Refugee Integration in European Human Rights Law and EU Law

A Right to be Integrated?

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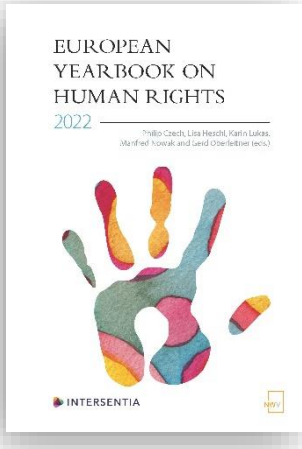

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REFUGEE INTEGRATION IN EUROPEAN HUMAN RIGHTS LAW AND EU LAW

A Right to be Integrated?

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* This contribution is based on my Master's thesis written within the Advanced Master programme in European and International Human Rights Law and completed under the supervision of Assoc. Prof. Moritz Jesse and Prof. Titia Loenen at Leiden University. I am grateful for their support throughout the process and beyond. However, the information and views set out in this contribution are those of the author and do not necessarily reflect the official opinion of any other affiliated party. Responsibility for the information and views set out therein lies entirely with the author.

ABSTRACT

Refugee integration is a highly politicised topic and is rarely analysed from a legal perspective. This contribution aims to address this gap by tracing the potential of the right to be integrated in legal terms, analysing its legal sources in European human rights law, and in European Union (EU, the Union) law, using a doctrinal method. It answers the question: is there a state obligation to provide integration support for refugees? And, alternatively, is there a right for refugees to be integrated? While such an acknowledgement has a high value from a practical perspective, to further the rights of refugees by legally obliging states to build inclusive societies in line with democratic values and principles, it is also important from the point of view of ensuring legal certainty. By being sensitised to the different uses and underlying principles of integration, judges could ensure a higher level of legal consistency in cases pertaining to integration. The contribution reveals that there is a right for refugees to be integrated which has its source in EU law. However, as it has not been invoked so far, the current analysis proposes an interpretation of that right in terms of both its content and level of protection.

1. INTRODUCTION

In recent years, the study of integration has come under a lot of criticism in social sciences, with critics disparaging the concept altogether due to its inherent bias towards imposing a vision of society ruled by majority and white-privilege power structures.[1] In response, other scholars have argued for the value of integration research, and for the need to distinguish between the analytic and policy concepts of integration, calling for a critical approach to the latter.[2] Integration remains a highly politicised topic and, as such, is rarely analysed from a legal perspective, as much as there is a need for such analysis.[3] Despite remaining a political concept, integration is often used in the case law both of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR), the two major supranational courts in Europe. However, it remains

1 W. Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production', (2018) 6(31), *Comparative Migration Studies*, p. 14. Schinkel focuses on the role of researchers of migrant integration as conscious or unconscious perpetuators of unequal power relations. He claims that the concept (and practice) of integration is 'purified both from notions of class and race', and that this aspect has the function of sustaining 'a classed and raced form of dominance that is less precisely called "native" or even "nativist" than "white"'.

2 R. Penninx, 'Problems of and Solutions for the Study of Immigrant Integration', (2019) 7(13), *Comparative Migration Studies*, p. 3.

3 For a recent example of such legal analysis, see S. Ganty, 'Integration Duties in the European Union: Four Models', (2021) 28(6), *Maastricht Journal of European and Comparative Law*, pp. 784–804.

a concept that lacks a legal definition. This contribution thus aims to offer an analysis of the concept of integration in European Union (EU, the Union) law and in European human rights law, needed for the purposes of ensuring better legal certainty and a consistent level of support for the integration of migrants, with a focus on refugees in the EU. It seeks an answer to the question: is there a state obligation to provide integration support for refugees? And, alternatively, is there a right for refugees to be integrated?

The research question above is prompted by the empirical fact that in many of the Central and Eastern European (CEE) countries, known as transit countries, there is no targeted integration support for refugees.[4] Not knowing the language or the institutional organisation of the host country, refugees are left to fend for themselves. Such an approach shifts the responsibility from the state entirely to those who are in need of support. While there are a number of human rights

[4] More specific examples include Hungary as the most radical example, but also Poland, Slovakia and Bulgaria. A common feature of the integration policies of these countries (as much as such policies formally exist) is that there is no specific targeted integration support for refugees and subsidiary protection holders (in the sense of Directive 2011/95/EU (see *infra* note 5)) provided by the state, or delegated by the state to non-governmental organisations (NGOs) or to other governance levels (such as regions, and municipalities). By targeted integration support, I refer to support services specifically tailored to meet the needs of a newly arrived foreign population with international protection needs that are different from the needs of nationals. Targeted integration activities include, but are not limited to, language classes provision, social orientation programmes, mediation with institutions, housing arrangements, provision of information, etc. Hungary terminated all integration support for beneficiaries of international protection as of June 2016. In 2018 the Hungarian government announced that all European funding for integration of migrants and refugees in 2019 would be frozen, and adopted a bill in Parliament to criminalise individuals and groups assisting irregular migrants and penalise NGOs receiving foreign funding. The situation in Poland is similar in that, in 2016, the Polish Ministry of Interior and Administration, responsible for disbursing the Asylum, Migration and Integration Fund (AMIF), started announcing calls for proposals for NGOs, with significant delays and annulment of bid results without justification, thus leaving NGOs and the migrants they are assisting in limbo. Other cases in point are Slovakia and Bulgaria, where targeted integration support is provided mostly by NGOs working on a project basis. For Hungary, see, among others, T. Hoffmann, 'Illegal Legality and the Façade of Good Faith – Migration and Law in Populist Hungary', (2022) 47, *Review of Central and East European Law*, pp. 142–153. For Poland, see, among others, M. Pachocka, K. Pędziwiatr, K. Sobczak-Szelc et al., 'Integration Policies, Practices and Experiences – Poland Country Report', Centre for Migration Research, University of Warsaw, 2020, pp. 20–24, available at https://www.migracje.uw.edu.pl/publikacje/integration-policiespractices-and-experiences-poland-country-report-2/, last accessed 31.03.2022. For Bulgaria, see, among others, E. Bratanova van Harten, 'Integration Impossible? Ethnic Nationalism and Refugee Integration in Bulgaria', in M. Jesse (ed.), *European Societies, Migration and the Law*: *The 'Others' amongst 'Us'*, CUP, Cambridge 2020, pp. 230–246. For Slovakia, see, among others, K. Behúnová and S. Obonová, 'Annual Report on Migration and Asylum in the Slovak Republic', Report of the National Contact Point of the European Migration Network for the Slovak Republic, 2021, pp. 48–57, available at https://ec.europa.eu/home-affairs/system/files/2022-01/slovak_republic_arm2020_part2_en.pdf, last accessed 31.03.2022. For more detailed information on the integration policies and contexts in the above countries, see the updated reports on the Asylum Information Database AIDA, ECRE, available at asylumineurope.org, last accessed 31.03.2022.

provisions that could facilitate integration, such as the right to employment, education, health care, housing or social welfare, it seems that states do not have any obligation to ensure the prerequisites for the enjoyment of these rights: at minimum, language courses and social orientation classes. Therefore, the aim of this contribution is to trace the potential of the right to be integrated in legal terms, analysing its legal sources in EU law and European human rights law.

In order to do so, section 2 presents an overview of the various perspectives on the legal concept of integration: a 'thin' socio-economic understanding of integration versus a 'thick' one based on an ethnic and cultural understanding of belonging. The following two sections offer a doctrinal analysis of the legal concept of integration under EU law (section 3), and in the case law of the ECtHR (section 4). The contribution concludes with a short discussion of the findings on whether one can speak of a right for refugees to be integrated in the EU legal order, and what its implications are.[5] In answering the research question, the contribution adopts a constructivist epistemic position to law, according to which law is constructed in the process of ongoing interaction between individuals and groups and ensuing institutions (which guarantee stability of the legal systems).[6] The norm formation/change process is the result

5 The focus on refugees is called for by their particular situation in many of the CEE countries, as explained above. However, it does not mean that the legal analysis focuses only on refugee-related case law. The reason for this methodological choice lies in the acknowledgement of the fluid relationship between refugees and migrants from both legal and practical perspectives. The legal matters relate to the fact that while refugee status under the Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954), (hereinafter 'Refugee Convention'), is declaratory, in practice states often withhold refugee rights pending the end of a refugee status determination procedure which grants the status. As a result, every refugee was a migrant prior to his/her recognition, or subsequent to the cessation of his/her international protection (if any). The practical matters refer to the local integration of refugees. On a local level, where integration takes place, municipalities generally do not distinguish between migrants and refugees, as their integration needs are largely the same. In the remainder of the contribution I use the term refugee as a generic term encompassing subsidiary protection holders falling under the scope of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), OJ L 337/9 (hereinafter 'Qualification Directive'), unless otherwise indicated. While, in principle, refugees may acquire the status of members of the families of EU citizens in the course of time, due to limitations this contribution does not draw inspiration from the concept of integration of EU citizens. For integration on a local level, see e.g. T. Caponio, O. Baucells and B. Güell, 'Civic Integration Policies from Below: Accounting for Processes of Convergence and Divergence in Four European Cities', (2016) 39(5), *Ethnic and Racial Studies,* pp. 878–895. For integration of EU citizens, see S. Ganty (2021), 'Integration Duties in the European Union', *supra* note 3, pp. 784–804.

6 More specifically, it follows Benhabib's approach, based on Habermasian discourse ethics, according to which the validity of norms and normative institutions stems from the agreement among all concerned in special argumentation situations called discourses. Through the concept of 'democratic iterations', she acknowledges the agency of the democratic majorities

of 'jurisgenerative politics', in which the demos is 'not only the *subject* but also the *author of its laws*'[7] From such a perspective, norms are not given, they are contested and constructed by polity members and, importantly, by institutions (and, more specifically, courts).

2. THE CONCEPT OF INTEGRATION

The aim of this contribution is not to coin yet another definition of integration. It is to identify the different concepts of integration as used by the CJEU and the ECtHR, and their underlying meaning. For this, I draw on a theoretical perspective that serves as a frame of reference for the understanding of the underlying meaning of integration, and which has its source in integration studies, as well as in the legal studies of integration. Firstly, I start from the three dimensions of integration suggested by Penninx: the legal/political, socio-economic and cultural/religious.[8] Secondly, and building on the above, I analyse the legal (and also political) aspects of integration through a socio-economic and cultural lens.

This approach is underpinned by Kymlicka's distinction between a 'thin' and a 'thick' concept of integration.[9] The two can be distinguished best by looking at the level at which integration is deemed achieved; namely, a socio-economic understanding of integration would imply that as long as a migrant is legally residing, economically active, has knowledge of the local language and the social organisation of the host society, and is able to participate in and contribute to it, integration is achieved. This is the 'thin' concept which corresponds to the first two elements of integration: legal status and participation.[10] According to the

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to mediate norms: S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, CUP, Cambridge 2004, p. 13. This approach has also been adopted by Costello. See also C. Costello, *The Human Rights of Migrants and Refugees in European Law*, OUP, Oxford 2016, p. 174.

7 S. Benhabib (2004), *The Rights of Others*, *supra* note 6, pp. 19–20 (emphasis in the original).

8 R. Penninx, 'Integration of Migrants: Economic, Social, Cultural and Political Dimensions', in M. Macura, A. MacDonald and W. Haug (eds.), *The New Demographic Regime: Population Challenges and Policy Responses*, UN, New York/Geneva 2005, pp. 137–152. The model was further elaborated in R. Penninx (2019), 'Problems of and Solutions for Integration', *supra* note 2, p. 5, where the author introduced, in addition, the three levels of interaction: individual, group and institutional.

9 W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed., OUP, Oxford 2002, p. 362: '[I]nsofar as immigrants and other ethnocultural minorities are pressured to integrate into the nation, the sort of socio-cultural integration which is required for membership in the nation should be understood in a "thin" sense, primarily involving institutional and linguistic integration, not the adoption of any particular set of customs, religious beliefs, or lifestyles. … Put another way, the conception of national identity, and national integration, should be a pluralist and tolerant one.'

10 By analogy with the concept of citizenship, integration means a status which gives rights, participation (not only political, but also socio-economic) and identity. See L. Bosniak,

'thick' concept, integration is primarily understood as belonging. It demands that, on top of the socio-economic participation and contribution, migrants should forsake part of their identities and cultural beliefs and practices, in order to be seen as belonging to society. This aspect sums up the identity component of integration.

Importantly, this distinction is a main predictor between inclusive and exclusive integration legislation and policies. In addition, previous research on the legal concept of migrant integration in EU law has identified a trend towards exclusive policies.[11] Groenendijk established the existence of two perspectives on the relationship between law and integration in EU law: (1) integration as refusal of admission to the country, or as immigration control; and (2) integration as a secure legal status and equal treatment.[12] The third concept that he identified, integration as a requirement for naturalisation, is more common in national policies, and in European human rights law.[13] The integration policies based on the first concept, which has been prevalent in the past two decades,[14] have been called 'illiberal practices in liberal regimes'.[15] According to commentators, integration is used by the state as an identity policy tool which allows it to determine who belongs to its imagined national community,[16] thus retaining control on the nation, and preventing the 'erosion of the bond of citizenship'.[17]

Since the main aim of the right to be integrated is to contribute to the maintenance of inclusive societies based on democratic values, it must be framed in 'thin', socio-economic terms. Therefore, in the remainder of the contribution I distinguish between 'thin' and 'thick' integration concepts in the analysis of the legislation and case law pertaining to migrant and refugee integration, in order to strictly delineate the scope of the right to be integrated in a way that avoids the

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'Status Non-Citizens', in A. Shachar, R. Bauböck and I. Bloemraad et al. (eds.), *The Oxford Handbook of Citizenship*, OUP, Oxford 2017, p. 317.

11 E. Guild, K. Groenendijk and S. Carrera, 'Understanding the Contest of Community: Illiberal Practices in the EU?', in E. Guild, K. Groenendijk and S. Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration*, Routledge, Oxford 2009, pp. 1–2.

12 K. Groenendijk, 'Legal Concepts of Integration in EU Migration Law', (2004) 6, *European Journal of Migration and Law*, p. 113.

13 For national policies and practices, see Y. Pascouau, 'Mandatory Integration Schemes in the EU Member States: Overview and Trends', in Y. Pascouau and T. Strik (eds.), *Which Integration Policies for Migrants? Interaction Between the EU and its Member States*, Wolf Legal Publishers, Nijmegen 2012, pp. 129–140.

14 Cf. C. Joppke, 'Civic Integration in Western Europe: Three Debates', (2017) 40(6), *West European Politics*, p. 1156, who questions this prevalence in light of the development of inclusive local integration policies.

15 See E. Guild, K. Groenendijk and S. Carrera (2009), 'Understanding the Contest of Community: Illiberal Practices in the EU?', *supra* note 11, p. 3.

16 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso Books, London 1983.

17 See E. Guild, K. Groenendijk and S. Carrera (2009), 'Understanding the Contest of Community: Illiberal Practices in the EU?', *supra* note 11, p. 16.

pitfalls of advocating for a right that could potentially be used for the purpose of excluding those whom it was originally meant to benefit.

3. REFUGEE INTEGRATION IN THE EU

3.1. EU COMPETENCE IN THE AREA OF REFUGEE INTEGRATION

Tracing the roots of the right to be integrated requires starting from the analysis of EU law where one finds the most explicit reference to this right, specifically Article 34 of the Qualification Directive:

> In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.

This means that the EU has competence to legislate, and enforce legislation, in the area of refugee integration. These powers depend on the level of that competence: whether it is exclusive, shared or limited to support and coordination.[18] There seems to be some ambiguity about the type of competence the EU has in the area of refugee integration.[19] The reason for this is that, according to Article 79(4) Treaty on the Functioning of the European Union (TFEU), the EU has the competence to 'establish measures to provide *incentives and support* for the action of Member States with a view to promoting the integration of third-country nationals residing legally on their territories, *excluding any harmonisation* of the laws and regulations of the Member States'.[20] However, the Qualification Directive, the main asylum instrument containing refugee integration measures,[21] is a constituent element of the Common European Asylum System (CEAS), which is set up on the basis

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18 Consolidated Version of the Treaty on the Functioning of the European Union, 2012 OJ C 326/47, Articles 3, 4, 6 (hereinafter 'TFEU').

19 H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, Leiden 2006, p. 145, p. 156, who, on the basis of his interpretation of Article 61(a)(b) TEC in conjunction with Article 63 TEC, concludes that the legal basis for the standards for 'secondary rights' of refugees, as he calls the content of international protection, must fall under the scope of Article 63(3)(a) TEC (replaced by Article 79(4) TFEU), where the legal migration matters fall. See also Consolidated Version of the Treaty Establishing the European Community, 2002 OJ C 325/33 (hereinafter 'TEC').

20 Article 79(4) TFEU, author's emphasis.

21 In addition to the Qualification Directive, it should be pointed out that Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection (Recast), OJ EU L 180/96 also contains a number of integration-related provisions regulating access to education, work and health care for asylum seekers. While I agree that integration does not start upon granting

of Article 78(1)(2) TFEU, whereby the EU has shared competence with Member States (MS).[22] This distinction is by no means insignificant, because, based on which of these provisions the matter of refugee integration falls under, the right of refugees to be integrated contained in Article 34 of the Qualification Directive would leave more or less leeway to MS in implementing it. Furthermore, it certainly has implications with regard to the level of harmonisation of refugee integration policies throughout the EU.

3.2. SOURCES OF EU LAW ON REFUGEE INTEGRATION

3.2.1. EU Law and the Refugee Convention

Costello sees the CJEU as a 'refugee law court' with a 'far-reaching role', albeit with a limit.[23] The reason for such a claim is rooted in both primary and secondary EU legislation. Already, back at the inception of the CEAS, the Tampere Milestones[24] contained a reference to the Refugee Convention,

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international protection, my focus, in the right to be integrated, is on the comprehensive set of measures due to the refugee upon the provision of a stable legal status.

22 Article 78(1) TFEU: 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.' See also Article 4(2)(j) TFEU. The distinction between migration and asylum policies in EU law can be explained historically. Initially, the European Community's interest in asylum law was a side effect of its ambition to establish free movement of persons within the Community. With the establishment of a common internal market with the Single European Act of 1986, which introduced 'an area without internal frontiers', there was a shift of control towards the external borders of the community. This made the issue of entry of third country nationals (TCNs) 'a matter of common concern'. It was the Treaty of Amsterdam of 1997 which introduced the competence of the European Community to adopt policies in the area of freedom, security and justice, where asylum and migration issues are located. While 'immigration and asylum [were] part of a comprehensive approach and often developed in parallel',[22] it seems that the Tampere Milestones of 1999 have contributed to the separation between migrant and refugee integration, thus assigning refugee integration to the area of asylum. Ever since, a set of policies on legal migration have been developed, and a separate set of policies have constituted the CEAS. See H. Battjes (2006), *European Asylum Law and International Law*, *supra* note 19, p. 26; and H. Urth, 'Building a Momentum for the Integration of Third-Country Nationals in the European Union', (2005) 7, *European Journal of Migration and Law*, p. 163.

23 C. Costello (2016), *The Human Rights of Migrants and Refugees*, *supra* note 6, p. 174.

24 Council of the European Union, *Presidency Conclusions, Tampere European Council, 15–16 October 1999*, 16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm, last accessed 31.03.2022. The Conclusions revolved around four main elements: (1) development of partnerships with countries of origin; (2) a Common European Asylum System (CEAS) in compliance with the Refugee Convention and other international law; (3) fair treatment of TCNs, aiming at equating the rights and obligations of TCNs as far as possible to those of nationals in the respective host countries; and (4) management of migration flows including fighting trafficking in human beings, through strict border and visa controls.

which was later introduced in Article 63 TEC.[25] This important link has been preserved in Article 78 TFEU, and has been further strengthened in Article 18 (right to asylum) of the CFREU,[26] proclaimed in 2000 and introduced as a source of EU law in the TFEU in 2009. Furthermore, all CEAS instruments contain a reference to the Refugee Convention in their preambles,[27] and the Qualification Directive takes this link one step further by acknowledging that '[t]he Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees'.[28] On the basis of the above, it becomes easy to see how the CJEU may be seen as a surrogate court, in view of the fact that the Refugee Convention has no enforcement body of its own. The CJEU has held that the Qualification Directive 'must … be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU'.[29]

The case of *Alo and Osso* provides guidance on how the CJEU interprets the Qualification Directive in light of the Refugee Convention.[30] The CJEU had to interpret the right to freedom of movement within the MS, enshrined in Article 33 of the Qualification Directive. Despite the personal scope of the Refugee Convention encompassing refugees, and not subsidiary protection holders, the CJEU accepted that the Refugee Convention should be used as a source of interpretation of the content of international protection for both categories.[31] Furthermore, Article 33 of the Qualification Directive does not distinguish between the rights of refugees and subsidiary protection holders, which means that the interpretation of Article 26 of the Refugee Convention, corresponding to Article 33 of the Qualification Directive, applies to both categories of beneficiaries of international protection.

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25 Article 63 TEC, para. 4: 'The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'.

26 Charter of Fundamental Rights of the European Union, 2012 OJ C 326/391, Art. 18 (hereinafter 'CFREU').

27 Qualification Directive, Recitals 3 and 24. See also Recital 23: 'Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.'

28 Ibid., Recital 4.

29 CJEU (ECJ), *Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, Case C-364/11, 19.12.2012, ECLI:EU:C:2012:826, para. 43. See also CJEU (ECJ), *Bolbol v Bevándorlási és Állampolgársági Hivatal*, Case C-31/09, 17.06.2010, ECLI:EU:C:2010:351, para. 38. However, the CJEU does not have the jurisdiction to directly interpret the Refugee Convention, as a German Court requested in *Qurbani*: CJEU (ECJ), *Mohammad Ferooz Qurbani*, Case C-481/12, 17.07.2014, ECLI:EU:C:2012:2101, para. 28.

30 CJEU (ECJ), *Alo and Osso v Region Hannover*, Joined cases C-443/14 and C-444/14, 01.03.2016, ECLI:EU:C:2016:127.

31 Ibid., para. 32.

Article 34 of the Refugee Convention is the corresponding provision to Article 34 of the Qualification Directive.[32] Like Article 33, its content does not distinguish between the rights of refugees and beneficiaries of international protection. Therefore, it can be foreseen that in future cases pertaining to the right to integration facilities under Article 34 of the Qualification Directive, the CJEU ought to interpret Article 34 of the Refugee Convention by analogy with *Alo and Osso*.

Although Article 34 of the Refugee Convention is too weak to ensure a substantive right,[33] it is indicative of the need for an extra step on the part of state parties before refugees can naturalise and become legally equal to citizens, on top of all of the other rights enshrined therein.[34] In this sense, Article 34 can be regarded as a nascent right to be integrated,[35] for three reasons: (1) it introduces the need for extra effort on the part of states to facilitate the integration of refugees beyond the available set of civil and socio-economic provisions forming the content of international protection stipulated in the Refugee Convention; (2) it provides some guidance on the content of this right, by distinguishing it from the other provisions that could facilitate refugee integration, such as the rights to employment, education, social welfare, health care, etc.; (3) it cautions against forceful change of identity through assimilation/integration.[36] All these

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32 Article 34 Refugee Convention: 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

33 J. Hathaway, *The Rights of Refugees under International Law*, CUP, Cambridge 2005, pp. 237–238 and p. 981.

34 This position disagrees with Hathaway when he says that 'local integration is not really distinguishable from the primary solution envisaged by the Refugee Convention, namely simple respect for refugee rights. That is, the rights which are said to be the hallmarks of the solution of local integration are essentially the same rights which actually accrue by virtue of refugee status itself.' (ibid., p. 978). See also C. Murphy, *Immigration, Integration and the Law: The Intersection of Domestic, EU and International Legal Regimes*, Ashgate, Farnham 2013, who follows Hathaway.

35 A. Grahl-Madsen, *Commentary on the Refugee Convention 1951 Articles 2–11, 13–37*, UNHCR, New York/Geneva 1997, available at http://www.unhcr.org/3d4ab5fb9.pdf, last accessed 31.03.2022: 'Article 34 is in fact the laying of foundations, or stepping stones, so that the refugee may familiarize himself with the language, customs and way of life of the nation among whom he lives, so that he – without any feeling of coercion – may be more readily integrated in the economic, social and cultural life of his country of refuge. Language courses, vocational adaptation courses, lectures on national institutions and social pattern, and above all stimulation of social contacts between refugees and the indigenous population, are but some of the means which may be employed for the purpose.' This interpretation is corroborated by UN Executive Committee 56th Session, Conclusion on Local Integration No. 104 (LVI), UN Doc. A/AC.96/1021, 2005.

36 The drafting history of the Refugee Convention shows that the term 'assimilation' was not meant to connote with its 'usual meaning of loss of the specific identity of the persons'. See R. Marx, 'Administrative Measures, Article 34', in A. Zimmermann, F. Machts and J. Dorschner (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, OUP, Oxford 2011, pp. 1148–1149.

need to be kept in mind for the analysis of the right to be integrated in EU law, as the Refugee Convention is an important source of law for refugee-related matters.

3.2.2. EU Law and Fundamental Rights

Unlike the ECtHR, the CJEU has largely only been seen as a human rights adjudicator since the CFREU was introduced, in Article 6 TEU, as a primary source of EU law in 2009.[37] In addition to the CFREU, '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.[38] However, with regard to MS' legislation, this shall be the case 'only when they are implementing Union law'[39] Further, Article 52(3) of the CFREU explicitly provides that Union law may provide more extensive protection than the European Convention on Human Rights (ECHR).[40] This is not surprising, having in mind that the CFREU, unlike the ECHR, is a compilation of both civil-political and socio-economic rights.[41]

Instead of being the only reason for the increasing role of the CJEU as a human rights court, the proclamation of the CFREU can be seen as having a multiplier effect within a combination of developments which led to that effect. The scope of the Court's jurisdiction expanded to other areas of law and policy-making upon the adoption of the Lisbon Treaty in 2009, most importantly in the area of asylum by repealing Article 68 TEC, pursuant to which there was a limitation on requests for preliminary rulings by national courts in the area of freedom, security and justice.[42]

This transformative potential of the CFREU in integration-related cases has worked both ways. For example, in *Kamberaj*, the CJEU relied on Article 34 CFREU for the interpretation of the meaning of 'housing benefit' as a 'core benefit' in the sense of Article 11(4) of the Long-Term Residence Directive, thus

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37 Consolidated Version of the Treaty on European Union, Article 2, 2012 OJ C 326/13, Article 6 (hereinafter 'TEU'). See G. Du Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', (2011) 105, *American Journal of International Law*, pp. 649–693, for an alternative narrative on the place of human rights in the history of the EU.

38 Article 6(3) TFEU.

39 Article 51(1) CFREU. See also CJEU (ECJ), *Åklagaren v Åkerberg Fransson*, Case C-617/10, 26.02.2013, ECLI:EU:C:2013:105, para. 21.

40 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950) ETS 5 (hereinafter 'ECHR').

41 Articles 27–38 CFREU.

42 Article 68 TEC; G. Du Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator', (2013) 20, *Maastricht Journal of European and Comparative Law*, p. 170.

broadening the scope of rights of third-country nationals (TCNs).[43] In other cases, the CJEU has disregarded the possibility for the CFREU to provide a higher level of protection, as long as the provision at hand complied with the human rights standards contained in the ECHR.[44] In such cases it usually affords the states a limited margin of appreciation, 'which is no different' from that accorded to them by the ECHR.[45]

Regardless of the inconsistent application of the CFREU by the CJEU,[46] Article 18 CFREU on the right to asylum retains its strong potential to support the right to be integrated, as the interpretation of 'asylum', read in conjunction with Article 78(1) TFEU, includes the right to a durable solution.[47] This durable solution, in our case local integration, is an essential aspect of the 'appropriate status' that should be offered to TCNs in need of international protection as per EU primary legislation.[48]

3.3. REFUGEE INTEGRATION UNDER THE QUALIFICATION DIRECTIVE

In order to answer the question about whether Article 34 of the Qualification Directive imposes a positive obligation on MS to provide integration support to refugees, this section first traces the historical development of the provision for the purposes of its historical interpretation. This is followed by a suggestion for a literal, and schematic and teleological interpretation of Article 34.

The first Qualification Directive was adopted within the Tampere Programme, as part of the CEAS, back in 2004.[49] It established the complementary or subsidiary form of international protection which is based on human rights law, especially the case law on the prohibition of torture enshrined in Article 3 ECHR.[50] The Directive sets two main objectives: (1) 'to ensure that Member States

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43 CJEU (ECJ), *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano et al.*, Case C-571/10, 24.04.2012, ECLI:EU:C:2012:233, paras. 78–80. See also Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who Are Long-Term Residents, OJ EU L 16/44 (hereinafter 'Long-Term Residence Directive').

44 CJEU (ECJ), *Parliament v Council*, Case C-540/03, 27.06.2006, ECLI:EU:C:2006:429; Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, OJ EU L 251/12 (hereinafter 'Family Reunification Directive').

45 CJEU, *Parliament v Council*, *supra* note 44, para. 62. For criticism of this approach, see C. Costello, *The Human Rights of Migrants and Refugees* (2016), *supra* note 6, p. 157.

46 G. Du Búrca (2013), 'After the EU Charter of Fundamental Rights', *supra* note 42.

47 H. Battjes (2006), *European Asylum Law and International Law*, *supra* note 19, p. 112.

48 Art. 78(1) TFEU.

49 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, OJ EU L 304/12 (hereinafter 'first Qualification Directive').

50 European Commission, Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, COM(2001) 510 final, 12.09.2001, p. 5.

apply common criteria for the identification of persons genuinely in need of international protection'; and (2) 'to ensure that a minimum level of benefits is available for these persons in all Member States'.[51] These are necessary in order to 'limit the secondary movements of applicants for asylum between Member States where such movement is purely caused by differences in legal frameworks'.[52]

The then adopted provision on integration facilities read as follows: 'In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes'.[53] While it maintained a strong obligation for states to 'facilitate the integration of refugees',[54] it did not give clarity on the content of this facilitation. Neither did it reveal the content of the alternative of 'creat[ing] pre-conditions which guarantee access' to already existing and/or alternative programmes.

Tracing the changes between the Commission's proposal and the adopted text helps fill in some of the gaps. The suggested by the Commission Article 31(1) was much more concrete and imposed a strong obligation on MS: 'In order to facilitate the integration of refugees into society, Member States shall make provision for specific support programmes tailored to their needs in the fields of, *inter alia*, employment, education, healthcare and social welfare'. In the commentary on the proposed Article, the Commission explains that Article 31 codifies existing practices in most MS.[55] It further states that it 'believes that it is necessary to provide specific support for disadvantaged groups, including many refugees, rather than only allowing them equal access into mainstream employment and education opportunities'.[56] Such support could include individual plans for employment and education, language courses, training courses, measures to promote self-maintenance, events to provide an introduction to the history and culture of the MS, and joint events with nationals of the MS to 'promote

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51 *Supra* note 49, Recital 6 first Qualification Directive.

52 Ibid, Recital 7 first Qualification Directive. For the same reason, it aimed at an 'approximation of rules on the recognition of refugee and subsidiary protection status'. Nonetheless, differential treatment between refugees and subsidiary protection holders was retained with regard to a number of rights, including access to integration. It has been extensively criticised by civil society and academia. However, the differential treatment provisions were held on to by Member States, and can be seen as compromises in order for the Directive to be adopted: J. McAdam, 'The Qualification Directive: An Overview', in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, Nijmegen 2007, pp. 24–27.

53 *Supra* note 49, Article 33(1) first Qualification Directive.

54 One could also claim that the imposed obligation is not that strong, as it does not refer directly to integration, but to a facilitation of integration. However, compared to other integration-related provisions, this one is still much stronger.

55 European Commission, COM(2001) 510 final, *supra* note 50, p. 33. This must have been the case at the time of adoption, as ten Member States joined the EU in 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia; and Bulgaria and Romania joined in 2007.

56 Ibid.

mutual understanding'.[57] The fact that a separate provision on integration was retained in the final version of the Directive altogether supports a general understanding that, if the Directive is to meet its objectives, an extra effort is required from states to facilitate the inclusion of the newcomers.

In 2009, the Commission proposed an amended version of the Directive which aimed at ensuring 'higher protection standards' and their 'further harmonisation in order to reduce secondary movements'.[58] In its section on the content of international protection, it proposed to a large extent equal rights between refugee and subsidiary protection holders. As regards integration, its proposition was that 'Member States shall ensure access to' appropriate integration programmes. It suggested the introduction of Article 34(2), which recommended that '[t]hese integration programmes could include programmes and language training tailored as far as possible to the needs of beneficiaries of international protection'.[59] While the Council agreed with the general aim of increasing the protection standards, and hence with the trend to approximate the rights of refugees and subsidiary protection holders, it rejected the proposed Article 34(2), keeping the final provision in the recast Qualification Directive of 2011 relatively vague regarding the content of integration.[60] The main reasons for a more wary approach on the part of some MS are, 'in particular [related] to the possible costs involved and the risk that beneficiaries of international protection might receive better treatment than own nationals', suggesting a reserved stance towards harmonisation in the area of socio-economic rights.[61]

The recast Qualification Directive of 2011 retained the two main objectives of its predecessor, and in the area of integration sought to compensate for the vagueness on the scope of integration support contained in its operative part by adding some clarification in Recital 47 of its preamble:

> The specific needs and particularities of the situation of beneficiaries of refugee status and of subsidiary protection status should be taken into account, as far as possible, in the integration programmes provided to them including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned.

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57 Ibid., p. 34.

58 Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Convent of the Protection Granted, COM(2009) 551 final, 21.10.2009, p. 5.

59 Ibid., p. 42–43.

60 Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (Recast), 2009/0164 (COD), 11.03.2011, p. 61. See also S. Peers, 'Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive', (2012) 14, *European Journal of Migration and Law*, p. 217.

61 Council of the European Union, *supra* note 60, p. 1.

On the basis of the above chronological overview, a historical interpretation of Article 34 calls for a close reading of the integration provisions contained in the Qualification Directive and Article 34 of the Refugee Convention, in that integration is a combination of mainstream measures in the areas of, *inter alia*, employment, education, social welfare, housing and health care (the content of international protection), and targeted provisions, such as language and vocational training (including recognition of qualifications), and orientation in the history, culture and organisation of the host society. The historical interpretation thus suggests a reference to international refugee law, as manifested in the case of *Alo and Osso* analysed above.

A literal interpretation of Article 34 supports a strong obligation of a broad material scope, giving leeway to MS in deciding on its content. This interpretation is limited, though, by the qualification of integration programmes 'so as to take into account the specific needs' of beneficiaries of international protection. This creates an obligation for states to know what these needs are in the first place. That would mean that MS would be in breach of their obligations unless they take not just any measures, but 'appropriate' measures to facilitate refugee integration. The assessment of appropriateness will necessarily entail an assessment of the general principle of effectiveness. According to this principle, '[i]f in a specific case Community legislation on asylum procedures does not apply, domestic rules that bar application of European asylum law must be tested against the effectiveness principle'.[62] The principle of proportionality is a natural correlate to the principle of effectiveness. Firstly, the test calls for an examination of the objectives and the context of the Directive.[63] Secondly, it asks if the means used under domestic law to achieve those objectives are no more than those which are appropriate and necessary to achieve that end.[64] The literal interpretation, then, also suggests a high chance of incompliance with EU law of national legislation such as that in Hungary or Bulgaria, where refugees are granted equal rights with nationals, but no additional integration support.[65]

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62 H. Battjes (2006), *European Asylum Law and International Law*, *supra* note 19, p. 536. See also CJEU, *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano et al.*, *supra* note 43, para. 78.

63 D. Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109*, Brill/Nijhoff, Leiden 2011, p. 211.

64 Ibid., p. 212.

65 For Hungary, see EASO, 'Description of the Hungarian Asylum System', 2018, p. 20, available at https://euaa.europa.eu/sites/default/files/public/Description-of-the-Hungarian-asylum-system-18-May-final.pdf, last accessed 02.06.2022; §10 and §17 Act LXXX of 2007 on Asylum, stipulating that refugees and beneficiaries of subsidiary protection have the same rights as those of Hungarian citizens with a few exceptions, including the right to vote and to hold an office for which Hungarian citizenship is required. For Bulgaria, see E. Bratanova van Harten (2020), 'Integration Impossible?', *supra* note 4, p. 239; Ordinance on the Terms and Conditions for Conclusion, Implementation and Termination of Integration Agreements with Foreigners Granted Asylum or International Protection of 25.07.2017, §1(3) Supplementary

Finally, a schematic and teleological interpretation of Article 34 is also necessary under an effectiveness test. We saw that the Directive has two main objectives, both aimed at the harmonisation of asylum systems and the provision of a minimum level of benefits in order to prevent secondary movements. This interpretation supports the previous two interpretations by reconfirming the importance of targeted integration measures in addition to the mainstream components of integration, as well as a strong obligation for MS to ensure access to such targeted integration measures in anticipating that a harmonisation in the area of refugee integration will significantly reduce the need for 'forum shopping' for asylum seekers and beneficiaries of international protection in a number of Western European states. It also strengthens the interconnectedness between the qualification of a person as being in need of international protection and the content of this protection, making it hard to distinguish between the two, and rendering a claim for a differential competence of the EU in the area of refugee integration harder to sustain.

If the above interpretation of Article 34 Qualification Directive supports a right for refugees to be integrated, it is necessary to ask whether refugees can invoke this right in national courts. In order for a provision of EU law to have direct effect – that is, to be claimed directly before national courts – it needs to meet, cumulatively, two criteria: that it is both 'sufficiently precise' and 'unconditional'.[66] While the previous sections show that, unlike in refugee law, there is a strong and unconditional obligation for MS to 'ensure access to [appropriate] integration programmes', the scope of these programmes remains vague. However, 'ambiguous or vague wording does not necessarily bar a provision from being directly effective, for the ambiguity may be solved by interpretation'.[67] Unlike in the area of refugee integration, there is plenty of case law in the area of legal migration that may serve as a source for interpretation in future cases where refugee integration issues are at stake in the framework of the Qualification Directive. The analogous interpretation by horizontal cross-referencing between various legal instruments on integration is not a new phenomenon, and has been observed in a number of CJEU cases.[68] This approach makes the analysis of the jurisprudence of the CJEU indispensable for the purpose of a study on the topic of integration.

provisions, which stipulates that '[t]he access to the available integration possibilities … is provided under the terms and conditions for Bulgarian citizens' (unofficial translation).

66 H. Battjes (2006), *European Asylum Law and International Law*, *supra* note 19, p. 540.

67 Ibid.

68 K. Groenendijk, 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach', (2014) 16, *European Journal of Migration and Law*, pp. 329–330.

3.4. SCOPE AND LIMITATIONS OF THE RIGHT TO BE INTEGRATED IN EU JURISPRUDENCE

3.4.1. The Socio-Economic Concept of Integration

In the interpretation of similar legal concepts, the CJEU strives to ensure coherence within the fragmented EU legislation on migration and integration.[69] Since both the Family Reunification Directive and the Long-Term Residence Directive contain provisions on integration conditions and integration measures, the bulk of cross-referencing takes place between cases interpreting provisions thereof. Bilateral and multilateral agreements between the EU and third countries fall within the scope of above Directives, so far as the agreements do not offer a higher level of protection.[70] Thus, the case law on integration-related matters concerning Turkish citizens under the EEC–Turkey Association Agreement of 1963 adds an important layer to the analysis.[71]

The socio-economic concept of integration has already been confirmed in the European Court of Justice (ECJ) case law back in 1987 when MS challenged the competence of the Commission to collect information from them on their draft measures and agreements concerning workers from non-MS and their family members on 'the promotion of integration into the workforce, society and cultural life'.[72] The then Court of Justice of the European Communities held that, '[t]he promotion of the integration into the workforce of workers from non-member countries must be held to be within the social field … in so far as it is closely linked to employment', and therefore fell within the Competence of the Commission.[73] However, it also stated that the cultural aspects of integration were not related to employment, and hence fell outside of the Commission's competence.[74] What that means is not that there are no cultural elements to integration, but that these elements were considered to fall outside the competence of MS.

Even though there is no definition of the scope of integration in any of the relevant legal instruments, the need to define it arose soon after the adoption of the Family Reunification Directive, in the case of *Parliament v Council*.[75]

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69 Ibid., p. 329.

70 *Supra* note 44, Article 3(4)(a) Family Reunification Directive; *supra* note 43, Article 3(3)(a) Long-Term Residence Directive.

71 Agreement Establishing an Association Between the European Economic Community and Turkey, signed at Ankara, 12 September 1963, OJ EU L 361/1 (hereinafter 'EEC–Turkey Association Agreement').

72 CJEU (ECJ), *Germany, France, Netherlands, Denmark and United Kingdom v Commission*, Joined Cases C-281, 283, 284, 285 and 287/85, 09.07.1987, ECLI:EU:C:1987:351, para. 2.

73 Ibid., para. 21.

74 Ibid., para. 36.

75 CJEU (ECJ), *Parliament v Council, supra* note 44.

The socio-economic concept of integration that can be discerned in *Parliament v Council* concerns the situation of the sponsor. In its defence of the waiting period of between two to three years from the beginning of the legal stay before the sponsor is allowed to have his/her family member join him/her as per Article 8 of the Family Reunification Directive, the Council claimed that such a period of time:

> [P]ursues a legitimate objective of immigration policy, namely the effective integration of the member of the family in the host community, by ensuring that family reunification does not take place until the sponsor has found in the host State a solid base, both economic and domestic, for settling a family there.[76]

This approach implies that: (1) integration happens by itself naturally with the passage of time (two to three years); and (2) once the sponsor can provide evidence that (s)he is in possession of appropriate accommodation, comprehensive sickness insurance for all family members and stable and regular resources, as required under Article 7 of the Family Reunification Directive, the joining family members will be able to 'display a certain level of integration'.[77]

An interpretation of integration framed in socio-economic terms has been common in the CJEU case law on legal migration. This is noticeable in the case of *Dülger*.[78] As the CJEU held, the concept 'members of the family' must be interpreted within the context of and in terms of the objective EU law pursues: firstly, it is the idea that having family members reunite with a Turkish worker, 'who is already legally integrated in the host Member State', furthers his/her employment and residence; and, secondly, after three years of residence in the host state, allowing the family member(s) of the Turkish worker to have access to the labour force 'seeks to deepen the lasting integration of the Turkish migrant worker's family', finally promoting 'social cohesion in the society concerned'.[79] The focus is on the working migrant whose economic integration is enhanced by family reunification. Recently, this line of reasoning was further developed in *Khachab*, and in *Sidika Ucar and Recep Kilic*.[80]

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76 Ibid., para. 95.

77 One cannot help but note that this concept of integration is the opposite of the objective of family reunification contained in Recital 4 of the Family Reunification Directive: 'Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.'

78 CJEU (ECJ), *Dülger v Wetteraukreis*, Case C-451/11, 19.07.2012, ECLI:EU:C:2012:504.

79 CJEU, *Dülger v Wetteraukreis, supra* note 78, paras. 37, 39, 40 and 42.

80 CJEU (ECJ), *Khachab v Subdelegación del Gobierno en Álava*, Case C-558/14, 21.04.2016, ECLI:EU:C:2016:285, para. 48; and CJEU (ECJ), *Sidika Ucar and Recep Kilic*, Joined Cases C-508/15 and C-509/15, 21.12.2016, ECLI:EU:C:2016:986, para. 68.

As a result of increasing socio-economic requirements for sponsors, family reunification has practically become a privilege for those who can afford it, and not a means for integration. The CJEU established some limits to the economic requirements in *Chakroun*.[81] That case concerned the economic situation of a sponsor. The CJEU ruled that EU law precludes MS from restricting family reunification to an extent that would undermine the objective – namely, to promote family reunification – and the effectiveness of the Directive.[82] The reasoning of the CJEU in this case has been heralded by academics as a 'bold ruling',[83] especially taking into account its potential to be followed in interpreting the limits to the MS' leeway in determining the scope of integration conditions and integration measures.[84] Without reference to *Chakroun*, *Commission v Netherlands* limited the amount of the charges levied on TCNs and their family members for the issuance of long-term residence permits within the provisions of the Long-Term Residence Directive, also based on the principles of effectiveness and proportionality.[85]

3.4.2. Integration Measures and Integration Conditions: The Cultural Concept of Integration

In addition to the socio-economic understanding of integration in *Parliament v Council*, the CJEU held that an integration condition requires the proof of a 'minimum level of capacity for integration' before any further integration could begin.[86] This implies either that there are people who are deemed 'non-integrable', and that such circumstance is the result of a personal deficiency for which they are responsible themselves, or that states have an obligation to create conditions that could in practical terms allow such 'deficient' people to

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81 CJEU (ECJ), *Chakroun v Minister van Buitenlandse Zaken*, Case C-578/08, 04.03.2010, ECLI:EU:C:2010:117. See D. Arcarazo (2011), '*The Long-Term Residence Status*', *supra* note 63, p. 222. He poses the question whether it is possible to argue that practices which consider that, to be integrated, TCNs and their family members should earn a particular amount of money per year, could constitute direct discrimination on grounds of social origin.

82 CJEU (ECJ), *Chakroun v Minister van Buitenlandse Zaken*, *supra* note 81, paras. 43 and 45.

83 See C. Costello (2016), *The Human Rights of Migrants and Refugees*, *supra* note 6, p. 106.

84 S. Mullaly, 'Migration Law and Civic Integration in Europe: Reflecting on Mandatory Integration Requirements Following *Chakroun*', in Y. Pascouau and T. Strik (eds.), *Which Integration Policies for Migrants? Interaction Between the EU and its Member States*, Wolf Legal Publishers, Nijmegen 2012, p. 144. For additional innovative elements of *Chakroun*, including its reference to the situation of EU citizens and their family members, see A. Wiesbrock, 'The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken*', (2010) 6, *European Constitutional Law Review*, pp. 462–480.

85 CJEU, *Commission v Netherlands*, Case C-508/10, 26.04.2012, ECLI:EU:C:2012:243, paras. 73, 75 and 79.

86 CJEU, *Parliament v Council*, *supra* note 44, para. 68.

overcome their unfavourable situations.[87] The CJEU ascertained that, despite the lack of a definition of the concept of integration, its interpretation by MS is limited by fundamental rights and general principles of Community law.[88] However, it further posited that a condition for integration 'has the general objective of facilitating the integration' of TCNs,[89] and that it is compatible with the right to family and private life enshrined in Article 8 ECHR, as 'the necessity for integration may fall within a number of the legitimate objectives referred to in Article 8(2) of the ECHR'.[90] This line of reasoning has been continued in the subsequent case law on the interpretation of 'integration measures' and 'integration conditions', both of which represent a more culturally imbued concept of integration.

The first opportunity to tackle the issue of 'integration measures' and 'conditions' arose in the case of *Dogan*,[91] where the CJEU decided to limit its reasoning to entirely socio-economic matters under the EEC–Turkey Association Agreement. Regardless, in his opinion, Advocate General Mengozzi elaborated on whether MS were allowed to reject an application for family reunification on the basis of a failure of a family member to pass a language test abroad.[92] In order to answer the above question, he had to clarify the scope of the notion of 'integration measures'. Following *Chakroun*, Advocate General Mengozzi interpreted the scope of 'integration measures' alongside the concept of 'integration conditions' contained in the Long-Term Residence Directive.[93] Conducting a historical analysis of the choice of one or the other term in the process of drafting the Long-Term Residence Directive, he came to the conclusion that 'it is none the less clear that "integration measures" must be regarded as less onerous than "integration conditions"'.[94] A systematic interpretation of Article 7 of the Family Reunification Directive pointed him to the assertion that 'integration measures … cannot pursue the aim of *selecting* the persons who

87 Ganty refers to the first model as the selective model, and to the second as the activation model, and identifies them as the most common ones applied to TCNs: S. Ganty (2021), 'Integration Duties in the European Union', *supra* note 3, pp. 798–803.

88 CJEU, *Parliament v Council*, *supra* note 44, para. 70.

89 Ibid., para. 69.

90 Namely, integration conditions may be necessary 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others': Article 8(2) ECHR. CJEU, *Parliament v Council*, *supra* note 44, para. 66.

91 CJEU (ECJ), *Dogan v Federal Republic of Germany*, Case C-138/13, 10.07.2014, ECLI:EU:C:2014:2066.

92 CJEU, *Dogan v Federal Republic of Germany*, Case C-138/13, AG Opinion, 30.04.2014, ECLI:EU:C:2014:287.

93 Ibid., para. 51.

94 Ibid., para. 52. Mengozzi followed this interpretation in the subsequent cases dealing with the issue of 'integration measures' and 'integration conditions': e.g. CJEU, *C and A v Staatssecretaris van Veiligheid en Justitie*, Case C-257/17, 07.11.2018, ECLI:EU:C:2018:876, AG Opinion, para. 52.

may exercise their right of reunification', but instead they 'must essentially be intended to *facilitate* integration'.[95] Unlike the use of 'condition for integration' in Article 4(1) of the same Directive, 'integration measures' cannot be meant as a 'prerequisite which must be proven by the interested party'.[96] However, such an interpretation does not mean that it can only 'impose straightforward "obligations to use best endeavours"', but could be understood as imposing 'obligations to achieve a certain result', as long as they are proportionate to the objective of integration and do not undermine the effectiveness of the Directive.[97]

In 2015 the CJEU had to interpret the scope of 'integration conditions' within the Long-Term Residence Directive, in the case of *P & S*.[98] According to an amendment in the Dutch legislation of 2007, a group of TCNs who were already long-term residents in the Netherlands at the time of the amendment were required to pass a language and civic integration examination. The CJEU interpreted the integration requirement provision not as an 'integration condition', but as an 'integration measure'.[99] However, since long-term residents have equal rights to those of nationals, and an obligation to pass a civic integration test was not imposed on nationals, the CJEU assessed the measure in light of the non-discrimination principle.[100] It found that TCNs and nationals are not in a comparable situation in that the latter are presumed to have such knowledge, unlike TCNs, which finding justified the differential treatment.[101] The remainder of the judgment reaffirms the effectiveness and proportionality test of *Commission v Netherlands*, finding that the objective of the language and civic knowledge tests did not undermine the effectiveness of the Directive,[102] but that the system of fines that would be imposed on those who did not pass such a test was not proportional, as it jeopardised the achievement of the objectives of the Directive, thus depriving it of its effectiveness.[103]

The Opinion of Advocate General Szpunar, albeit followed in its totality in the judgment, went a bit further in its interpretation of 'integration conditions' and 'integration measures'.[104] Following *Dogan*,[105] Szpunar pronounced himself on the content of 'integration measures' in examining whether the national provisions were 'justified by overriding reasons in the public interest and

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95 CJEU, *Dogan v Federal Republic of Germany*, *supra* note 92, para. 53, emphasis in the original.
96 Ibid., para. 54, emphasis in the original.
97 Ibid., para. 56.
98 CJEU, *P and S v Commissie Sociale Zekerheid Breda*, Case C-579/13, 04.06.2015, ECLI:EU:C:2015:369.
99 Ibid., para. 38.
100 Ibid., para. 40.
101 Ibid., para. 42.
102 Ibid., paras. 45–47.
103 Ibid., para. 53.
104 CJEU, *P and S v Commissie Sociale Zekerheid Breda*, Case C-579/13, AG Opinion, 25.01.2015, ECLI:EU:C:2015:39.
105 CJEU, *Dogan v Federal Republic of Germany, supra* note 91.

whether they were proportionate'.[106] On the basis of a proportionality test, he posited that:

> A person who has lived in a given environment for a long time has undoubtedly created a network of integrating ties with that environment, through marriage or family, living with neighbours, work, hobbies and activities in non-governmental organisations. An integration measure that does not permit the individual assessment of such factual circumstances and which simply recognises the result of an integration exam is disproportionate to the purpose of facilitating that person's further integration into society.[107]

Shortly after, the CJEU had to decide on the scope of 'integration measures' within the Family Reunification Directive, in the case of *K & A*.[108] According to Dutch legislation, applicants for a residence permit for family reunification purposes should have passed, prior to the application, a language test proving they have basic knowledge in Dutch; and a basic civic integration examination which includes knowledge of the history, geography and political organisation of the Netherlands, of housing, education, work, healthcare and civic integration, rights and obligations of TCNs, 'the rights and obligations of others', and 'accepted rules of conduct in the Netherlands'.[109]

The CJEU based its reasoning on *Chakroun*, accepting that family reunification is the rule, and all restrictions must be interpreted restrictively, and must not 'undermine the objective and effectiveness' of the Directive.[110] The CJEU did not find it necessary to distinguish between 'integration measures' and 'integration conditions' in order to hold that 'integration measures … can be considered legitimate only if they are capable of facilitating the integration of the sponsor's family members'.[111] It then went on to agree that knowledge of the language of the host country, and of the society, would not only greatly facilitate communication, but would also 'encourage interaction and the development of social relations', as well as make access to the labour market and vocational

106 Ibid., para. 38.

107 CJEU, *P and S v Commissie Sociale Zekerheid Breda*, *supra* note 104, para. 92.

108 CJEU, *Minister van Buitenlandse Zaken v K and A*, Case C-153/14, 09.07.2015, ECLI:EU:C:2015:453.

109 Ibid., paras. 18–20. Individuals could be exempted from these requirements only if 'very special individual circumstances' make it permanently impossible for them to pass the examination (para. 23).

110 Ibid., paras. 46 and 50.

111 Ibid., para. 52. It should be noted that Advocate General Kokott did not follow Advocate General Mengozzi in *Dogan*, in the distinction between 'integration measures' and 'integration conditions', holding that the concept of 'integration measures' should be interpreted autonomously, and that its interpretation may differ between the Family Reunification Directive and the Long-Term Residence Directive. This stance led to the obliteration of the difference between the two concepts: CJEU, *Minister van Buitenlandse Zaken v K and A*, Case C-153/14, AG Opinion, 19.03.2015, ECLI:EU:C:2015:186, paras. 19–29.

training easier.[112] As such, these integration measures pass the effectiveness test; and the proportionality test would be satisfied by a case-by-case examination of each application.

As can be seen from the above cases, the CJEU has condoned state measures which serve to exclude family members or TCNs from the EU, or the respective MS, on the basis of their perceived incompatibility with the culture of the host country, or lack of proof of the alternative.[113] It can be concluded that the CJEU agrees that 'integration measures' and 'integration conditions', which are clear examples of a culturally imbued notion of integration, can be imposed on TCNs with the objective of 'ensuring successful integration', and that the latter objective may constitute an overriding reason in the public interest. It has been posited that, in this way, the CJEU acknowledged the states' discretion on determining their public interests.[114] Further, it is usually at the stage of the proportionality test where a state measure fails to further the objective of EU law. Therefore, the CJEU holds that each practice should be assessed on a case-by-case basis.

It seems from the above analysis that the CJEU is generally unwilling to engage with matters of culture. A few reasons for this can be advanced.[115] Firstly, the CJEU may wish to avoid discussing a cultural definition of integration because it raises many further questions that depart from the strictly legal domain, such as those pertaining to superiority of different cultures, whose culture is representative of the nation, etc.[116] Secondly, although the CJEU has

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112 CJEU, *Minister van Buitenlandse Zaken v K and A*, *supra* note 108, para. 53.

113 See, in the same vein, D. Kostakopolou, S. Carrera and M. Jesse, 'Doing and Deserving: Competing Frames of Integration in the EU', in E. Guild, K. Groenendijk and S. Carrera (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration*, Routledge, Oxford 2009, p. 184.

114 CJEU, *Genc v Integrationsministeriet*, Case C-561/14, AG Opinion, 20.01.2016, ECLI:EU:C:2016:28, paras. 33–35. This judgment is a clear example of the restrained position the CJEU takes on matters pertaining to strong cultural aspects of belonging and integration. While the CJEU followed the Advocate General's Opinion in his overall conclusion, it did not follow the same reasoning regarding the proportionality of the restrictive measure. Advocate General Mengozzi carried out a systemic analysis of the Danish restriction on family reunification, on the basis of a capacity for integration, which led him to state that that provision 'is based on a fundamental – and, in [his] view, difficult to rebut – assumption of incompatibility of cultures' (para. 48).

115 However, in *A v Udlændinge- og Integrationsministeriet*, the CJEU pronounced itself on a cultural matter within the proportionality test it conducted, but once again against the backdrop of socio-economic arguments: 'It follows that the attachment of a Turkish national to his State of origin cannot limit his prospects of integration, since the relationship with that State of origin and the relationship with the host Member State are not such as to be mutually exclusive.': CJEU (ECJ), *A v Udlændinge- og Integrationsministeriet*, Case C-89/18, 10.07.2019, ECLI:EU:C:2019:580, para. 39.

116 See K. Groenendijk (2004), 'Legal Concepts of Integration', *supra* note 12, p. 114. Groenendijk does not discuss the cultural dimension of integration, because he would like to 'avoid discussions as to which culture is superior or the dominant one in a country', and because 'public authorities in a democratic state should not be involved in how citizens should feel and think'.

expanded the scope of the 'social' domain since 1987, it has not gone so far as to totally disconnect it from the exercise of the economic freedoms underpinning the EU.[117] It is true that, since 2009, the EU has been based on a number of purportedly shared values,[118] which gives it the competence to rule on value-related issues. However, due to the enormous cultural differences within the EU, it can be seen why entering the domain of values is a non-starter. Finally, the CJEU is also attentive not to rule in ways that would incur financial costs for MS.

4. THE PROTECTION OF INTEGRATION IN EUROPEAN HUMAN RIGHTS LAW

4.1. THE DEFERENTIAL STANCE: INTEGRATION AS AN ELEMENT OF PRIVATE LIFE

This section examines the case law of the ECtHR in its direct reference to the concept of integration. This includes a long, but incomprehensive – due to limitations – list of judgments, mostly under Article 8, but also Articles 9 and 14 ECHR.[119] On the one hand, this analysis hopes to contribute to a 'jurisgenerative' exchange between the two Courts; and on the other, it will assess the extent to which we could talk of an autonomous human right to be integrated under the ECHR.

There is neither a right to asylum, nor a right to be integrated, under the ECHR, which is primarily a legal treaty of civil and political rights. Therefore, unlike in EU law, there is no interpretation of integration as a legal concept in European human rights law. That does not mean that the ECtHR does not invoke the issue of integration, especially in extradition cases of first- or second-generation migrants or family reunification cases where, in both cases, the right to private and family life under Article 8 ECHR is at stake.[120] Beyond the material jurisdiction of the ECtHR, the Council of Europe (CoE) has engaged with the issue of integration via soft law mechanisms such as, for example, reports commissioned by the CoE Commissioner for Human Rights on migrant integration.[121] This broader interest in integration raises the question of how the ECtHR understands the relationship between integration and human rights.

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117 CJEU, *Genc v Integrationsministeriet*, AG Opinion, *supra* note 114, para. 27.

118 Article 2 TEU.

119 Many of the cases under consideration are immigration cases under Article 8 ECHR. See M. Klaassen, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases', (2019) 37(2), *Netherlands Quarterly of Human Rights*, pp. 157–177.

120 C. Murphy, 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights', (2010) 12, *European Journal of Migration and Law*, p. 24.

121 Council of Europe, 'Time for Europe to Get Migrant Integration Right', 2016, available at https://rm.coe.int/ref/CommDH/IssuePaper(2016)2, last accessed 31.03.2022;

Unlike EU law, formally the ECHR does not distinguish between economic migrants, asylum seekers, refugees, etc. Universality is one of the main characteristics of human rights.[122] However, there is tension between the universality of the human subjects and their citizenship status which accords them the protected rights within and by the nation state.[123] Indeed, the level of protection accorded by the ECtHR depends on the legal status of migrants, irregular migrants being the least protected,[124] and the category of 'settled migrants' receiving the highest protection. However, that highest level of protection is by no means equal to that of nationals, because 'even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the power of the Contracting States to expel aliens'.[125] Further, this principle applies 'regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there'.[126] Logically, the position of refugees in this equation should be closer to that of 'settled migrants', as their recognition strongly militates against expulsion, or for family reunification in the host country, as family life may only be maintained there and return may invoke a risk of inhuman and degrading treatment under Article 3.[127]

Council of Europe, 'Realising the Right to Family Reunification of Refugees in Europe', 2017, available at https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0, last accessed 31.03.2022. In 2016, a Special Representative of the Secretary General on Migration and Refugees was appointed to monitor national compliance of treatment of migrants and refugees with human rights. As of January 2022, this position is held by Leyla Kayacik.

122 See S. Benhabib (2004), *The Rights of Others*, *supra* note 6, p. 82.

123 Ibid., p. 2. But see also D. Owen, 'Citizenship and Human Rights', in A. Shachar et al. (eds.), *The Oxford Handbook of Citizenship*, OUP, Oxford 2017, p. 243, for a positive relationship between human rights and citizenship.

124 ECtHR, *Butt v Norway*, no. 47017/09, 04.03.2013, para. 65: 'Whilst the Court had held in its case-law that a non-national's stay in a Contracting State might amount to the establishment of "private life", this applied to "settled migrants" only. However, the applicants could not be regarded as "settled migrants" as their stay in Norway had never rested on a formal decision of permanent residence.' (references omitted).

125 ECtHR, *Kilic v Denmark*, no. 20730/05, 22.01.2007.

126 ECtHR, *Üner v the Netherlands*, no. 46410/99 [GC], 18.10.2006, para. 54.

127 H. Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration*, Edward Elgar, Cheltenham/Northampton 2014, p. 197. For some reason, though, even in cases involving refugees, the ECtHR does not always find it necessary to assess the case in light of this fact. For example, in *Tuquabo-Tekle*, the ECtHR found a violation of Article 8, but did not consider at all the invocation of the refugee-like situation of the mother at stake: ECtHR, *Tuquabo-Tekle and Others v the Netherlands*, no. 60665/00, 01.03.2006, para. 50. In *Abdi*, an expulsion case, the ECtHR mentioned in passing that the applicant was a refugee, but never considered that fact, and authorised expulsion: ECtHR, *Abdi v Denmark*, no. 41643/19, 14.09.2021, para. 5. An exception in this regard is ECtHR, *M.A. v Denmark*, no. 6687/18 [GC] 09.07.2021, para. 14. See also ECtHR, *M.S.S. v Belgium and Greece*, no. 30696/09 [GC] 21.01.2011, para. 251, where in the context of asylum seekers, the ECtHR held that it 'attaches considerable importance to the applicant's status

The old refrain used by the ECtHR since *Abdulaziz, Cabales and Balkandali*, its first migration case in 1985, that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory',[128] and the fact that more than 30 years later it is used as a main source of contention in the interpretation of migration-related cases,[129] is indicative of the deferent position the ECtHR takes to state sovereignty vis-à-vis national migration policies.[130] By the same token, it has accepted that '[i]t is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens'.[131] For the above reasons, the ECtHR attaches great importance to the states' prerogative to regulate migration and also accords them a wide margin of appreciation in this area, which is taken into consideration when the ECtHR conducts a proportionality or a fair balance test.[132] However, the margin of appreciation is limited and depends on the quality of the law and its application to the facts at hand. Only if the ECtHR is not satisfied with the assessment done on a national level will it do its own assessment of the merits of the case (especially a proportionality test).[133]

Once the ECtHR decides to limit the state margin of appreciation, it applies a proportionality test under Article 8(2).[134] The ECtHR developed a clear set of criteria to be used in the balancing act in the cases of *Boultif*[135] and *Üner*.[136]

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as an asylum-seeker and, as such, a member of a particularly unprivileged and vulnerable population group in need of special protection'.

128 ECtHR, *Abdulaziz, Cabales and Balkandali v the UK*, no. 9214/80; 9473/81; 9474/81, 28.05.1985, para. 67.

129 See ECtHR, *Biao v Denmark*, no. 38590/10 [GC], 04.05.2016, para. 117.

130 This line of reasoning has been pointed out and criticised by others. See C. Murphy (2010), 'The Concept of Integration', *supra* note 120, pp. 41–42. And from the perspective of conflating nationality and belonging, see S. Da Lomba, 'Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR', (2017) 6(4), *Laws*, p. 10.

131 ECtHR, *Slivenko v Latvia*, no. 48321/99 [GC] 09.10.2003, para. 115. See also ECtHR, *Chair and J. B. v Germany*, no. 69735/01, 06.03.2008, para. 56.

132 See S. Da Lomba (2017), 'Vulnerability and the Right to Respect for Private Life', *supra* note 130, p. 15. See I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, CUP, Cambridge 2018, pp. 107–108 for a difference between proportionality and balancing tests. See also C. Costello (2016), *The Human Rights of Migrants and Refugees*, *supra* note 6, p. 114: '[Employing a multi-factor balancing test, rather than its typical mode of proportionality assessment] seems to explain the assessment of the entire issue under Article 8(1), rather than raising distinct issues of interference (8(1)) and justification (8(2)) in turn. It reflects the statist assumption that refusing admission does not normally require a justification.' In this regard, see M. Klaassen (2019), 'Between Facts and Norms', *supra* note 119, p. 162.

133 ECtHR, *Külekci v Austria*, no. 30441/09, 01.09.2017, para. 38; ECtHR, *Ndidi v the United Kingdom*, no. 41215/14, 29.01.2018, para. 76.

134 It usually applies this test in deportation cases which trigger negative obligations of states. See M. Klaassen (2019), 'Between Facts and Norms', *supra* note 119, pp. 160–162.

135 ECtHR, *Boultif v Switzerland*, no. 54273/00, 2.11.2001, para. 48.

136 ECtHR, *Üner v the Netherlands, supra* note 126, paras. 57–58.

In this test, the different criteria have different weights, but the ECtHR accords a special consideration to the criminal record of the applicant and the gravity of their offences, if any.[137] Usually, such migrants are not considered 'fully integrated' by the ECtHR, as they have acted in defiance of the law in their host country and the majority of them also lack education and/or employment.[138] The latter aspects form part of the additional criteria used in the proportionality test, and their consideration is subsumed under the assessment of the length of the applicant's stay in the country from which he or she is to be expelled, and the solidity of the social, cultural and family ties with the host country, and with the country of destination. These integration-related criteria are considered in the assessment of the right to private life of the applicant, unless he or she has a family life, in which case other criteria, such as the best interest of the child, are a primary consideration.[139] This statement is corroborated by the following interpretation of the ECtHR:

> [A]s Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8.[140]

The scope of integration as an element of private life has been elaborated in detail by the ECtHR in *Slivenko v Latvia*.[141] The case concerns a mother and a daughter of Russian origin who had spent their whole lives in Latvia. Pursuant to the treaty on the withdrawal of Russian troops from Latvia of 1994, the family was forced to move to Russia.[142] In its assessment of whether the forced removal of the family members constituted a violation of their right to private and family life, the ECtHR drew heavily on the aspect of private life encompassing 'the network of personal, social and economic relations' of the applicants.[143] It found that, while the removal measure was in accordance with the law and pursued the legitimate

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137 See S. Da Lomba (2017), 'Vulnerability and the Right to Respect for Private Life', *supra* note 130, p. 5.

138 ECtHR, *Levakovic v Denmark*, no. 7841/14, 23.01.2019, para. 44; ECtHR, *K.A. v Switzerland*, no. 62130/15, 07.10.2020, para. 37; ECtHR, *Kaya v Germany*, no. 31753/02, 28.09.2007, para. 64; ECtHR, *Salem v Denmark*, no. 77036/11, 24.04.2017, para. 71; ECtHR, *A.H. Khan v the United Kingdom*, no. 6222/10, 20.03.2012, para. 41; ECtHR, *Külekci v Austria*, *supra* note 133, para. 49. But in contrast, see ECtHR, *Zakharchuk v Russia*, no. 2967/12, 11.05.2020, para. 59, where despite the criminal offences of the applicant, 'the Court does not doubt that the applicant was fully integrated'.

139 See M. Klaassen (2019), 'Between Facts and Norms', *supra* note 119, pp. 165–167.

140 ECtHR, *Malsov v Austria*, no. 1638/03 [GC], 23.06.2008, para. 63.

141 ECtHR, *Slivenko v Latvia*, *supra* note 131, para. 115.

142 Ibid., para. 46.

143 Ibid., para. 96.

aim of protection of the national security, it was not necessary in a democratic society because 'the applicants were sufficiently integrated into Latvian society'[144] and 'could [not] be regarded as endangering the national security of Latvia'.[145] This case set important benchmarks for the scope of integration, including on the level of knowledge of the local language, and a requirement of participation in the local society on a par with the locals as regards access to medical services, accommodation, employment and education in favour of social mixing, thus delineating the socio-economic scope of integration according to the ECtHR.[146]

4.2. INTEGRATION AS A LIMITATION TO INDIVIDUAL RIGHTS

From the perspective of the 'thickness–thinness continuum', it becomes clear that, unlike the CJEU, the ECtHR seems to condone a much 'thicker' concept of integration, going beyond language knowledge and labour market integration. The ECtHR held in *Üner* that:

> [T]he rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be.[147]

This premise is reminiscent of the five-year period under the Long-Term Residence Directive, upon which the TCN is expected to be, to a large extent, integrated in the host country.[148] As will become clear, while socio-economic inclusion is a prerequisite for integration, it is not a sufficient marker of it for the ECtHR.

The ECtHR often sides with states which hold the lack of nationality of the host state against the applicant, interpreting it as an indicator of allegiance to a foreign country, despite the fact that the individual may have spent all his/her life in that 'host' country.[149] In *Samsonnikov v Estonia*, the ECtHR dealt with the case of an Estonian resident of Russian origin who was born in, and had spent all his life in, Estonia. Due to his criminal offences, and the fact that he had not applied for Estonian citizenship, the ECtHR found the expulsion measure

144 Ibid., para. 125.
145 Ibid., para. 127.
146 Ibid., paras. 123–125.
147 ECtHR, *Üner v the Netherlands, supra* note 126, para. 58. However, in cases of criminal charges against the applicant, even persons born and raised in a country can be regarded as not well integrated. See *supra* note 138.
148 *Supra* note 43, Recitals 4 and 6, and Article 5(1)(a)(b) Long-Term Residence Directive.
149 ECtHR, *Zakharchuk v Russia*, *supra* note 138, para. 60.

against him proportionate to the aim pursued.[150] The dissenting judges criticised the outdated position of their colleagues, noting that:

> In an area of profound changes in Europe, from both a human rights and an economic viewpoint, long-term legal residents have stronger ties with the host country than with the country of their nationality. They participate in the economy by working and paying taxes and they are influenced by the culture, language and education of the host country. As a result of this reality, nationality is defined as a legal and not an effective bond with the country.[151]

As can be seen, there are different understandings of the concept of belonging expressed in the majority and minority opinions: the majority one being rooted in ethnicity and culture, and the minority one being framed in 'thinner' socio-economic terms. In its subsequent case law, the ECtHR has embraced the ethnic understanding of integration to an extent which poses the question whether it is even possible for nationals to be integrated. In order to understand this strong cultural element of the concept of integration, it is necessary to look at case law concerning nationals of the state party.

In *S.A.S. v France*, the applicant was a French national, a devout Muslim wishing to wear a niqab, a full-face veil, in public spaces, who challenged a law proscribing this practice.[152] An individual who failed to comply with this prohibition would incur a criminal offence, and possibly an obligation to take a citizenship course.[153] This case deserves more space than the current contribution can afford. What matters for understanding the content of 'social integration', referred to in para. 28 of the judgment, is that it relates to the concept of 'living together', for which 'interaction between individuals' is of crucial significance. Importantly, the ECtHR underlines several times that it is the responsibility of states to fight the consolidation of stereotypes which affect certain categories of the population, and discourage the expression of intolerance;[154] that 'pluralism, tolerance and broadmindedness are hallmarks of a "democratic society"';[155] and that 'the expression of a cultural identity' contributes to that pluralism.[156] Regardless, it takes a U-turn when it posits that France:

> [I]s seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness, without which there is no democratic society. It can thus be said

150 ECtHR, *Samsonnikov v Estonia*, no. 52178/10, 03.10.2012, paras. 88 and 91.
151 Ibid., Joint Dissenting Opinion of Judges Lazarova Trajkovska and Hajiyev, para. 3.
152 ECtHR, *S.A.S. v France*, no. 43835/11 [GC] 01.07.2014.
153 Ibid., para. 27.
154 Ibid., para. 149.
155 Ibid., para. 128.
156 Ibid., para. 120.

> that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[157]

The ECtHR accepts that wearing a niqab poses a threat to social interaction, and thus may endanger 'the rights and freedoms of others'.[158] Therefore, while the ECtHR stated that 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms',[159] it held that, in the name of pluralism, tolerance and broadmindedness, a state can invoke the concept of 'living together', social integration and interaction in order to ban a cultural identity practice that contributes to that pluralism.[160]

In the same vein, the ECtHR maintained the view that integration can be used as a ground for limitation of the right to freedom of religion, in the case of *Osmanoğlu and Kocabaş*.[161] According to the submission of the Swiss government, compulsory mixed swimming lessons were a measure intended to protect foreign pupils from any form of social exclusion,[162] which the ECtHR accepted as falling within the scope of the legitimate aims of the protection of others or the protection of public order.[163] In its judgment, the ECtHR reaffirmed that attendance of mixed swimming classes was 'above all in [the applicants'] own interests, specifically that of their children's successful socialisation and integration'.[164] In the end, this judgment reconfirmed the ECtHR's approach in *S.A.S.* that tolerance can serve as a legitimate aim to curtail tolerance, or that integration can serve as a legitimate aim to curtail integration, depending on the definitions thereof.

Specifically in relation to refugees, the ECtHR recently pitted individual integration against group integration. In the case of *M.A.*, a Syrian beneficiary of temporary protection in Denmark had applied for a family reunification with his wife before the lapse of the allowed statutory period of three years.[165] He claimed that being with his wife would benefit his integration into Danish society. The Danish government, on its part, used the argument of integration to introduce the restrictive statutory period in the first place, claiming that controlling migration ensured the 'effective integration of those granted protection with

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157 Ibid., para. 153, references omitted.
158 Ibid., paras. 119 and 141–142.
159 Ibid., para. 119.
160 Ibid. The ECtHR accorded France a wide margin of appreciation (para. 155).
161 ECtHR, *Osmanoğlu and Kocabaş v Switzerland*, no. 29086/12, 10.01.2017.
162 Ibid., para. 63.
163 Ibid., para. 64.
164 Ibid., para. 103.
165 ECtHR, *M.A. v Denmark*, *supra* note 127, para. 165.

a view to preserving social cohesion'.[166] The ECtHR accepted both interests as legitimate, and took note of the position that 'family reunification may also favour preserving social cohesion and facilitate integration'.[167] Therefore, the ECtHR agreed that integration understood as a migration control tool for limiting the number of foreigners on the territory of a state could be seen as a legitimate general interest.

4.3. THE TRANSFORMATIVE POTENTIAL OF *BIAO*

The judgment of *Biao* seems like an outlier in the above series of cases.[168] The applicant, a Danish citizen of Togolese origin, challenged the so-called 'attachment requirement',[169] which aimed to 'ensure the best possible integration of immigrants in Denmark' through family reunification.[170] The reasons for its introduction included the establishment of the fact that 'there are Danish nationals who are not particularly well integrated in Danish society and for this reason the integration of a spouse newly arrived in Denmark may entail major problems'.[171] At the same time, this rule went further in that it offered relaxed conditions for Danish migrants returning to Denmark with their partner(s) and children.[172]

The ECtHR found a violation of Article 14 in conjunction with Article 8. It underlined that Mr Biao, having acquired Danish nationality, had already resided in Denmark for more than nine years, had mastered the language, had knowledge of Danish society, and had gainful employment.[173] Therefore, a claim that he was not integrated would amount to 'general based assumptions or prevailing social prejudice in a particular country [which] do not provide sufficient justification for a difference in treatment'.[174] Therefore, and noting that there is 'a certain trend towards a European standard' to eliminate 'the discriminatory application of rules in matters of nationality between nationals

166 Ibid.

167 ECtHR, *M.A. v Denmark*, *supra* note 127. The ECtHR found a violation of Article 8 on the account that the blanket three-year waiting period imposed 'insurmountable obstacles to enjoying family life' for the applicant (para. 193).

168 ECtHR *Biao v Denmark*, *supra* note 129.

169 Ibid. The attachment rule meant that 'family reunion could be granted only if both spouses were over 24 years old and their aggregate ties to Denmark were stronger than the spouses' attachment to any other country' (para. 17). Later, that rule was complemented by the so-called '28-year rule', according to which '[p]ersons born or having arrived in Denmark as small children could also be exempted from the attachment requirement, provided they had resided lawfully there for 28 years' (para. 22).

170 Ibid., para. 26.

171 Ibid., para. 28.

172 ECtHR *Biao v Denmark*, *supra* note 129, para. 29. Presumably this group 'has maintained strong ties with Denmark' by speaking Danish at home, following the Danish news, celebrating the Danish holidays, etc.

173 Ibid., para. 125.

174 Ibid., para. 126.

from birth and other nationals',[175] and that EU law on family reunification makes no distinction between the above two groups,[176] it found that a family reunification policy which aims at ensuring integration but discriminates on the grounds of ethnic origin is not compatible with human rights standards.[177]

This judgment radically breaks with the postulates held in *Abdulaziz, Cabales and Balkandali* that have been used as a guiding light in a tremendous number of migration-related cases over the past few decades. Certainly, a period of more than 30 years is enough for the ECtHR to apply evolutive interpretation of the ECHR in an area of such dynamic developments, especially on an EU level, thus bringing human rights standards up to EU standards, which in some areas offer higher protection than the ECHR. Moreover, regarding integration, *Biao* may be considered a future authority, both for the ECtHR and the EU, on setting limits to exclusionary concepts of integration applied by states parties. Furthermore, it can serve as the source for delimiting the content of integration to include a certain period of residence, language knowledge, knowledge of the host society, gainful employment and, potentially, naturalisation. This further supports the claim of this contribution that language and societal knowledge must be seen as the building blocks of the right to be integrated.

5. CONCLUSION

This contribution makes the case for a right to be integrated for refugees in the EU. That right is to be based on a 'thin' concept of integration which views inclusion as a matter of socio-economic participation, devoid of cultural and ethnic elements. More concretely, it shall include a right to language classes and societal orientation classes for those who need them, to be provided in a non-discriminatory manner. While being integrated is a long-term process which goes beyond the suggested content of a right to be integrated, the analysis has shown that the proposed aspects are not covered by any human rights instrument. This is what called for a serious consideration of the sources of a right to be integrated, in order to trace its content and the level of protection due.

On the basis of the above legal analysis, it can be concluded that there is a right for refugees to be integrated in EU law, namely under Article 34 of the Qualification Directive. However, this right has not yet been invoked, and at this stage remains in its embryonic phase.[178] While directives allow for some leeway of MS to shape their legislation and policies in order to achieve the

175 Ibid., para. 132.
176 Ibid., para. 134.
177 Ibid., para. 138.
178 See C. Murphy (2013), *Immigration, Integration and the Law*, *supra* note 34, p. 190.

prescribed result, the CJEU has held that some provisions, such as a right to family reunification, are of direct effect.[179] In order for a right to be integrated to be of direct effect, it needs to be sufficiently clear and unconditional. The analysis of international refugee law as interpreted by the CJEU shows that there is a strong basis for a right to be integrated, enshrined in Article 34 of the Refugee Convention. However, as that provision does not impose an obligation of result, its binding power is quite weak.[180] Nonetheless, in light of the fact that refugee law can be considered a source of EU law, an interpretation of the relevant provisions of the Refugee Convention contributes to delineating the scope of the right to be integrated, namely by showing that it encompasses additional elements to those already listed under the content of international protection. This interpretation of the Refugee Convention paves the way for a right to be integrated as a prerequisite for the enjoyment of all other rights.

The analysis of EU law showed that both secondary legislation and the CJEU jurisprudence condone MS' more culturally imbued integration policies and practices, up to a limit, being defined by compliance with fundamental rights, and the principles of effectiveness and proportionality of EU law. Such an approach is understandable in light of the EU's competences ensuing from the protection of the single market, grounded in strong economic terms. While, initially, the cultural aspects of integration did not fall under the competence of the EU, this has slowly been changing over the past decades.

We saw that human rights law, which aims at the protection of the rights of individuals from state arbitrariness, is a source of EU law, thereby encouraging the cross-referencing between the CJEU and the ECtHR case law. This is why it was essential to analyse the stance of the ECtHR towards the concept of integration. In accordance with a 'jurisgenerative' constructive approach, the ECtHR case law on integration could potentially contribute to the protection of a right to be integrated under EU law by offering better clarity on the scope of integration. In addition, from the perspective of individual applicants, the ECtHR is in a better position to offer individual protection, due to the differences in the institutional set-up of the two Courts. Under the preliminary reference procedure, migrants and refugees have access to the CJEU only indirectly, and at the discretion of the national judges applying EU law. This enforcement system 'is also a source of fragility'.[181] Under the ECHR, individuals have a right of individual petition that, provided that the petition meets the admissibility criteria, allows a certain national practice to be challenged directly.

Since 1985, the ECtHR's reading of integration has been deferential to states' immigration policies, with a few exceptions.[182] In its assessment of cases

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179 See C. Costello (2016), *The Human Rights of Migrants and Refugees*, *supra* note 6, p. 150.

180 See J. Hathaway (2005), *The Rights of Refugees*, *supra* note 33, p. 987.

181 See also C. Costello (2016), *The Human Rights of Migrants and Refugees*, *supra* note 6, p. 326.

182 See section 4.3 above.

pertaining to extradition, family reunification or freedom of religion, the ECtHR has understood integration not only in socio-economic terms, but also in cultural terms, accepting that integration could be a legitimate aim for the limitation of individual rights. Moreover, migrants were also supposed to cope on their own, and were expected to pledge allegiance to the host state by relinquishing their nationality and possibly their cultural identity, if it was different from the majoritarian understanding of local culture.

In the end, a right to be integrated expresses a strong belief in the viability of both the concept of integration and the idea of human rights. While 'the end of human rights history' may be in sight when it comes to human rights in the courtroom, mostly on a national level, under the pressure of populist governments, human rights discourse still retains a major transformative potential.[183] The fact that people from all walks of life and in all corners of the world 'all took their privileged status as human beings for granted; all assumed a right to equal voice' points to a deep-seated internalisation of the moral force and power of the human rights discourse to make claims and demand their rights.[184] The realisation of human rights remains 'dependent on trustworthy public institutions',[185] which makes it indispensable that we turn our gaze to the ECtHR and the CJEU for the recognition of a right of refugees, and possibly of all migrants, to be integrated as a precondition for building and sustaining inclusive communities based on respect for human dignity, freedom, democracy, equality and the rule of law.

183 S. Moyn, 'The End of Human Rights History', (2016) 233(1), *Past & Present*, pp. 307–322.

184 M. Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World*, HUP, Harvard 2017, p. 208.

185 By analogy with Ignatieff's claim on the relationship between ordinary virtues and public institutions (ibid., p. 217).