder for those Colombian immigrants to enter Ecuador.

One more step towards the Universal Citizenship framework was the initiative of the government, in partnership with the Office of the UN High Commissioner for Refugees (UNHCR), to start registering migrants on their territory. This helped "to increase its capacity to provide security in migrant-receiving communities and led to an expansion in refugee reception offices and infrastructure in the border provinces."¹³⁸ However, Correa's

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

constituents, the Ecuadorian Military, Ministries of Interior and Foreign Affairs and the national media opposed these migration-related policies and due to this public outrage, Correa had to “slow down the initiative.”¹³⁹ After 2010, this program was discontinued.

Ecuador’s experiment proved that the rights given to individuals by virtue “are still subject to the fluctuations of political expediency, particularly as re-election campaigns approach and the government faces electoral pressure from constituents.”¹⁴⁰

After the former U.S. President Trump’s statements on building the wall and introducing the ‘Muslim travel ban’, the former President of Bolivia, Evo Morales, criticized these policies in 2017 and said that the free movement of people constitutes “a fundamental element for the development of a universal society in coexistence with the planet.”¹⁴¹ He said that migration is an element of development and migrants should not be blamed for the economic crisis that is caused because of the rich. Furthermore, Morales mentioned that migrants are the ones who “make abandoned fields flourish”¹⁴² and who “handle the heaviest jobs.”¹⁴³ Morales was joined by the former Presidents of Colombia, Ecuador and Spain. All of them defended the idea of Universal Citizenship and advocated for migrants “as the engine of social and economic development.”¹⁴⁴

Despite the fact that some political leaders are accepting this ‘utopian’ notion and even trying to implement it, the rise of populism and the concentration on national sovereignty serve as barriers. One would argue that humans need a sense of belonging to survive. Some seek this feeling through being with others and “some seek belonging through excluding others. That reflects the idea that there must be those who don’t belong in order for there to be those who

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ teleSURtv “¿Qué es la ciudadanía universal y por qué es importante?” [“What is universal citizenship and why is it important?”]. June 20, 2017. Accessed at <https://www.telesurtv.net/news/Que-es-la-ciudadania-universal-y-por-que-es-importante-20170620-0041.html>.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

do.”¹⁴⁵ The sense of belonging includes similarities, common heritage, mutual understanding. It excludes external and estranged forces that could discontinue the harmony of belonging. Since people are driven by these senses, politicians follow the same path to satisfy their constituents and thus, populism comes into play.

However, achieving progress and protecting human rights cannot be accomplished if we do not zoom out from our shells. Hungary, as one of the countries undergoing “successful democratic and economic transformation, [since 2010 - it turns into a] competitive authoritarian state.”¹⁴⁶ The Hungarian government imposes many challenges on refugees and considers them as a “burden or a major threat” ¹⁴⁷ for Europe. The growth of populism and extreme right-wing politicians in charge feeds the sense of belonging in the society and therefore, undermines the value of universal human rights.¹⁴⁸

¹⁴⁵ Hall, K. “Create a Sense of Belonging”. *Psychology Today*. Mar. 24, 2014. Accessed at <https://www.psychologytoday.com/us/blog/pieces-mind/201403/create-sense-belonging>.

¹⁴⁶ Krekó, P. et al. “Anti-Muslim populism in Hungary: From the margins to the mainstream”. *Brookings*. July 24, 2019. Accessed at <https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream/>.

¹⁴⁷ *Ibid*

¹⁴⁸ Human Rights Watch. “The Dangerous Rise of Populism: Global Attacks on Human Rights Values”. Accessed at <https://www.hrw.org/world-report/2017/country-chapters/global-4#>.

CONCLUSION

The reason behind imposing such strict and bureaucratic measures on foreign nationals is to prevent the overflow of third-country nationals to Europe. That is why the EU Member States generally prefer to accept individuals who are skilled and/or well-educated. However, if states host only people who would bring welfare to their nation, I believe that this requirement should apply to all equally and not exclusively to those who usually come from the Global South.

One of the ways of eliminating this problem would be to establish consistent and fair regulations on all foreigners. For instance, to apply for the EU Blue Card, which is almost the same as the work permit for third-country nationals in the EU, one of the prerequisites for acquiring it is to have a job offer.¹⁴⁹ Furthermore, employers, on the other hand, require to have a valid work permit first before even accepting a job application.¹⁵⁰ Regardless of these confusing requirements from governments and employers, it is preferred to give the EU Blue Card to other candidates, whoever has a legal residence in a given country, to be employed, since one of the requirements is ‘the labor market test’ that “shows that there is no equally qualified worker registered as a jobseeker with the Public Employment Service (AMS) available for the job.”¹⁵¹

I believe one of the solutions, although seemingly radical, to this problem would be creating a system through which people who wish to commute to another country would register and go through an individualized screening process. This could be an online platform made easy for everyone. It would require official information about a person and their

¹⁴⁹ Federal Ministry of Austria. “EU Blue Card”. Accessed at <https://www.migration.gv.at/en/types-of-immigration/permanent-immigration/eubluecard/>.

¹⁵⁰ U.S. Department of State. “Diplomacy in Action: Vacancy Details in Brussels, Belgium”. Accessed at https://erajobs.state.gov/dos-era/vacancy/viewVacancyDetail.hms?_ref=zmg4etdbpt0&returnToSearch=true&jnum=20325&orgId=119.

¹⁵¹ *Supra* note 149.

intentions of a visit. After the authorization process, people would be able to either go or not go to another country. If they get rejected, there should be a reason provided. For instance, if a person from Azerbaijan wants to go to France to work and settle down simply because they like that country, they should register on that platform and prove that they have a job and a house arranged and they want to permanently immigrate to France. If all documents prove to be legitimate, the French government should give out a temporary card that would allow a person from Azerbaijan to commute. After some time, if the French Migration Office considers that this person has followed the rules, paid taxes, etc., then they could grant them citizenship. This policy should apply to all countries within the EU as it provides an easier and non-discriminatory solution to individuals' right to free movement, it diminishes the power of "passport privilege," prevents indirect race discrimination and ceases the existence of visa-free regimes, Schengen areas, Visa Waiver Programs or visas on arrival to certain developed nations from the Global North.

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