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MIGRATION AS SEEN FROM THE PERSPECTIVE OF A "THIRD COUNTRY": A CHALLENGE FOR GLOBAL AND CLASSICAL CONSTITUTIONALISM

ABSTRACT

With the rise in migratory movements, two key issues have become increasingly relevant: on the one hand, the protection of migrants' rights and the regulation of migration processes by states; and on the other hand, questions concerning state sovereignty, national security, and internal socio-political tensions. Considering that there are currently around 102 million migrants worldwide - including refugees, (internally) displaced persons and asylum seekers, the relevance of this issue becomes evident. With the rise in global mobility over the past decade, foreigners in host countries have often become particularly vulnerable - legally, socio-economically, politically, culturally, and in other aspects.[2]

While there are individual academic works on this topic and intense scholarly debates are ongoing across Europe, the proposed article offers a new perspective on the issue - namely, from the viewpoint of so-called third countries.[3] These are states that, based on intergovernmental agreements with the countries where asylum is sought (so-called destination countries)[4] allow individuals to remain temporarily on their territory while their asylum claims are being processed in the destination country.

By addressing this and other related issues, the present article offers a contribution to the scholarly debate on migration as a global challenge.

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[1] UN Global forced displacement statistics (2022) <https://www.unhcr.org/dach/de/services/statistiken> [last accessed on 19 April 2024].

[2] Janina Söhn and Kai Marquardsen, 'Erfolgsfaktoren für die Integration von Flüchtlingen' (2017) Für Bundesamt für Migration und Flüchtlinge, Forschungsbericht 484, Soziologisches Forschungsinstitut Göttingen (SOFI) an der Georg-August-Universität, 4, 14.

[3] This research was conducted at the Berlin Social Science Center (WZB) within the Global Constitutionalism research program, as part of the GRMP project supported by the European Union and DAAD.

[4] Country of origin - the country of a foreign national's citizenship, or, in the case of a stateless person, their country of permanent residence; host country / country of destination - the state to which a person travels in order to seek asylum; transit country - a state through which a person passes en route to the destination/ host country; third country - a country which, based on intergovernmental agreements, grants individuals the right to remain temporarily on its territory while their asylum application is being considered in the destination country.

I. INTRODUCTION

In the context of globalization, law is gradually undergoing social transformation. The transformation of law, as one of the subsystems of society, is driven both by its internal logic and external interactions with other social subsystems.[5] Reality shows us how difficult it is to respond to global social challenges; yet in this context, it is hard to envision a better solution than the limitation of power through global and/or national constitutional order - serving, ultimately, to protect the human being, the individual. Since classical constitutionalism is primarily aimed at precisely this purpose, a logical question, perhaps even a hope, arises as to whether global constitutionalism might be better equipped to address global and transnational challenges, at the very least. Migration is precisely such a phenomenon. It has acquired a new and significantly broader dimension[6] in recent years, making its relevance particularly compelling for the theory of global constitutionalism.

Law, like other social subsystems, is obligated to fulfill a specific social function,[7] which must first and foremost be reflected in constitutionalism. While the concept of constitutionalism has traditionally been examined at the national level, the dynamic processes of globalization have given it an entirely new meaning. Global constitutionalism is less associated with a legal order established solely by the state, and its development is instead driven by transnational phenomena unfolding at the global level.

The discussion presented in this article aims to examine the paradigm of constitutionalism in the context of the constitutional-legal understanding of migration and to clearly demonstrate its global transformation. Without reflecting on or rethinking the new social order and legal space shaped by migration, it is impossible to fulfil the classical function of law - namely, the just and functional regulation of social relations.

The migration policy is undoubtedly one of the most pressing political issues worldwide. Developments in this field have led to intense debates on both national and international levels, which makes its academic examination all the more important. Scholars are striving to address the challenges of migration from an interdisciplinary perspective. Notably, within the social sciences and the theory of constitutionalism, a range of insightful and valuable approaches has been developed. Of particular significance is the theory of the so-called liberal paradox,[8] along with other key theoretical

[5] Lasha Bregvadze, Theory of Autopoietic Legal Culture: Legal Transfers and Legal Self-Regulation in Global Society, Doctoral Dissertation (Ivane Javakhishvili Tbilisi State University Press 2016).

[6] Ana Pirtskhalaishvili, 'Dilemma of Equality of Rights between Nationals and Foreigners' in Konstantine Korkelia (ed.), Human Rights Protection and Legal Reform in Georgia (Legal and Judicial Reform Consultation in the South Caucasus 2020) 257-294.

[7] Lasha Bregvadze, 'Genealogy of Transnational Law: Fragmented Normative Orders of the Global Society' in Bessarion Zoidze (ed.), Collected Volume 60 (Prince David Institute of Law 2013).

[8] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal,

frameworks[9] such as Niklas Luhmann's systems theory,[10] Gunther Teubner's theory of societal constitutionalism,[11] Jürgen Habermas's concept of a political constitution for a pluralistic world society,[12] and Immanuel Kant's vision of universal cosmopolitanism.[13] These theoretical developments are complemented by the ongoing political and public discourses on migration both within the EU and at the national level.

The aim of this paper is to present a multidimensional perspective on migration against the backdrop of the idea of global constitutionalism. However, it is equally important for the academic discourse to remain two-sided, so that that the article also addresses the opposing viewpoint - one that views migration as a threat and seeks to manage it exclusively through the lens of the classical nation-state.

II. MIGRATION AND GLOBAL CONSTITUTIONALISM

1. THE PATH TO GLOBAL CONSTITUTIONALISM

In the literature on constitutional theory it is widely accepted that constitutionalism is undergoing a comprehensive transformation, namely, a shift from classical constitutionalism to global constitutionalism. The latter recognizes the existence of significant legal orders beyond, and above - the nation-state. These changes are undeniable when viewed in the context of developments over the past century, particularly in the post-World War II period. This primarily refers to the international legal recognition of the fundamental rights of the human being as an individual; the formation of the European Union as a supranational organization, and the unprecedented growth of its role at the international stage.

The Concept of Legalization (The IO Foundation and the Massachusetts Institute of Technology 2000) 401-419; David Beetham, Democracy and Human Rights: Contrast and Convergence (Expert paper presented at the Seminar on the Interdependence between Democracy and Human Rights at the UNHCHR 2002); David Beetham, Democracy and Human Rights (Polity Press 1999) 9-14; Jürgen Habermas, Faktizität und Geltung (Beiträge zur Diskurstheorie des Rechts und des demokratischen Verfassungsstaates 1992).

[9] John Rawls, Die Idee des politischen Liberalismus (Suhrkamp Verlag 1992); John Rawls, Nochmals die Idee der öffentlichen Vernunft' in John Rawls, Das Recht der Völker (de Gruyter 2000); Jürgen Habermas, Die Einbeziehung des Anderen (Suhrkamp Verlag 1996); Georg Nolte, 'Strukturwandel der internationalen Beziehungen und Völkerrechtspolitik' in Giovanni Biaggini, Oliver Diggelmann und Christine Kaufmann (Hrsg.), Polis und Kosmopolis – Festschrift für Daniel Thürer (Nomos 2015) 557-563; Jürgen Habermas, Eine politische Verfassung für die pluralistische Weltgesellschaft (Die Kritische Justiz 2005) 222-247.

[10] Niklas Luhmann, 'Einführung in die Systemtheorie' <https://luhmann.ir/wp-content/uploads/2021/07/Einfuhrung-in-die-Systemtheorie.pdf> [last accessed on 15 February 2024].

[11] Günther Teubner, 'Societal Constitutionalism: An Alternative to State-Centred Constitutionalism?' (2018) 1 Journal of Law 311-342 (translated from English into Georgian by Lasha Bregvadze).

[12] Habermas, supra note 9.

[13] Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch (F. Nicolovius 1795).

While the recognition of these changes is undisputed, scholarly opinions in the legal literature are divided into two main perspectives when it comes to evaluating their implications. According to the first view, the concept of "constitutionalism"- as a doctrine of a state's fundamental legal order - has degenerated, losing its (traditional) meaning[14] and being reduced to an empty phrase. This view takes a negative stance toward the transformation of classical constitutionalism. It refers to the current state as a "shadow of constitutionalism."[15]

The second group of scholars views the transformation of constitutionalism from its classical form to a global one as an inevitable and natural development, and assesses it positively. According to this perspective, traditional constitutionalism no longer aligns with the practices of international, European, and national jurisdictions. Its transformation is seen as necessary, as it contributes to overcoming what is referred to as "national parochialism."[16] It is precisely from this parochial outlook that migration processes are often inadequately analyzed, as they continue to be perceived solely through the lens of the nation-state.

The distinction between the nation-state and global constitutionalism is undoubtedly one of the central issues in ongoing constitutional debates. The positions are clearly divided: constitutionalism based on the idea of the nation or the state embodies the centuries-old doctrine of the constitution as the fundamental constitutional order of the state. Global constitutionalism, on the other hand, represents a new and emerging constitutional paradigm that originated in England and the United States and has, over the past decade, been gaining increasing support in Europe, particularly in Germany.[17] According to some German scholars, the idea of global constitutionalism has spread through constitutional studies like an "academic pandemic."[18]

[14] Ming-Sung Kuo, 'The End of Constitutionalism As We Know It?' (2010) 1 Transnational Legal Theory 329-369.

[15] Martin Loughlin, TP. McCormick and Neil Walker (eds), The Twilight of Constitutionalism? (Oxford University Press 2010).

[16] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), Ruling the World? Constitutionalism, International Law, and Global Governance (Cambridge University Press 2009) 258-324, 307.

[17] Oliviero Angeli, 'Von der Gründung zur Begründung. Über die Rolle der Imagination im globalen Konstitutionalismus' in Hans Vorländer (Hrsg.), Demokratie und Transzendenz. Die Begründung politischer Ordnungen (2013) 509-525; Oliviero Angeli, 'Der globale Konstitutionalismus (2014) 24 fiph-Journal 24-25.

[18] Joseph Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in ders. und Gráinne de Búrca (Hrsg), The Worlds of European Constitutionalism (2012) 8-18, 8.

2. THE IDEA OF GLOBAL CONSTITUTIONALISM

Global constitutionalism is a theory that seeks to bring constitutional law and international law closer together, but only on the premise that the starting point of the discourse is not state power or sovereignty, but rather the individual, the human being, and their rights. Accordingly, from the perspective of this theory, addressing the challenges of migration must be based first and foremost in human dignity; an only thereafter may state interests such as security, the prioritization of its own citizens, and their preferential treatment over migrants - be taken into consideration. It is also noteworthy that the theory of global constitutionalism, similar to national constitutionalism, does not seek to establish a "constitutional order." The complexity and multidimensionality arising from the interconnection of various legal systems (national, continental, and international) may also be interpreted as a form of a "unified constitutional order"- but only under the condition that such an interpretation is understood as part of the so-called interpretive turn.[19] The latter implies that legal scholars, judges, and practitioners, regardless of their national legal systems, ultimately engage in reasoning guided by common principles and approaches.

An example of the above-mentioned is demonstrated by Mattias Kumm[20] in his well-known publication "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review." He builds on the fact that, globally, in liberal democracies, the principle of proportionality constitutes a central structural feature[21] in the adjudication of rights. According to Kumm, the challenge posed by such practice[22] is primarily institutional rather than ideological, since, from

[19] Angeli, supra note 17.

[20] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4.2 Law & Ethics of Human Rights 142-175.

[21] Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law; David M. Beatty, The Ultimate Rule of Law (Oxford University Press 2005); Evelyn Ellis, The Principle of Proportionality in the Laws of Europe (Hart Publishing 1999); Wojciech Sadursk, Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer 2005). On Applying Proportionality Principle, see Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionality' in Sujit Choudhry (ed), The Migration of Constitutional Ideas (Cambridge University Press 2006) 84; Explanations are provided by Frederick Schauer, 'Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture' in Georg Nolte (ed), European and US constitutionalism (Cambridge University Press 2005) 49; Vicki C. Jackson, 'Ambivalence, Resistance and Comparative Constitutionalism: Opening up the Conversation on Proportionality Rights and Federalism' (1999) 1 University of Pennsylvania Journal of Constitutional Law 583; See also: Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 Law & Ethics of Human Rights 79.

[22] Another question is whether proportionality analysis truly justifies the idea of the primacy of rights, which lies at the core of the liberal tradition. For a more in-depth discussion of these issues, see: Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy (Legal Theory Today) (Hart Publishing 2007).

a broader perspective, the principle of proportionality applies uniformly to all forms of legal reasoning, regardless of national regulations. The author concludes that the proportionality test functions as an analytical framework grounded in the "common principles" of liberal democracy.[23] While in the aftermath of World War II, the concept of proportionality was not generally embedded in constitutional limitation clauses, over time, courts have effectively articulated the criteria necessary for proportionality analysis through their jurisprudence.[24] In addition to national jurisdiction, it is noteworthy that Article 52 (1) of Chapter VII of the Charter of Fundamental Rights of the European Union, as recently codified by consensus, affirms: "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[25] The same is affirmed by the text of the Constitution of Georgia, Article 34 of which sets forth the general principles for the protection of fundamental human rights. According to its second paragraph, the exercise of fundamental human rights must not infringe upon the rights of others; while the third paragraph states that "any restriction of a fundamental human right shall be proportionate to the importance of the legitimate aim."

The relationship between rights and the proportionality test was analyzed by Robert Alexy.[26] According to Alexy, the abstract rights listed in constitutional catalogues are principles. Principles, as understood by Alexy, require realization to the greatest extent possible, given that they inherently involve competing interests. Principles are structurally equivalent to values. Assertions about values may be formulated as assertions about principles, and vice versa.

Assertions of principles express an "ideal must." Similar to assertions of values, as Alexy states, they are not "bound by the possibilities of the factual and normative world." [27] The proportionality test serves as the means through which values are linked to the possibilities of the normative and factual world. When we encounter a conflict between principles and countervailing considerations, the proportionality test provides a criterion for determining which interest should prevail in a given situation. It offers an analytical framework for assessing whether limitations imposed on a given principle are justified within a specific context.

The proportionality test is not merely a convenient pragmatic tool that assists in providing a doctrinal structure for legal analysis. If rights, as principles, are akin to assertions of values, then the structure of proportionality offers an analytical framework

[23] ibid, 134.
[24] ibid.
[25] Charter of Fundamental Rights of the European Union (2007) O.J. C 303/01.
[26] Robert Alexy, A Theory of Constitutional Rights (Oxford University Press 2002).
[27] ibid, 60.

for evaluating the necessary and sufficient conditions under which a right prevails over a competing good. Reasoning about rights entails reasoning about how a particular value relates to the urgent demands of specific circumstances. It requires both general and, at the same time, practically oriented reasoning.[28]

This line of reasoning leads us to two core insights of the theory of global constitutionalism:

I. The staring premise is the deep normative interconnectedness between legal orders at all levels - national (particularly within liberal democracies) and international, which, for the most part, dissolves national boundaries and becomes global in nature;

II. The normative primacy of constitutionalism does not imply justification of a legal norm by a specific authority; rather, the justification or limitation of human rights depends on their interpretation - an interpretation that, in turn, is grounded in the principle of proportionality.

Despite its Universalist aspirations, global constitutionalism is not a political project aimed at establishing a world state grounded in a global constitutional order. Nor is it an attempt to equate existing structures of international law with domestic constitutional regimes, either as an equivalent or analogue. While global constitutionalism is not bound to the concept of statehood, it nonetheless recognizes the role of the state in people's lives and within the framework of international law.[29]

While some scholars challenge the theory of global constitutionalism with substantial arguments, it is worth exploring, given the ambition of the universality of the given theory - what kind of response it may offer to the challenges of migration. The connection between global constitutionalism and migration stems from the global nature of both phenomena. Therefore, the following chapter will examine the approaches of global constitutionalism to the issue of regulation of migration.

III. MIGRATION AS A CHALLENGE AND A DILEMMA FOR THE NATION-STATE

The modern world is undergoing political and ideological transformation, which has a significant impact on the understanding of constitutionalism. The driving force behind these changes stems from globalization and centers around two main phenomena: on the one hand, the strengthening of national sentiment and the defense of the idea of state sovereignty; and on the other hand, the protection of the "human being" as an

[28] Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Oxford University Press 1989).

[29] Mattias Kumm, 'Zur Geschichte und Theorie des Globalen Konstitutionalismus. Gegenwärtige Herausforderungen des Globalen Konstitutionalismus' in Internationale Gerechtigkeit und institutionelle Verantwortung (De Gruyter 2019).

individual, regardless of citizenship - an approach that some view as leading to the so-called dilution of the concept of citizenship.

The central question is what kind of legal regulation can be considered optimal for achieving both objectives: protecting the rights of foreigners in host countries, while at the same time preserving the institution of citizenship, thus safeguarding the identity of the state, its cultural values, constitutional order and principles.

1. THE GLOBALIST APPROACH TO THE CHALLENGES OF MIGRATION

As previously noted, global constitutionalism is less focused on state authority and more centered on the protection of individual rights - in this case, the rights of migrants. By its very nature, any response to the challenges of migration must come through international cooperation. It is a fact that both globally and within the EU, serious efforts have been underway for several years to establish a unified migration policy.

One of the most recent attempts to regulate migration stems directly from the idea of global constitutionalism, which is embedded in the United Nations' 2018 Global Compact for Safe, Orderly and Regular Migration (GCM).[30] The Global Compact views the phenomenon of migration in a positive context: "Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance."[31] It is only briefly acknowledged that migration may affect countries "in very different and sometimes unpredictable ways."

It is apparent that migration is not confined to the territory of a single country but rather intersects easily with the interests of multiple states that logically, makes migration a matter most appropriately addressed through the framework of international law. It must be taken into account that migration affects all states to a greater or lesser extent, while at the same time, "no state can address migration alone."[32] This is precisely the foundational idea of the aforementioned Global Compact, which seeks to establish a comprehensive international regime for cross-border migration - one that requires close cooperation among all states.

The Global Compact on Migration was adopted at an international conference held in Marrakech, Morocco, in December 2018. It was endorsed by a resolution of the United Nations General Assembly with a majority of 152 votes. However, the fact that five countries voted against it (Israel, Hungary, the Czech Republic, Poland, and the United

[30] The United Nations Global Compact for Safe, Orderly and Regular Migration (2018).
[31] GCM No. 8, UN Doc. A/CONF.231/3 (2018); UN Doc. A/RES/73/195 (2018).
[32] GCM Nos. 7, 11 and 15.

States), twelve abstained, and twenty-four did not participate equally highlights the challenges and unresolved issues associated with the Compact.

The Global Compact on Migration is grounded in the 2030 Agenda for Sustainable Development[33] and is based on the 2016 New York Declaration for Refugees and Migrants.[34] Alongside the 2018 Global Compact on Refugees,[35] it provides signatory states with a solid foundation for implementing shared principles and commitments. Although refugees, as defined by the 1951 Geneva Convention and its 1967 Protocol, are also migrants who often face similar challenges and vulnerabilities and in practice, benefit from equal protection under universal human rights, migrants and refugees are nevertheless considered two distinct groups, governed by different legal frameworks.[36] However, this issue falls outside the scope of the present article.

Moreover, the Global Compact on Migration does not contain an explicit provision regarding the forced removal of individuals from host countries. On the contrary, the parties commit to "ensure effective respect for, protection of, and fulfillment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle"[37] through the implementation of the Compact. This commitment is underscored by the assertion that the Compact is "people-centered" and possesses a "strong human rights dimension."[38]

All stages of the migration cycle include, among others, the point of departure; namely, the territory of a given state. This implies the individual's right to leave that territory for the purpose of migration. This principle is also affirmed in Objectives 5 and 21 of the Global Compact, which call for enhancing the "availability and flexibility of pathways for regular migration."

At the same time, it should be noted that the Global Compact calls on states to cooperate in minimizing the adverse drivers and structural factors that compel people to leave their place of residence. This includes the obligation of states to reduce the risk of natural disasters, mitigate the effects of climate change, decrease youth unemployment, and prevent brain drain.[39]

From the perspective of international law, individuals are protected from forced migration, as no one should be compelled to leave their own country. This, in turn, corresponds to every person's right to freely and lawfully choose their place of residence within the territory of their country.[40]

[33] UN Doc. A/RES/70/1 (2015); GCM Nos 6 and 18.
[34] UN Doc. A/RES/ 71/1 (2016); GCM No. 3 GCM.
[35] UN Doc. A/RES/73/151 (2018).
[36] GCM Nos. 3 and 4.
[37] GCM No. 15.
[38] Markus Kotzur, Migrationsbewegungen als Herausforderungen an das Völkerrecht, 49 Berichte der deutschen Gesellschaft für Internationales Recht (C.F. Müller 2018) 295-319.
[39] GCM No. 18.
[40] Article 12, paragraph 1, International Covenant on Civil and Political Rights of 1966.

On their way to destination countries, migrants face numerous difficulties and dangers. In addition to domestic regulations of individual states, they are protected by international human rights law during this journey. To safeguard the lives of migrants, the Global Compact on Migration obligates signatory states to engage in "international cooperation to prevent migrant deaths and injuries, protect their lives, and, to this end, conduct search and rescue operations individually or jointly."[41]

In this context, two decisions made by the United Nations Human Rights Committee in 2020 are of particular interest. Both decisions concern the same incident. In October 2013, a group of Syrians and Palestinians seeking to enter Italy irregularly boarded a fishing vessel at a port in Libya. The boat was carrying approximately 400 people, including many children. After several hours at sea, the vessel began to sink. A distress call was made to the relevant Italian authorities, who redirected the alert to Malta's border forces. However, due to the delayed response, more than 200 people died, including relatives of the complainants.

The application against Malta was declared inadmissible by the Committee on formal grounds.[42] In response to the second application, directed against Italy, the Committee concluded that the state had violated the right to life of more than 200 individuals (Article 6, Paragraph 1 of the ICCPR) and determined that Italy must provide full reparation for the harm suffered. The Committee reasoned that Italy failed to respond in a timely manner to the emergency situation and did not act "with all possible speed to save persons in distress," thereby failing to protect the lives of numerous individuals.

The responsibility of states to prevent threats to the life and physical integrity of migrants has also been emphasized by the European Court of Human Rights. In one of its well-known cases, *Hirsi Jamaa and Others v. Italy*, [43] the applicants, who had left Libya and were traveling by boat toward Italy, were intercepted by Italian border police patrol vessels. They were transferred onto military ships and returned to Tripoli. Despite the existence of a bilateral agreement between Italy and Libya, the Court, in its 2012 judgment, unanimously held that Italy had violated Article 3 of the European Convention on Human Rights. The Court found that returning the applicants to Libya exposed them to a real risk of inhuman and degrading treatment, and, at the same time, to the danger of arbitrary deportation to Eritrea and Somalia.[44]

However, in another case similar to *Hirsi Jamaa and Others v. Italy,* the Court developed a different approach. In the *Melilla* case, some individuals managed to climb over the

[41] GCM Objective 8, No. 24.

[42] The Decision of the Human Rights Committee in Case Communication N3043/2017 "A.S. et al. v. Malta", 13 March 2020. UN Doc. CCPR/C/128/D/3043/2017, paragraphs 1-7.

[43] Judgment of the European Court of Human Rights N27765/09 "Hirsi Jamaa and others v. Italy", 23 February 2012 (rectified 16 November 2016).

[44] ibid, paragraphs 85 et. seq.

border fence between Spain and Morocco, but Spain immediately returned them to Morocco.[45] The Court found that this action did not constitute collective expulsion, as the applicants themselves had placed the state in that situation and had created a "disruptive scenario" despite the availability of legal means to enter the country. If a legal entry route exists, individuals who enter the territory irregularly and in large numbers may be returned immediately to their country of origin.[46] The Court based this conclusion on the state's international obligation to register all asylum seekers at its border.[47]

The EU acquis, which regulates migration processes can be categorized into three groups, based on the types of persons it aims to protect. The right to asylum is guaranteed by Article 18 of the EU Charter of Fundamental Rights. The legal framework established in accordance with the Geneva Refugee Convention and the two treaties of the European Union is highly developed and further enriched by the case law of the European Court of Justice in Luxembourg. [48] Based on this framework, three distinct groups of individuals benefiting from international protection can be identified: The first group consists of refugees within the meaning of the Geneva Convention; the second group includes individuals who do not qualify as refugees but who would face a real risk of execution, torture, inhuman or degrading treatment, or serious threat to their lives due to armed conflict in their home country if returned. These individuals are granted so-called subsidiary protection. The third group comprises persons who may apply for "temporary protection"- a status established for exceptional situations involving the mass influx of people forced to flee their country due to armed conflict or widespread violations of human rights.[49]

All three categories of individuals are entitled to remain in the EU for a limited period of time, although the duration of stay varies depending on the category. The EU's 2001 Directive on mass influx of displaced persons[50] allows such individuals to remain in the EU for up to three years. However, in many cases, even after a court denies their right to remain, individuals continue to stay illegally within EU territory that presents a challenge to the effective implementation of the rule of law in practice. Despite court judgments denying an individual the right to asylum, enforcement of such judgments

[45] Judgment of the European Court of Human Rights N8675/15 and N8697/15 N.D. and "N.T. v. Spain", 13 February 2020. Paragraph 213.

[46] Eckart Klein, 'Migration and Public International Law' (2023) 3 Vectors of Social Science 5-16.

[47] Diana Schmalz, 'The Disparate State of Refugee Protection in the European Union' (2022) 82 Heidelberg Journal of International Law, 529-539.

[48] See note 45 supra.

[49] Jean-Francois Durieux and Agnès Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2004) 47 German Yearbook of International Law 105-159; Walter Kälin, 'Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism' (2001) 44 German Yearbook of International Law 202-236.

[50] Directive 2001/55/EC of the Council (20 July 2001), O. J. No. L 2001 (7 August 2001) 12.

often fails, thereby undermining the overall credibility of the process. As a result, the authority of the state and the justice system is compromised. For this reason, it is essential to develop a legal framework that, based precisely on clear and enforceable regulations, can ensure better protection of migrants' rights and guarantee their life and physical integrity.

At the same time, it must be acknowledged that in the context of global developments such as climate change, wars, and conflicts, the natural end or reduction of migration flows is unrealistic. Therefore, migration must be regulated. However, under the existing international legal frameworks, largely guided by humanitarian principles, many challenges remain unresolved, particularly considering that the resources of host countries are not unlimited. These resources are exhaustible and must, therefore, be managed within clearly defined legal frameworks.

Despite repeated efforts to address the challenges of migration, it remains a phenomenon accompanied by numerous unresolved problems. Most notably, countless human lives are lost in the pursuit of a better life. According to UN data from 2023, since 2014, up to 10,000 migrants have died each year, the majority of whom drown at sea/in the ocean.[51] In 2023 alone, a record-high 8,565 migrant deaths were recorded.[52] This underscores the fact that the existing protection mechanisms offered by international law have proven insufficient. Greater effort is required, along with the adoption of more effective policies for regulating migration at the global level.

2. A NATION-STATE-BASED APPROACH TO ADDRESSING MIGRATION

Equally noteworthy is the perspective of the opposing approach, which places state sovereignty and security at the forefront and considers the rights of the migrant as an individual only thereafter.

A regulatory model of this kind can be exemplified by the typical ideological approach of Europe's conservative wing in responding to the challenges of migration. One such example is Professor Ruud Koopmans, a Dutch sociologist and migration scholar, who heads the migration research group at the Berlin Social Science Center and is also a professor at Humboldt University of Berlin. His views often spark intense debate, not only among migration scholars but also within the broader public, frequently leading to sharp polarization and conflicting opinions.[53]

[51] Missing Migrants Project <https://missingmigrants.iom.int/> [last accessed on 15 February 2024].
[52] ibid.
[53] Statement by the Student Council of Humboldt University <https://www.refrat.de/article/pmrechtelehre.html> [last accessed on 15 February 2024].

In 2023, Koopmans published his well-known work "Asylum Lottery: A Review of Refugee Policy from 2015 to the War in Ukraine."[54] In his work, Koopmans harshly criticizes the EU's liberal approach to asylum policy and, more broadly, to migration regulation. According to the author, "Europe must urgently change its asylum policy, as the current system costs thousands of lives and poisons the political climate." Koopmans argues that a compromise between the political left and conservatives is needed - one that allows for a numerically equal level of migration, but prioritizes those who are in genuine need of protection and willing to work."[55]

A key issue is how the scholar envisions achieving this goal. According to him, it is a tragedy that hundreds of thousands of people apply for asylum in Europe each year, with many dying along the way. Only half of those who arrive in Europe ultimately receive asylum legally. Given the high risks and costs associated with reaching Europe, many poor individuals - especially women, children, the elderly, and the sick - are left behind. On the other hand, the author argues that young people from relatively better-off families, particularly healthy men - have the best chance of obtaining a winning ticket in what he refers to as the "lottery" titled "the European Asylum Law". According to him, the current asylum policy is accompanied by serious integration challenges and security risks for European societies; therefore the promise that migration of refugees would address the skill shortages and demographic problems in Europe, remains far from being fulfilled. For instance, in Germany, by the end of 2020 nearly two-thirds of the population from the eight most significant countries of origin were reliant on state benefits to cover their living expenses.[56] The author claims that refugees committed sexual assaults against nearly 3,000 women, and that the majority of fatal Islamist terrorist attacks over the past decade were carried out by perpetrators who were either recognized as refugees or posed as such. In Germany alone, between 2017 and 2020, approximately 300 people were killed and over 1,600 were victims of attempted murder by individuals who had entered the country under refugee status. According to the author, this is the price paid by both refugees and host societies for the humanitarian principles underpinning asylum law. However, such consequences are inevitable unless the needs of asylum seekers are reconciled with the capacities and security interests of host societies.[57] Although efforts to reform asylum law have been ongoing for decades, the core problems remain unresolved. According to Koopmans, the way out of this deadlock lies in what he sees as the greatest challenge: finding a compromise between progressive and conservative political camps.[58]

[54] Ruud Koopmans, Die Asyl-Lotterie, Bilanz der Flüchtlingspolitik von 2015 bis zum Ukrainekrieg (C.H. Beck 2023).

[55] Ruud Koopmans, Europa muss das Asylsystem dringend reformieren (2023) 16/2 Neue Zürcher Zeitung 30-32.

[56] See note 53 supra.

[57] See note 54 supra.

[58] ibid.

It is worth examining the model Ruud Koopmans proposes to the public as a compromise - and why it appears to appeal primarily to a conservative perspective. Under his new "compromise" model, he outlines a six-point system based on the following cumulative conditions:

1. The asylum-granting country should accept the same number of refugees/migrants annually as it has done in previous years.
2. To prevent migrant flows from resulting in deaths along the journey, host countries should establish processing centers directly in countries of origin, where applications would be assessed locally and migrants selected on humanitarian grounds.
3. If uncontrolled migration from such countries continues to occur, migrants arriving by land or sea will not have the right to choose the country in which they seek asylum. Instead, they will be resettled to "third countries," where they will remain for the duration of the asylum application process. If granted protection, they will receive asylum in the country determined by the host state - not by their own preference.
4. The "temporary host third countries" would be selected on the basis of their ability to ensure the protection of migrants' rights. As examples, Koopmans mentions Albania, Moldova, Tunisia, and Senegal, and does not rule out Georgia as a potential option as well. A specific quota would be agreed upon in advance, determining how many asylum seekers each country could accommodate temporarily. The author is critical of certain cases, such as Rwanda - currently in negotiations with the United Kingdom, implying that migrants' rights may be violated there.
5. It is essential that negotiations with temporary host countries be conducted on the basis of equality and fairness. Under such agreements, these states would receive a defined financial contribution (which would be channeled for their economic development) and their citizens would be granted facilitated access to the EU's labor market. This would also benefit the EU, as these countries possess significantly better-prepared human capital compared to that within the EU. In addition, the financial gains from such cooperation would stimulate local economies and contribute to the broader development of these partner countries.
6. The fact that refugees would no longer have the opportunity to claim asylum in a specific European country would act as a deterrent and lead to a reduction or halt in the large migration flows currently affecting the EU.

According to the author, this approach, on the one hand, would reduce irregular migration, and on the other hand, ensure that asylum is granted to those who are genuinely vulnerable, rather than to those who are able to apply in Europe simply in search of better living conditions. In addition, it would allow migration to be regulated in such a way that individuals eligible for asylum are selected outside the EU, thereby

preventing the irregular stay of asylum seekers within the Union and, in turn, reducing the negative impact associated with rising crime rates.

In addition, transferring asylum seekers to third countries would lead to a decrease in migration to the EU, which at the same time, would benefit from the influx of highly or moderately skilled labor from these third countries.[59]

This concept raises significant concerns for several reasons. First and foremost, it is discriminatory and relies on numerical manipulation by linking rising crime and security threats in the EU countries to migrants. While it is true that refugees do commit criminal offenses, a closer look at statistical data reveals that the claim that refugees or foreigners commit more crimes than the native population is misleading. Recent statistics show that in 2021, only 7.1% of criminal offenses committed in Germany were attributed to non-citizens, [60] even though foreigners made up 32% of the population.[61]

It is also worth noting that foreign nationals are more likely than citizens to be accused of crimes without eventual conviction, which points to a potential stigmatization. Germany experienced a particularly large influx of refugees in 2015-2016. According to criminologist Walburg, while this may have played a role in increased crime rates, its impact was likely marginal rather than substantial.[62]

Moreover, the concept presents several internal contradictions when compared to Koopmans's own theoretical framework. For instance, as mentioned earlier, Koopmans' argument begins by portraying the majority of refugees as criminals, yet later he envisions the transfer of these same individuals to "third, temporary host countries" as a path to those countries' development. At the same time, he presents citizens of these temporary host countries as valuable human capital and proposes their facilitated employment in the EU's labor market. The scholar also argues that semi-democratic countries would benefit economically from the EU's financial contributions in exchange for temporarily hosting asylum seekers. However, he simultaneously acknowledges that these "third countries" are governed by semi-democratic regimes, where, in practice, financial resources are often not invested in public welfare but instead become sources of corruption. Therefore, Koopmans's argument regarding the development and prosperity of these third countries is weak and insufficiently substantiated.

In various academic and political discussions, the possibility of assigning Georgia the status of a "temporary host country" has also been raised.[63] This debate may gain renewed

[59] See note 53 supra.

[60] This number has been steadily decreasing since 2018.

[61] See statistics in German newspaper Tagesspiegel <https://www.tagesspiegel.de/politik/gefluchtete-und-kriminalitat-was-hinter-den-zahlen-steckt-9602333.html> [last accessed on 15 February 2024].

[62] ibid.

[63] See statistics <https://idfi.ge/ge/statistics_of_internally_displaced_persons_in_georgia_by_income> [last accessed on 15 February 2024].

relevance following the EU's designation of Georgia as a "safe country of origin."[64] However, in Georgia's case, the contradictions outlined above are further exacerbated by the challenges the country faces in relation to its internally displaced persons. As is well known, the conflicts with Russia have resulted in the internal displacement of nearly 280,000 people within Georgia. This situation imposes a considerable economic burden on the state, making the prospect of designating Georgia as a "temporary host country" even more problematic.

In addition to its discriminatory nature, the above-mentioned concept stands in contradiction to the United Nations Sustainable Development Goals,[65] which frames global development within a common context. The concept, by contrast, deepens and exacerbates inequalities between countries; since, rather than addressing the "discomfort" caused by migration, it seeks to externalize it - pushing the issue beyond the European borders. It should also be noted that the departure of citizens from third countries (individuals who would be competitive even in the European labor market) may lead to brain drain in those countries. Preventing this outcome is precisely one of the aims of the above-mentioned UN Global Compact.[66]

To date, a similar model has been in place in several countries. For example, Australia implements the so-called deterrence policy, under which refugees are sent not to the target country, but to Papua New Guinea and Nauru. The United Kingdom has also adopted a comparable approach: since 2023, a special regime has been applied to refugees arriving by boat, with Rwanda selected as the designated third country under a bilateral agreement. Under the "Illegal Migration Act," the question of granting asylum to a refugee is considered only after they have been deported. This regulation has been strongly criticized by the UN Human Rights Committee, which has stated that the United Kingdom is in direct violation of international law (specifically, the Geneva Convention relating to the Status of Refugees) and in particular, the prohibition of collective expulsion. According to UN High Commissioner for Human Rights Volker Türk, "This law not only raises serious legal concerns from an international perspective, but also sets a troubling precedent. The dismantling of asylum-related obligations may be followed by other countries, including in Europe, which could have a negative impact on the international system for the protection of refugees and human rights as a whole." [67] He also calls the UK Government to take the initiative to repeal the law and to ensure that the rights of all migrants, refugees, and asylum seekers are respected, protected,

[64] Georgia and Moldova were designated as safe countries of origin since December 23, 2023.

[65] Department of Economic and Social Affairs Sustainable Development <https://sdgs.un.org/goals> [last accessed on 15 February 2024].

[66] GCM No. 18.

[67] United Nations High Commissioner for Refugees, 'UK, UN Warn of Profound Impacts on Human Rights and International Refugee Protection System' (2023) <https://www.unhcr.org/dach/at/94755-uk-un-warnen-vor-tiefgreifenden-auswirkungen-auf-die-menschenrechte-und-das-internationale-fluchtlingsschutzsystem.html> [last accessed on 15 February 2024].

and fulfilled without discrimination. “To this end, efforts must also be made to ensure the prompt and fair processing of asylum and human rights claims.”[68]

In Germany, a similar model is currently under discussion at the federal government level. The government is exploring whether it would be feasible to transfer asylum procedures to third countries, following the example of other states that have adopted comparable schemes. The United Nations High Commissioner for Refugees (UNHCR) holds the position that, in principle, transferring asylum procedures to third countries is possible, but emphasizes that it must be approached with great caution and implemented only under strict conditions. As is commonly practiced in existing models, asylum seekers who have already arrived are transferred to a designated third country, where they are required to await the outcome of their asylum application process.

Strict conditions imply that the countries to which asylum seekers are transferred must respect human rights and be signatories to, and compliant with, the Geneva Convention relating to the Status of Refugees, thereby upholding their obligations in the protection of human rights. According to UNHCR,[69] such arrangements must be based on appropriate agreements between states to ensure the “fair sharing of responsibility for refugees”. The designated country must retain primary responsibility for assessing asylum applications. Moreover, international protection must be granted by the state in which the asylum seeker arrives and submits their request for asylum.

In Germany, as of November 2023,[70] an assessment is underway to determine the feasibility of conducting asylum procedures in third countries on a transit basis - that is, outside the territory of the European Union.

IV. CONCLUSION: TO WHAT EXTENT IS IT POSSIBLE TO ADDRESS THE CHALLENGES OF MIGRATION THROUGH THE APPROACHES OF GLOBAL CONSTITUTIONALISM?

When discussing two opposing ideas, the central issue identified by both sides is irregular migration. This implies that, from a legal standpoint, migration must be shifted as much as possible from the irregular to the legal sphere in accordance with national and international law. Despite ongoing initiatives, the effective regulation of migration remains as a challenge. As outlined above in the article, fundamentally different approaches exist depending on the underlying ideological foundations. However, both lines of reasoning possess their respective strengths and weaknesses to varying degrees.

[68] ibid.

[69] Statement of Katharina Lumpp, the UNHCR Germany <https://www.tagesschau.de/inland/migration-asylverfahren-drittstaaten-100.html> [last accessed on 15 February 2024].

[70] ibid.

Especially after alternative approaches to addressing the challenges of migration were discussed in the article, it has become increasingly clear that migration-related problems can only be effectively addressed within the framework of global constitutionalism - drawing from its core ideas, principles, and underlying worldview. While it is true that for decades the international community has struggled to agree on a unified policy, it is equally evident that individual states, acting independently and driven solely by their national interests, are unable to solve global problems. From the perspective of a particular state, a migration issue may appear to be resolved within its territory, but in reality, this often amounts to shifting the problem elsewhere rather than resolving it. This is precisely why the United Nations Sustainable Development Goals are of equal relevance and importance to all countries, regardless of their level of development.

It is important that efforts to address migration-related issues begin with those aspects of the challenge that are most manageable. One such entry point could be the simplification, refinement, and proper legal regulation of labor migration. This would primarily serve to protect the rights of migrants who are working illegally in Europe and are often subjected to exploitation as a result. Such individuals should be given the opportunity to transition into legal employment as swiftly as possible. In turn, this would generate greater tax revenues for the host states.

In general, all challenges can be overcome only if states are willing to cooperate and regard international migration as a shared responsibility. Although current prospects may not be particularly promising, the Compact rightly calls on all states to enhance cooperation in the interest of all.[71]

According to Article 8 of the Global Compact on Migration, "no state can address migration alone." Only solidarity, now established as a core principle of international public law, can generate the conditions necessary to respond to the challenges of international migration.[72] At the same time, it is essential that such cooperation be carried out by states on the basis of reasoned judgment and inclusive participation by all relevant countries - those of origin,[73] transit, and destination. In order to ensure a reasonable balance, the responsibility of migrants themselves must also be taken into account - a dimension that still receives insufficient attention in discussions surrounding the adoption of international instruments.[74]

[71] Eckart Klein, 'Migration and Public International Law' (2023) 3 Vectors of Social Sciences 14.

[72] Rüdiger Wolfrum and Chie Kojima (eds), Solidarity: A Structural Principle of International Law (Springer 2010).

[73] Country of origin – the country of which a foreign national is a citizen, or, in the case of a stateless person, the country of their permanent residence.

[74] Christian Tomuschat, 'Der UN-Migrationspakt' in ÖVerfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen' in Festschrift für Ulrich Fastenrath (C.F. Müller 2019).

The key merit of global constitutionalism lies in its recognition of migration as a positive phenomenon and its attempt to regulate it from this perspective. Starting from this premise, it becomes easier to focus on the protection of migrants' rights and to concentrate specifically on the rights of individuals.

At the beginning of the 21st century, in light of the growing significance of migration, both the international community and individual states must approach this phenomenon through a new, more deliberate and scientifically grounded discourse. Such a compromise should be sought within the framework of the third pillar of classical global constitutionalism - democracy, the rule of law, and human rights. Moreover, in the pursuit of a compromise-based solution, equal consideration must be given to the well-being and interests of each individual as well as those of each state and society.