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**RIGHT TO ASYLUM AS A FUNDAMENTAL RIGHT –  
AN INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK AS AN  
EXAMPLE OF PUBLIC LEGAL BASIS FOR THE PROTECTION OF  
HUMAN RIGHTS**

Arguably, Europe's history has been actually shaped by migration. For centuries, merchants, craftsmen and intellectuals crossed the continent to practice their trades or begin new lives. Millions of people emigrated also from Europe, first to the colonies and later to the Americas and the Antipodes. Nonetheless, the large-scale immigration into Western Europe is more recent nowadays. In 2015, over 1 million people – refugees, displaced persons and other migrants – have made their way to the EU, either escaping conflict in their countries and/or in search of better economic prospects. Numbers of people arrive in the EU after perilous land and/or sea journeys, requiring basic humanitarian assistance, such as provision of health care, emergency shelter and – at least - basic legal aid. It should be noted that many of these displaced people are children who naturally have special protection needs, what puts additional light to the matter. It goes without saying that the migration flow is mostly impacting all the transit countries, not infrequently overwhelming national emergency response capacities. Particularly there all these internationally set out legal standards providing for protection of refugees shall apply efficiently, effectively, without any unnecessary delays, providing for asylum and, consequently, for a safe roof over the head(s) of those who come seeking it, for given reason. That is, however, rather rarely the case as the application of these aforementioned legal instruments – and therefore the effective protection of the fundamental right – remains wishful thinking to certain extent, as demonstrated by the jurisprudence of the Court of Justice of the European Union (CJEU), whereas once again not the quantity of the existing pieces of internationally recognized legislation but their quality matters, measured in their efficient application.

Having said this, it shall be clearly emphasized that the right to asylum is a fundamental right. Undoubtedly, granting this right is an obligation, recognized internationally since decades. Although the legal framework regarding asylum is constantly developing at international, European and, subsequently, national level of the EU Member States, there are still divergent lacunas to be addressed in one way or another, particularly as regards the uniform application of the given legal instruments.

Firstly, at the international level the well established right to asylum follows the key attribute of national sovereignty that it is the right of states to have exclusive control over its territory and hence over persons present in its territory, that is to say

to admit or exclude aliens from its territory [3, 10]. At the international level, the right to asylum is guaranteed with due respect of the Geneva Convention of 28<sup>th</sup> July 1951 and the Protocol of 31<sup>st</sup> January 1967 relating to the status of refugees as well as the provision of Article 14 of the Universal Declaration of human rights of 1948. As such, «[G]rounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centerpiece of international refugee protection today.» Admittedly, this Convention, which has entered into force on 22<sup>nd</sup> of April 1954, has been subject to only one amendment in the form of a protocol, essentially removing both the geographic and temporal limits of the 1951 Convention. Notably, the above-mentioned Convention, as a post-Second World War instrument, was originally limited in its temporal and geographic scope solely to persons fleeing events occurring before the 1<sup>st</sup> of January 1951 within Europe. Considering the reality of circumstances, the Protocol of 31<sup>st</sup> of January 1967 removed these both abovementioned limitations, giving thus the Convention universal coverage, supplemented by refugee and subsidiary protection regimes in several regions. This gained even more significant meaning in light of the recent developments within the immigration policies, particularly within the European Union, forced by the necessity of facing the current immigration flows.

Secondly, within the European context should be highlighted that, although the provision of Article 14 of the Universal Declaration of Human Rights expressly protected the right to «seek and enjoy asylum from persecution», this right is not found in the texts of other general instruments of international human rights law such as the ICCPR or the European Convention on Human Rights (ECHR). It should be underlined however with this regard that when those instruments were drafted, the Geneva Convention on the Status of Refugees was commonly thought to constitute a *lex specialis* which fully covered the need, therefore an *expressis verbis* regulation of asylum was not included [3, 10]. Access to the territory for non-nationals is, thus, not expressly regulated in the ECHR, nor does it establish who should receive a visa. However, also under the ECHR, states have the right, as a matter of well-established international law and subject to their treaty obligations (including the ECHR), to control the entry, residence and expulsion of non-nationals. Admittedly, ECtHR jurisprudence only imposes certain limitations on the right of states to turn someone away from their borders.

Thirdly, at the European Union's level, particularly within the primary law framework, the right to asylum is guaranteed in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (both hereinafter referred to as the Treaties), with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, as provided for in the provisions of Article 18 of the Charter of the Fundamental Rights of the EU (Charter). Furthermore, the provisions of Article 19 of the Charter prohibit collective expulsions and protect individuals from being removed, expelled or extradited to a state where there is a serious risk of death

penalty, torture or other inhuman or degrading treatment or punishment. It should also be underlined with this regard that the Charter provisions are based on the provisions of Article 78 of the Treaty on the Functioning of the European Union, which require the Union to respect the said Geneva Convention.

Considering the abovementioned, the constitutive importance and everlasting relevance of the named Convention and the Protocol is not only widely recognized, but also expressively incorporated into European legal framework in formal manner. In accordance with the provisions of Article 1 of the above-mentioned Convention, the right to asylum shall be granted to that one who «[...] *owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*» In other words, asylum is granted to people fleeing persecution or serious harm in their own country and therefore being in need of international protection, what everyone can observe nowadays in one way or another in several places in the world. Consequently, as already indicted, asylum is a fundamental right and granting it to people who comply with the criteria set out in the provisions of the named 1951 Geneva Convention relating to the status of refugees constitutes an international obligation, commonly recognized by States parties, which includes also EU Member States. It should be clearly stated at this point that the EU integrated these conditions for qualification for international protection in its own legal framework. Furthermore, it has even broadened the concept by creating a category of beneficiaries of international protection additional to refugees, i.e. beneficiaries of subsidiary protection.

Finally the uniform application of this legal framework established for the fundamental right of asylum shall be addressed in this context. It goes without saying that at least across the European Union that uniformity shall be given. There are however at least two issues calling for reflection. Firstly, the differentiated approach of the CJEU to the right of asylum, demonstrated in number of recently rendered judgments, does not lead to the uniform solution. Secondly, the scope of the application of the Charter, addressed to the EU institutions and other bodies operating within the EU institutional system, complicates it further, as in accordance of the provisions of Article 51 the Charter is applicable to the Member States when they implement EU law. *A contrario*, the Charter does not apply in cases where the Member States operate outside the scope of EU law. The definition of the latter seems to be crucial to interpret the EU asylum legislation as instrumental to the effective exercise of the right to asylum.

#### **LITERATURA:**

1. Roman Boed, *The state of the right of asylum in international law, accessible at the following link: <https://core.ac.uk/download/pdf/62547783.pdf>*

2. Adam Łazowski, *Exporting Cherries for the Cakes: The Charter of Fundamental Rights in Domestic Courts of the EU's Neighbourhood* [in:] Michal Bobek/Jeremias Adams-Prassl (eds.), *EU law in the Member States – The Charter of the Fundamental Rights of the European Union in the Member States*, pp. 499-523
3. Nuala Mole, *Asylum and the European Convention on Human Rights, Council of Europe 2000*
4. European Union Agency for Fundamental Rights (FRA), *Handbook on European Law relating to asylum, borders and immigration, Edition 2020*, accessible at the following link: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-handbook-law-asylum-migration-borders-2020-ed\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-handbook-law-asylum-migration-borders-2020-ed_en.pdf)

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**ASPEKT PODMIOTOWY DYREKTYWY PARLAMENTU  
EUROPEJSKIEGO I RADY (UE) 2019/1937 Z DNIA 23 PAŹDZIERNIKA  
2019 ROKU W SPRAWIE OCHRONY OSÓB ZGŁASZAJĄCYCH  
NARUSZENIA PRAWA UNII – TZW. DYREKTYWY O OCHRONIE  
SYGNALISTÓW**

Nowy unijny akt normatywny - Dyrektywa Parlamentu Europejskiego I Rady (UE) 2019/1937 z dnia 23 października 2019 r. w sprawie ochrony osób zgłaszających naruszenia prawa Unii - zgodnie z przyjętymi postanowieniami powinna zostać implementowana do porządku krajowego państw członkowskich UE do połowy grudnia 2021r. Kluczowym zagadnieniem jawi się kwestia jej aspektu podmiotowego – kto i na jakich zasadach będzie podlegał ochronie prawnej w ramach nowo przyjętych rozwiązań normatywnych [1, 16]. Przez unijnego prawodawcę został opracowany enumeratywny katalog podmiotów, które w przypadku sygnalizacji nieprawidłowości będą mogły zostać objęte mechanizmami parasolowymi. Godzi się zauważyć, że przedmiotowa regulacja stanowi standard minimalny. Oznacza to, iż kraje członkowskie uprawnione są do rozszerzenia wypracowanego na szczeblu unijnym katalogu chronionych podmiotów. Decydującym o przyznaniu ochrony sygnaliście faktorem jest fakt, iż pozyskał on informacje o nieprawidłowościach w kontekście związanym z pracą [2, 430-434].

Kategorią, którą należy wskazać jako pierwszą określoną przez unijnego prawodawcę to grupa pracowników. Zgodnie z orzecznictwem Trybunału Sprawiedliwości Unii Europejskiej, taki status posiadają osoby wykonujące przez określony czas konkretne świadczenia w zamian za wynagrodzenie. Istotnym jest, że