Magdalena Smieszek

The Evolving Psyche of Law in Europe

The Psychology of Human Rights and Asylum Frameworks

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Preface

There is a lack of words for the most important things anyway.[1]—Olga Tokarczuk

Although words cannot fully express it, I extend my utmost love and gratitude to my parents, Emilia Smieszek and Krzysztof Smieszek, for their immeasurable support, and for having the courage and resilience that gave me the path in life that informed and made this work possible. Indeed, the most meaningful things often appear in our senses and relationships, within the psyche that is transforming. The story was shaped by the journey that our family started in Poland. Against many obstacles, my parents and I left Krakow in 1985, when I was a little girl, driving through the Slovak part of then Czechoslovakia, via then communist Hungary, through the Slovenian part of then Yugoslavia, into Italy where we drove up to a refugee camp and claimed asylum. A year and a half later, we resettled in Canada, where I received the education and opportunities for a career in international human rights law. After many years working with international organizations in different parts of the world, primarily the United Nations High Commissioner for Refugees (UNCHR), my last posting was in Budapest in the regional office for Central Europe, on the subject of refugee integration and protection. Full circle back, I was working in the same countries that I traveled through with my parents in our asylum-seeking voyage, now part of the European Union.

With this history, it was appropriate that I pursue my doctoral studies on a subject that considers human rights and asylum in Europe, the shifting borders and identities, belonging and not belonging, and the social and economic struggles. More so fitting that I do this at the Central European University (CEU) in Budapest, the institution that explores these transitions and the goals of an open society. This book

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[1]Olga Tokarczuk, *House of Day, House of Night* (Writings from an Unbound Europe) (Northwestern University Press, 2003). Inspired by psychologist Carl Jung, Olga Tokarczuk, herself a psychologist turned Nobel Laureate in Literature, wrote this historical account about the human journey, through characters that experienced changing borders and identities, in a Polish town in the heart of Europe.

is the outcome of the extensive research in my doctoral work, combined with the years working directly with various communities, organizations, and migrants around the world, as well as the teaching that I have done along the way.

There have been many significant and meaningful moments, conversations, and insights that motivated this scholarly endeavor. One of those was the escalated movement of a large number of people into Europe in 2015, coming primarily from Syria, Afghanistan, and Iraq. This situation invoked in the public realm what can be characterized as a panic-stricken response, hence the construal of it as a crisis, but it also spurred responses of great compassion, generosity, and the humanitarian spirit. That year, I presented a paper at the Nordic Asylum Law Seminar in Uppsala, Sweden, where Alice Edwards, legal scholar and UNHCR senior advisor, stated something in her keynote address that rang especially true—she said that this subject is emotional. Indeed, I both observed and felt some of the emotions. At the time, I was also taking a doctoral course with Professor András Sajó on cognitive science and the law, with an emphasis on emotions in constitutional law. I decided to direct my research to explore these interlocking phenomena, to better know what brought us here in the first place, and thus be better equipped to address it.

There are numerous people to thank for this chapter in my life, many friends, family, and colleagues who have encouraged me, gave thoughtful inputs, and enriched this experience along the way. I am grateful to Professor Marie-Pierre Granger for supporting this project, for the extensive guidance and comprehensive feedback, and for being empathetic to the struggles along the way. Likewise, a special thanks to the heads of legal studies during my time at CEU. In particular, much gratitude goes to Professor Csilla Kollonay-Lehoczky for advising me, sharing wisdom, and always engaging with kindness. I also greatly appreciate the comments from Professor Elspeth Guild at the last stages of completion. And of course, thank you to my CEU colleagues, friends, faculty, and students that I had the pleasure of working with, all of whom deepened my knowledge.

The human journey continues.

Budapest, Hungary   Magdalena Smieszek

Contents

Abbreviations and Acronyms

AFSJ	Area of Freedom, Security, and Justice
CEAS	Common European Asylum System
CESCR	UN Committee on Economic, Social and Cultural Rights
CIIM	Common In-Group Identity Model
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EC	European Community
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECRE	European Council on Refugees and Exiles
EEC	European Economic Community
EU	European Union
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MS	Member State (of the European Union)
RCD	Reception Conditions Directive
SCT	Self Categorization Theory
SIT	Social Identity Theory
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCNs	Third Country Nationals
QD	Qualification Directive
QR	Qualification Regulation
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics

Chapter 1
Introduction

There is unity where there is community of pleasures and pains.[1]—Plato

We are ruled by the power of memory. We are ruled by the power of imagination.
We are ruled by the power of knowledge. And we are ruled by the power of emotion.[2]—
Philip Allot

1.1 Europe at a Crossroads: Crisis and Cognitive Dissonance

The evolving story of Europe amidst the story of humanity involves numerous global triumphs and defeats, viewed and experienced from multiple perspectives. Be it climate change, a pandemic, digital developments, migration, the economy, polarization, social disruptions, or the vulnerability of our mental health that is underlined by psychological challenges—they can coalesce to disturb the systems and minds holding things together. In the progress of history, the shapers of

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[1] Plato, *The Republic*, Book V, para 462. *The Republic* is about the city as a community that is good because it is based on justice in accordance with Socrates' understanding and description of politics as a byproduct of human psychology—as described in the Stanford Encyclopedia of Philosophy, "Plato's Ethics and Politics in *The Republic*" *First published Tue Apr 1, 2003; substantive revision Tue Sep 12, 2017* online at <https://plato.stanford.edu/entries/plato-ethics-politics/>.

[2] Allot (2016), para 8.1, p. 149. Philip Allot is Professor Emeritus of International Public Law at Cambridge University and a Fellow of Trinity College Cambridge. His work aligns with the themes herein on the intersections of international law and human consciousness produced by the mind, among which are emotions. Among his many roles, between 1960 and 1973 he was Legal Adviser for the British government including as Legal Counsellor for the British Permanent Representation to the European Communities in Brussels (1972–1973) when the UK became a member of the European Communities. He specializes in Constitutional Law, European Union Law, and International Public Law with a focus on re-conceiving international systems through the philosophy of Social Idealism.

European identity had decided that human rights values, universally prescribed, would feature prominently. But how to reconcile an identity based on a values system that applies to all human beings equally, the ultimate inclusionary ideal which human rights aim to fulfil, within a context that is socio-politically driven and therefore more often inclined to limit itself and exclude? The best way to understand the evolution, both from its historical context but also looking to the future, is to step back to a meta-perspective, one that delves in and out of the laws and policies from an interdisciplinary angle.

Let us begin then. The present study was propelled into being at an emotional point in our shared history—the 2015 migration-related "crisis" in Europe, a crisis that has had many names[3]—a time when persons from war-torn countries came in larger numbers into the European Union to seek asylum and aid, a situation that abruptly challenged the self-definitions and structures of European institutions and laws. While it has been viewed from policy, legal and economic perspectives, the crisis in Europe has also been a psychological one that concerns the question of how European states and *people* should respond to the situation. Crisis is psychological distress in response to what is perceived as circumstances threatening a particular way of being, when systems and values are put under stress. In general terms, a crisis is an uncomfortable confrontation that creates high levels of uncertainty about the direction to respond to a situation. Individuals and groups have varied impulses in such situations, whether acting out of moral obligation towards the human good, or self-interest or another kind of reasoning. If the right standards are not set in place amidst a diversity of views and inclinations, the crisis can linger. But which is right, and which is good, and for whom? How do we determine this?

Europe is at a crossroads, a civilizational one, as some would call it. The evolving migration story in Europe and globally touches the crux of what it means to be human because it confronts our conceptions of how we conceive of ourselves, how we treat each other, how we imagine and manage our societies, and how we determine who is the "we" making decisions about any of these things. The question that is applicable in the deliberations over migration is "whose Europe?"—does it belong to the European institutions or the nations states or the people within the states, and if so, which people? The tension exists between transnational bodies that unite for commonness, and the persistence of nation states and communities that seek to retain their distinctiveness and autonomy.

This book attributes the tensions within the laws, policies, negotiations and adjudications to an underlying social psychology of inclusion and exclusion that is pervading within them. The relationship between law and psychology inspired the present research, an inquiry into the psychological underpinnings and evolution of asylum laws and related human rights at the pan-European level. More specifically, the analytical focus here is on the inclusion and exclusion of refugees and asylum seekers within the European laws and how this links with their rights vis-à-vis other

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[3]Goodman et al. (2017), pp. 97–178; Cantat et al. (2019).

legal status categories, particularly their social and economic rights, emphasizing the evident dissonances that arise out of the social psychology.

1.2   Law and Psychology in European Legal Discourse

The interconnection of law and psychology, particularly human rights and social psychology, is an emerging interdisciplinary approach. There has been an increased interest among psychologists and social scientist generally with regard to the importance of human rights as it relates to social science research, social justice and global issues—particularly peace and conflict research.[4] Studies have shown that social psychology can be powerful in shedding light on human rights matters in relation to the self and group membership.[5] For example, empirical research has measured how relating to levels of abstraction about the human and group relations can determine the level of agreement with human rights;[6] how meanings of rights are entrenched in cultural or linguistic contexts and associated with perceptions of deservingness;[7] how social representation relates to different language translations of human rights;[8] and generally how identity, social conditions and intergroup processes affect rights-related thinking and behaviour.[9] In turn, as some have claimed, "virtually every aspect of legal rules and procedures relies on assumptions about human psychology – about how individuals think, feel, and make decisions."[10] Overall, psychological findings, especially from social psychology, have begun to illuminate and challenge some of the implicit assumptions about human behaviour embedded within laws and legal practices.[11]

Such research can provide insights for scholars, advocates and practitioners to enhance respect for human rights.[12] Inroads in this field have come more from the side of psychologists than from legal scholars incorporating psychology in the study of international law. Certainly there is a need for deeper scrutiny, as some international legal scholars themselves have pronounced when challenging the effectiveness of international law and human rights, noting the inability of international legal regimes to live up to their stated promises and actually decrease violations.[13]

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[4]Staerklé et al. (2015), pp. 133–141; Twose and Christopher Cohrs (2015), pp. 3–9.

[5]*Ibid* Staerklé et al. (2015), p. 133.

[6]McFarland (2015), pp. 10–27.

[7]Morrison et al. (2015), pp. 68–88.

[8]Doise (2002).

[9]Abrams et al. (2015), pp. 28–46; Stellmacher et al. (2005), pp. 267–292; Christopher Cohrs et al. (2007), pp. 441–469; Woods (2010), p. 51.

[10]Nadler and Mueller (2017), p. 124.

[11]*Ibid,* pp. 124–125; Kovera and Borgida (2010), pp. 1343–1385.

[12]Woods (2010), p. 53.

[13]Goldsmith and Posner (2005), Posner (2014), and Hopgood (2013).

Overall, the observation has been that in legal scholarship there has been a "preoc-
cupation with mechanisms for enforcing treaty commitments on recalcitrant states"
in relation to human rights and "no systematic attempt by legal scholars" to consider
psychology as a component of international law.[14]

   This is undoubtedly the case within legal inquiry on asylum matters, and the
present book aims at bridging this gap. That is not to say that there are is no existing
research or literature making some of these connections, but the originality of this
book lies in the broad encompassing of interrelated issues of justice, minds and
behaviours. A number of social psychologists have considered inclusion and exclu-
sion as it relates to refugees and asylum seekers, or "integration" and "mental"
aspects more broadly, hence touching on matters related to legal scholarship.[15]
Different studies also engaged on issues of psychology particular to refugee status
assessment.[16] Legal scholars that have investigated psychological aspects of law
have done so most vividly in the field of "law and emotions" as will be discussed
more closely.[17] The roots of European identity, for instance, have been researched at
length, and of note are scholars who look at the concept of Europe as a whole but
also delve into the psychology of identity.[18] Finally, although the literature that
broadly considers social and economic rights of asylum seekers and refugees is
scant, there is a recognized need that this is a critical issue in Europe needing more
attention.[19] This book aims to bring together these otherwise disconnected bits and
pieces as part of the overall research.

   From scholarship that was consulted in developing this project, the one that
comes close to the approach taken in the present book is the work by Tal Dingott
Alkopher on the "socio-psychological reactions in the EU to immigration," in which
she examines the reactions to the 2015 refugee crisis coming from EU institutions
and Member States, doing so through three socio-psychological lenses.[20] The three
lenses she uses are: (1) "securitize-the-self" feelings of anxiety and insecurity among
states in their national narratives that come "at the expense of supranational
European policies;" (2) "managing securitization" by the European Commission
reaffirming EU identity and "preserving a global discourse on human rights and
refugee-related inclusive norms;" and (3) viewing the crisis through the lenses of
empathy and desecuritization where states, primarily Germany but also Sweden,
maintained an open door policy which the author argues stems from "psychological

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[14]Woods (2010), pp. 54–56.

[15]*See* Esses et al. (2008), pp. 4–25; Haslam and Pedersen (2007), pp. 208–218.

[16]*See* Herlihy (2013), pp. 47–62; Rousseau and Foxen (2010), pp. 70–92.

[17]*See* Hoffman (2011), Nussbaum (2006, 2013), and Bandes (2000).

[18]*See* Castano (2004); Kølvraa (2018), pp. 1405–1418.

[19]*See* Thorton (2014); Cholewinski (2004), Odessa, Ukraine; UN High Commissioner for Refugees
(UNHCR), *Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced
Persons: A Comparative Perspective*, December 2009. Organised jointly by UNHCR and the
Council of Europe's Department of the European Social Charter; Pistoia (2018), pp. 781–807.

[20]Alkopher (2018), pp. 314–335.

lack of perceived threat from the immigrant-other" and a collective identity based on civilian power.[21]

Developing her own typology, Dingott Alkopher reflects through the socio-psychological lenses on the asylum policies primarily from the point of view of the EU and Member States. Whereas Dingott Alkopher focuses specifically on the crisis response, the focus within the present study is on the evolution of the international and European laws with the claim herein that socio-psychological lenses as analytical tools are likewise applicable to the broader history of these legal developments. The research here thus considers a wide range of actors—including refugees themselves. Moreover, this book looks specifically at a distinctive aspect of asylum policies, that being the two versions of inclusion and exclusion—the one defined by status category demarcations and the other determined through provision or denial of social and economic rights to the category holders. The overlapping areas with Dingott Alkopher's work are related to the meaningfulness and relevance of psychological concepts of threat-perception, collective identities and empathy in relation to the European laws and policies on asylum. Her sources are primarily from political psychology and International Relations literature on securitization, and interestingly, those conclusions largely match some of the findings derived directly from the social psychology theories that the present research employs. Importantly, Dingott Alkopher's experimental approach brings additional emphasis to the issue of psychological uncertainty at a time of perceived crisis as a key motivator of policy and legal reactions.

1.3   Pertinence of the Topic: Migration and the European Way of Life

Precisely because of the ongoing uncertainties in present-day Europe, migration and asylum have been among the touchiest of topics in both the public realm and the halls of European institutions. A key example came in July 2019 when the newly elected European Commission President, Ursula von der Leyen, the first woman to fill the role, put forth in her agenda for Europe six points that she called "headline ambitions," among which was "protecting the European way of life."[22] Two months later when appointing Margaritis Schinas as commissioner/VP with that title and portfolio, the phrase became an international news headline drawing controversy, a mix of criticism and support.[23] The backlash was in response to the semantics and

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[21]*Ibid,* p. 314.

[22]Ursula von der Leyen, "A Union That Strives for More: My Agenda for Europe" Political Guidelines for the Next European Commission 2019–2024 online at <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf>   [hereinafter von Der Leyen, Agenda for Europe].

[23]Stevis-Gridneff (2019).

the content of the portfolio that linked migration with security issues. The reactions were swift with accusations that the title acquiesced and gave credence to far-right populist rhetoric concerning migrants. By linking migration with security, the title can imply that Europe needs to be protected from migrants that pose it a threat. Marine Le Pen, the French far-right populist, said the position confirmed an "ideological victory" because it forced the EU to "admit that immigration poses questions about the future of Europeans' way of life."[24] In contrast, the outgoing European Commission President Jean-Claude Juncker did not like it, and Guy Verhofstadt, leader of the Liberal bloc was uncomfortable with the term. French MEP, Karima Delli, called the name completely unacceptable because the link was a "direct validation of the words of the far-right for whom immigrants are barbarians who threaten our way of life," adding: "[w]e cannot use the same semantics as people who oppose our European values" and that "if you know the history in Europe, you know Europe was made with immigration."[25] Molly Scott Cato, a UK Green MEP, said that it may look like a portfolio against fascists, "but only by adopting their divisive rhetoric around strong borders."[26]

The response from von der Leyen was that "home-grown populist with cheap nationalistic slogans" should not be allowed to "hijack the definition" and that "they want it to mean the opposite of what it is."[27] She asserted that, for some, "the European way of life is a loaded and politically charged term. But we cannot and must not let others take away our language from us: this is part of *who we are*."[28] In her version, Europe and its espoused values need to be protected from both the assertions of the far-right extremists and terrorist threats. And yet, the lack of clarity and shared meaning of protecting the European way of life is potentially doublespeak, and has been referred to as a dog whistle—coded political language, with different resonance for its intended targets.[29]

Indeed, words are loaded with meaning and discourse creates reality. The language of the political guidelines and priorities that von der Leyen put forward, as well as the controversy that followed, are telling. Even though ultimately the title was changed to "promoting" the European way of life instead of "protecting" it, a change that is seen as being open to others and less fascist sounding, the issues remain as do newly raised conversations about European values and the original content of the portfolio on the "migration and security" issue.[30] As it happened, a

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[24]Carraud (2019).

[25]Stevis-Gridneff (2019).

[26]Falzon (2019).

[27]Sheftalovich (2019).

[28]*Ibid*. Emphasis added.

[29]Gotev (2010). Dutch liberal Sophie in 't Veld said, "The title needs to go. Full stop. So my advice to you: drop the dog whistle and work with us for the next five years for a European Union that is open and inclusive".

[30]"EU Commission Incoming Chief Changes Title for Migration Portfolio After Controversy" *Euronews* (November 13, 2019) online at <https://www.euronews.com/2019/11/13/eu-commission-incoming-chief-changes-title-for-migration-portfolio-after-controversy>.

year later, in her September 2020 State of the Union address, in a state of the world under the grip of Covid-19, von der Leyden turned her reflection to the planetary and human fragility alongside the fragility of the values holding together the European community that are quickly called into question in times of crisis.[31]

A reflection on this aspect of the European Commission agenda is therefore a fitting starting point, because it touches on the major themes that will be discussed: the tension between European institutions and nation states as having a social psychological undercurrent, the divisiveness over the issue of migration in regards to inclusion and exclusion, questions about European identity, and human rights pronounced as a unifying force regarding European values of justice and rule of law. In von der Leyen's version, the meaning of the European way of life, and the values on which the Union is founded, are stated in the Lisbon Treaty from 2007. This refers to inclusionary concepts like dignity and equality for all as foundational values along with freedom, democracy, rule of law, and respect for human rights. These values, according to the Treaty, are common to Member States, and Europe is described as a society with prevailing notions of pluralism, non-discrimination, tolerance, justice, and solidarity.[32] The Treaty states that the aim of the Union is to promote peace, its values, and well-being of its peoples.[33] It goes on to state that "the Union offers its citizens an area of freedom, security and justice" within its borders, and freedom of movement is ensured by measures concerning "external border controls, asylum, immigration and the prevention and combating of crime."[34] This means that in the EU Treaty framework, issues of (im)migration and asylum are enshrined and always connected with security, a conceptual connection that translates into numerous layers of exclusionary laws, policies, and practices. As will be discussed, all these concepts have a philosophical, contextual, historical and psychological source that made them of value. Those sources intersect with present-day particulars that will also determine the direction for the future of Europe.

Europe does have among its key principles the rule of law, but the idea of Europe is an evolving one about a European "we" and as Philip Allot suggests in the opening quote, a broader *we* as human beings are ruled by powers that inform the law of any group, that includes being ruled by emotions alongside memory, imagination, and knowledge. Extracting the psychology of the values within the laws and policies is of concern here. For example, in her agenda and speech to the European Parliament in July 2019, von der Leyen invoked a string of references to the "feeling" that citizens of Europe are experiencing in response to disruptive developments referred to as meta-developments which include demographic change, globalization of the

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[31]European Commission Speech, "State of the Union Address by President von der Leyen at the European Parliament Plenary" (Brussels, 16 September 2020) [hereinafter 2020 EC President State of the Union Speech].

[32]Article 2. European Union, *Consolidated Version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01.

[33]Article 3.

[34]Article 3(2).

world economy, rapid digitalization of working environments, and climate change.[35] She concluded that all the developments have "left people with a feeling of losing control,"[36] looser ties within communities, and across Europe "a feeling of unease and anxiety."[37] These observed sentiments of heightened sense of disruption were echoed in von der Leyen's September 2020 State of the Union speech, just as the second wave of Covid-19 was taking over Europe, in which she noted the added uncertainty and suffering of people in "a period of profound anxiety for millions."[38]

This feeling, she posits, is prompted by reactions of authoritarianism, corruption, and protectionism. But "the European way" she purports is one of multilateralism, fair trade, and rule-based order.[39] It requires rediscovering European unity, strengthening internal unity, creating trust and confidence through tighter enforcement of legislation, through judgments of the Court of Justice. The rule of law, defending core values, and standing up for justice as a hallmark of Europe's accomplishments are central to her vision for a "Union of equality, tolerance and social fairness"[40] because the European Union is a "Community of Law" with the Commission as "an independent guardian of the Treaties."[41]

The rule of law is universal, says von der Leyen.[42] Referencing the vast number of people that have drowned in the Mediterranean that is among the world's deadliest borders, she repeatedly invokes the legal and moral duty of Europe to help refugees and respect the dignity of every human being, values enshrined in the Treaties that she says must be honoured and defended. What is needed, she says, is "empathy and decisive action."[43] She recounts how in 2015 she welcomed in her home a 19-year old Syrian refugee, someone who did not speak German and "was deeply scarred by his experience of civil war and flight" but today is fluent in German and English in addition to his Arabic, a community leader, a student, and an inspiration.[44] But then she notes that "one day, he wants to go home,"[45] perhaps her sincere reflection on his genuine wishes but also an unwitting nod to the view of a temporary nature of asylum, indicating that in the end, Europe or Germany are not the young man's home

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[35]von Der Leyen, Agenda for Europe, *supra* note 22, p. 4; Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission (July 16, 2019) online at: <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230>, p. 1 [hereinafter von Der Leyen, Opening Statement].

[36]Ibid von Der Leyen, Opening Statement, p. 2.

[37]von Der Leyen, Agenda for Europe, *supra* note 22, p. 4.

[38]2020 EC President State of the Union Speech, *supra* note 31.

[39]von Der Leyen, Opening Statement, *supra* note 35, p. 2.

[40]von Der Leyen, Agenda for Europe, *supra* note 22, p. 14.

[41]*Ibid* von Der Leyen, Agenda for Europe, p. 15 and Opening Statement, p. 3.

[42]von Der Leyen, Opening Statement, *supra* note 35, p. 3.

[43]*Ibid,* p. 4.

[44]*Ibid*.

[45]*Ibid*.

in spite of him learning the language and becoming a community leader. "They"—the migrants—are not fully part of the "we" in these references, and notwithstanding mention of refugee doctors saving lives in France during the height of Covid-19 or Moria camp aflame in Greece, the largest refugee camp in Europe destroyed, the oration still expressly links asylum with return so as to make "a clear distinction between those who have a right to stay and those who do not."[46] The concern of the European Commission is primarily to create trust, healing, solidarity, all through mutual compromises with and between EU Member States, not with the asylum seekers.

In short, the tone of the guidelines and overall agenda proposed by von der Leyen is tempered. The agenda calls for humane borders and empathy, but the next line refers to stricter securitization measures for irregular migration. There is an inclusionary sentiment followed quickly by one of threat-perception. This is pervasive in European law. Since "everything is linked"[47] according to von der Leyen, alongside an agenda for protection and integration of newcomers, there is a clear articulation of the need for internal security to protect European citizens with "cross-border cooperation to tackle gaps in the fight against serious crime and terrorism in Europe."[48] The calls for new initiatives did not appear to be very new in demeanor—an emphasis on stronger borders and renewed commitments to established standards. Indeed, the Pact on Migration and Asylum unveiled in September 2020 has a continual underlying strategy for prevention of arrivals, border containment, and increased emphasis on returns in exchange for solidarity among EU Member States.[49] On the other hand, a shift in rhetoric from the European Commission that now frames migration in a more positive light is welcomed as a "contrast with the poly-crisis hyperbole of the previous Commission."[50]

The same mixed tone came from Margaritis Schinas, as the designate of the title for protecting the European way of life, before it was changed to promoting, at his nomination hearing before the European Parliament. In his opening statement and when questioned repeatedly about what exactly the European way of life refers to, he said that being European, "*at is core*, means protecting the most vulnerable in our societies. It means access to healthcare, welfare and having the same opportunities"[51] which is a positive statement and yet still ambiguous enough to shape-shift into different meanings as to who is deemed as the most vulnerable and what same opportunities look like. Members of parliament commented that there is not necessarily content agreed upon concerning the European way of life, that the meaning has

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[46]2020 EC President State of the Union Speech, 2020 EC President State of the Union Speech, *supra* note 31.

[47]von Der Leyen, Agenda for Europe*, supra* note 22, p. 16.

[48]*Ibid,* p. 16.

[49]European Commission, *Communication from the Commission on a New Pact on Migration and Asylum* COM (2020) 609 final, Brussels, 23.9.2020.

[50]Woollard (2020).

[51]Gotev (2019).

not been defined.[52] In this regard, Schinas echoed von der Leyen that being European means standing up for values of peace, freedom, equality, democracy and respect for human dignity.[53]

1.4   A Broader View of Europe and the Law

The question within what constitutes Europe or European, or any place or idea for that matter, is what do its members have "in common" that would separate them from any other set of people—essentially a process of self-definition, an evolving one always rooted in some origin. Moreover, how is any of this determined? What are the underlying sources? While the origin stories for Europe are multifaceted, and constructions likely exaggerated and romanticized, there is general agreement about European culture having a legacy of Graeco-Roman antiquity. This legacy was noted by Ursula von der Leyen when she said that European values are drawn from the cradle of European civilization, this being Greek philosophy and Roman law which prompted, after dark epochs when dictators had prevailed, the best tool to defend freedoms and protect those that are vulnerable—the rule of law.[54] The philosophical, cultural and political beginnings of Europe, ones that separate "east" and "west" trace back to ancient Greece.[55] Of central influence have been the structures towards freedom coming out of ancient Greece, where cultures and mental spaces generally were not to be dictated by monarchs and aristocrats, but by the citizens of a *polis* that shaped their communities, with the common denominator being the attempt towards compromise and balance rather than use of power.[56] Europe is said to retain this ancient Greek conception of freedom as its core value to this present day, and professes an identity rooted in human rights. Further, insights about origins can be found in the name. The etymology of Europe is uncertain, though one proposal is linked to the Greek word *eurus* that means "wide" or "broad".[57] Another suggestion has a Semitic origin—*erebu* referring to sunset or *ereb* meaning evening, both references signifying "west" referring to the separation of Eurasia into Europe and Asia. Generally, the prefix *eu* in ancient Greek means "good" and "well" as an

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[52]*Ibid*.

[53]Timsit (2019).

[54]von Der Leyen, Opening Statement, *supra* note 35, p. 3.

[55]Jones (2011).

[56]Meier (2011), pp. 8–11.

[57]Etymology Online Dictionary, entry on "Europe" online at <https://www.etymonline.com/word/europe>.

adjective and "right" and "good cause" as a noun.[58] It also has the sense of "true" in scientific references.[59]

Likewise, the foundations of universal human rights, those conceptions of what is moral and good for human beings in general, also have numerous origins, with the concept of dignity often named as *the* foundational concept for human rights. The usual story goes that the birthplace of these human rights concepts as they are now was none other than Europe.[60] That is debatable, as origins tend to be, but also a tall order for the idea of Europe—to encompass and represent the universal good, the right and the true. French political journalist Edwy Plenel asserts that "no people, no nation, no continent and no civilization can lay claim to owning what is universal" as it "infers hierarchies between cultures, origins and identities" and such views about the "clash of civilizations automatically creates the prophecy of a global path of conflict and disorder."[61] Indeed, conflicts between nations deemed as *world wars* in the first half of the twentieth century were centred primarily in the place that even then defined itself as Europe. The commandments of international human rights took a more comprehensive form in response to wide-scale expressions of the worst aspects of humanity. The aftermath of World War II not only created human rights as we know them today, but they also created a Europe based on supranational institutions that claim human rights as foundational.[62]

Goodness, wellness, rightness and truth, all these expressions of positive value have a long history that is still evolving. We carry around these determinations of value in our genes, our psyches, and our communities throughout generations. The good, the right and the true is reasoned in the individual and collective mind and body, and we recognize or determine value through thoughts and emotions. Our thoughts and emotions are shared, they are social. These values are enshrined in the texts and practices of law, with justice as a balance of competing notions and feelings. The values—determinations of what behaviour serves the good—are further encapsulated in the form of laws in communities that form nation states or unions of nations and states. They are additionally defined by borders that are conceptual in the form of laws and physical in the form of walls, fences and technologies. Movement of people across the borders of these different communities that have been established to create civilizational and cultural order and meaning in an increasingly complex, populated, interconnected and mobility-driven world, challenge established identities and trigger emotions, our psychological and

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[58]Etymology Online Dictionary, entry on "eu" online at <https://www.etymonline.com/word/eu->; Stanford Encyclopedia of Philosophy, entry on "moral character" online at <https://plato.stanford.edu/entries/moral-character/>.

[59]Dictionary, entry on "eu" online at <https://www.dictionary.com/browse/eu->.

[60]It is the view of the author that the sources of human rights go much deeper and have a longer more universal foundation than what emerged in Europe during the Enlightenment, the French Revolution and the post-World Wars, time periods that are usually attributed to giving life to human rights as they are now.

[61]Penel (2019).

[62]de Búrca (2011), pp. 649–693.

embodied expressions of value. The issues are emotional, embedded deeply into our reflexes; they stir us, sometimes prompting compassion, and other times fear, along a spectrum of what is deemed as reasonable and unreasonable.

Legal instruments and institutions for human rights and asylum laws have often been created in the context of crisis to deliver fought-over and hard-won solutions to problems of the human condition. But the laws themselves can also reflect the cognitive dissonances in that legal and institutional space. Cognitive dissonance, like crisis, is a mental discomfort that occurs when there are contradictions in values; there is an experience and feeling of uncertainty because the situation challenges the consistency of how things are or perceptions of how things ought to be. The title for "protecting the European way of life" is an example of such a friction, a double entendre, a discord and duality of meanings that shows up in laws, policies, jurisprudence and negotiations. The crises and cognitive dissonances occur in Europe when there is a confrontation of moral responsibility aligned with compassionate impulses to help fellow human beings *versus* fears of these persons creating threats to one's identity, values, safety and economy. The human mind, in both its individual and collective sense, one which takes the institutionalised form of rules and laws, is paradoxical. On the one hand, laws in Europe emphasize a perspective towards social inclusion and integration in line with universal values and a human rights-based European identity. On the other hand, related laws create restrictive, even degrading and undignified environments that prevent inclusion and integration. These conflicts, crises, cognitive dissonances, however defined, need all the tools at their disposal to be better understood in order to resolve the ongoing conundrums.

1.5   Hypothesis, Approach, and Originality of Research

The starting premise of the research is the common understanding that inclusion and exclusion, defined in multiple ways, are at the heart of asylum and human rights law. Therefore, the research considers how the psychology of inclusion and exclusion is reflected in the evolution of Europe-wide human rights and asylum laws and frameworks. This is both a question for the research but also an assertion based on an original *hypothesis* that there would in fact be an underlying psychology to be found, one that has not been explored but, in any case, lays barefaced. With that as a starting point, new insights emerge about the numerous topics related to the current state of affairs in Europe concerning not only inclusion and exclusion of migrants seeking asylum but more broadly the interactions of human beings within groups and organizations.

Finding and articulating this as part of an interdisciplinary undertaking is not an easy task. The methodological approach proposed and employed, described in detail in Chap. 3, is analytical framing, a method from discourse analysis. Frames derived from social psychology theories are used to examine, compare, and critique the evolution of the laws. Thus, the overall goal is to analyse both human rights and asylum laws at the international level and within European frameworks, exploring

their evolution that is inclusionary in some respects and exclusionary in others, through a lens of social psychology of inclusion and exclusion. But the interdisciplinary aspect does not stop at the two disciplines of social psychology and legal studies. It is further informed by other schools of psychology as well as sources in political science, international relations, history, philosophy, sociology, biology, media studies and even finding inspiration in behavioural economics and neuroscience.

In a way, it is an attempt and invitation to use modern interdisciplinary insights to re-think, re-read and re-tell the European normative story concerning its human rights identity in relation to what is conceived of as European and non-European. The complex issue of migration, displacement and movement of people between nation states concerns the relationships between communities and their members—whether a worldwide community, European, or a more local one. The relationship between Europe and the world, and between those within what is defined as Europe at any given time, impacts the view of migration. The suggestion is that having a consciousness of this underlying psychology as being a driver of how value systems are created and sustained is important in re-considering and making more effective policies.

As noted, in legal scholarship literature there are occasional references to human psychology underlying the concepts, but few outright explorations. In legal studies generally, there is a longstanding tradition to focus on "objective" factors and law as an affect-free rationality-based project. As scholars have noted, there has been a dichotomization between reason and emotion.[63] This split is especially apparent in arguments in the migration context that involve one side calling the other side as "irrational" in their reasoning. However, new fields of scholarship see emotions as unavoidably intertwined with rational reasoning and a legitimate human experience worthy of exploration within legal spheres. Therefore, this research adds to existing emotion-focused scholarship in this regard, with a focus on Europe, asylum and human rights law.

The research takes a psycho-historical perspective to examine the evolution of the laws, primarily from their inception following the establishment of the United Nations and the European institutions after the Second World War. This post-war context produced the beginnings of international human rights law, the 1951 Refugee Convention, the European Communities founding treaties as well as the European Convention of Human Rights. All of these will be discussed, while also taking into consideration the much longer and richer history of asylum and human rights, said to be an offspring of the European Enlightenment but in fact having a much more complex lineage that can be articulated as being rooted in human psychological inclinations. In some cases, an evolution can be observed, while in others, the situation is surprisingly the same as in the past. The same rhetoric continues to reverberate, one perspective warning of the threats of unrestrained

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[63]Grossi (2015), pp. 55–60; Abrams and Karen (2010), pp. 1997–2074; Maroney (2006), pp. 125–133.

migration and primacy of national interests, the other pointing to moral and human-
itarian duties towards innocent victims—or in other words, "a long-established
dance – and everyone knows the steps."[64] As one author notes:

> The value of comparing the treatment of refugee 'issues' in the past with the present reveals
> both how much and how little has changed. Many legal instruments are now in place. . .at the
> same time, much anti-refugee discourse is almost identical with that of more than a century
> ago. To read the Daily Mail's anti-alien stance of the early twentieth century is to know how
> it stands with respect to Syrian refugees today.[65]

In particular, the comparison and connection to the World War II context is
meaningful for a number of reasons. The migration-related crisis in Europe since
2015, and around the world for much longer, as well as the context in which it
emerges—rise of right-wing populism and authoritarianism—has stoked compari-
sons with the situation in WWII and its aftermath. Numerous comparisons have been
made about the present-day displacement of refugees as a result of the wars, whether
in Syria or Afghanistan or elsewhere, being of the same critical global significance as
the WWII context. The figure of 60 million forcibly displaced persons around the
world, mostly taking refuge in the least developed countries, has been compared to
the estimated figure of 60 million Europeans that were displaced as a result of World
War II.[66] Headlines alert that a crisis of this scale not seen since the Second World
War is a catalyst for major legislative and institutional changes.[67]

And yet, while there are comparisons of similarity, things have changed signif-
icantly. Thus, a final point on originality is the multi-perspectival approach that
considers multiple sources in the development and impact of the laws and their
psychological underpinnings. The discussion considers both the negotiations of
legislators as well as their products—the laws themselves—how they can be
described as psychological inclinations by considering the texts and reasoning of
policy-makers, judges, asylum adjudicators, European society, asylum seekers/ref-
ugees and other non-European category-holders.

1.6 Overview of Chapters

Chapter 2 lays out the legal groundwork concerning rights of asylum seekers and
refugees with a primary focus on the global instruments before looking more
specifically at the European laws and policies. The chapter includes an overview
of key provisions in international law, primarily the Universal Declaration of Human
Rights, the International Covenant on Civil and Political Rights, the International

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[64]Hawes (2018), pp. 137–139.

[65]Stone (2018), pp. 101–106.

[66]UNHCR, Facts and Figures about Refugees online at <http://www.unhcr.org.uk/about-us/key-facts-and-figures.html>.

[67]UN News Centre (2015).

Covenant on Economic and Social Rights, the 1951 Refugee Convention, and other conventions to a lesser extent, as they are related to asylum seeker reception and refugee integration. It includes a brief introduction to relevant European law as this is further elaborated in subsequent chapters. The emphasis is placed on provisions concerning the right to asylum, refugee and other definitions, non-discrimination, naturalization/assimilation (aka integration), and the gradations of treatment concerning rights to housing, employment and social benefits—all of these are broadly related to inclusion and exclusion of persons under the asylum system.

Chapter 3 goes on to outline relevant methodologies and a conceptual framework, primarily frame analysis, drawing on established theories from the social psychology of inclusion and exclusion, with reliable generalizations that support the selected frames. The integrated and interdisciplinary methodology weaves language from social psychology into a discussion of laws and policies. The conceptual framework introduces the overall premises and the main frames of analysis informed by the social psychology of inclusion and exclusion that will be applied throughout in reflecting on European laws and policies concerning rights of asylum seekers and refugees. The main frames include (1) *identity formation of self and other* which focuses on social psychology theories of social identity and self-categorization; (2) *cost-benefit calculation* referring to the psychology behind helping behaviour—altruism, empathy, and their lack; and (3) *threat-perception* that refers to theories and models about the different layers of threat that social groups experience and how this can be counteracted. Throughout the chapter, references are made to sources from disciplines outside of social psychology and law that have used similar frames, namely international relations, political science, and media studies.

The focus of Chap. 4 is on the drafting of the 1951 Refugee Convention, particularly Article 1, concerning the refugee definition, also known as the inclusion/exclusion clauses. The chapter considers first the post-WWII state of mind in the negotiations and reflects on their preliminary stages. At that time, a dissonance had emerged among the drafters as to whether the definition of refugee should be broad and more inclusive or narrow and more exclusionary. A gradual dwindling of the humanitarian spirit can be observed. Relying on the *travaux préparatoires* of the last stage of negotiations at the Conference of the Plenipotentiaries, a picture appears about the underlying psychological forces that produced the Convention. The analysis of the drafting documents is unique in that the social psychological frame is applied and an emphasis here is placed on some of the emotionally-laden language used with at-times heated exchanges between the conference delegates. Much of the discussion concerns whose interests are being served by the provisions of the Convention—whether the State parties or the refugees. The crux of it centres on whether the refugee definition should apply to European refugees only, or whether it should have a universal application. Several other social psychological phenomena can be observed in the negotiations, including a weighing of socio-economic burdens as well as perceived threats to security.

Taking cues from political scientists and theorists in applying social psychological interpretation to a macro-level analysis, Chap. 5 considers Europe as an in-group that is defining its self-identity through laws and institutions, a process that has

involved identifying the non-European Other. The chapter describes the evolution of
European law concerning Europeans vis-à-vis migrants, and specifically asylum
seekers and refugees. Following WWII, human rights emerged as a defining feature
of European identity, certainly within the Council of Europe, but also within the
European Community, as evident in the founding treaties. At this time, there was an
omission of the "alien" and ultimately, the refugee, as to how far these European
human rights would be extended, showing a more confined and exclusionary
sentiment embedded in the treaties. As the European Community evolved into the
European Union, freedom of movement became a defining feature which also meant
that borders had to be redefined. The introduction of the legal concept of the
European citizen coincided with the development of the laws that formed the
Common European Asylum System. This resulted in the ongoing European Union
dilemma about its multiple and at times conflicting identities being both cosmopol-
itan and communitarian.

Building on this, Chap. 6 explores legal categorizations of the citizen, European
citizen, and non-European (specifically asylum seeker, refugee, and beneficiary of
international protection). Firstly, legal categorization is described in terms of its
social psychological nature akin to social categorization. The characteristics of the
concept of citizenship are unpacked and then applied to the legal category of
European citizenship. From the perspective of a psychological and emotional attach-
ment, European citizenship does not have the salience of national citizenship, and
this is reflected in the provisions of European Union law. Finally, the European
Union's legal system of assessing who qualifies for international asylum protection
creates a hierarchy of categories, referred to as a two-tier system, that feeds into
perspectives of those that are deserving and undeserving. This ultimately affects
their access to human rights, and notably social and economic rights. The system of
this legal category stratification has a detrimental impact.

Chapter 7 proposes that the legal concept of dignity, drawing its evaluative
substance from emotions, is an inclusionary concept. Tracing back some highlights
in the evolution of the dignity concept, from its historic roots to its modern iterations
codified in international and European laws, shows dignity featuring increasingly
and more prominently. Dignity in this chapter is further unpacked in its psycholog-
ical and philosophical sense. Case-law from the European Court of Human Rights on
the vulnerability and dignity of asylum seekers, particularly in terms of their living
conditions during the reception phase, do make use of emotions-based language and
reasoning. Likewise, in recent years, shifts in rulings have taken place in the Court of
Justice of the European Union as well as within recommendations that have come
from the Committee on Economic and Social Rights presiding over the European
Social Charter. The recent legislative and jurisprudential advancements show that
"dignity as humanity," "dignity as inclusion," and "dignity as a human-self identity"
can be potent in addressing categorized distinctions that pervade a dissonance in
European policies.

The conclusion in Chap. 8 ends on an optimistic and future-focused note aiming
to incorporate new interdisciplinary insights that links legal discourse with psycho-
logical knowledge, towards paradigm shifts and new legislative, and even cultural,

European co-creations. While legal scholars hint at references to psychology in a general sense or suggest the need for psychological linking and evaluation, this book goes ahead with an earnest attempt and the goal of making some indents in the arduous task of linking knowledge from social psychology to a deeper comprehension and analysis of inclusion/exclusion in human rights and asylum law in Europe.

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