A CASE IN DEFENSE OF THE UNIVERSALITY OF HUMAN RIGHTS

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ABSTRACT

In this paper, it is argued that a persistent and entrenched European particularism undermines the universality of human rights in the European Union (EU). It is institutionalised through the constitution of the citizenship of the EU and securitarian policies of migration control. What makes it apparent and problematic is the tendency of the EU to affirm the universality of human rights in the post-Amsterdam era. Therefore, the case of the EU is important and interesting in terms of unravelling the contradiction between particularist policies and the universality of human rights. Moreover, the tension between the universality of human rights and particularism in the case of the EU is illustrative of a universal problem in the enforcement of human rights; politically manufactured limitations imposed on universal human rights leave specific non-dominant groups unprotected against the power that targets them.

Keywords: *European Particularism, Human Rights, Universality, European Union, Exclusion, Third-country Nationals.*

ÖZET

Bu makalede, etkinliğini derinleşerek sürdüren Avrupalı kimliği merkezli (tikelci) yaklaşımın Avrupa Birliği (AB) içinde insan haklarının evrenselliği ilkesini zeminsizleştirdiği tartışılmaktadır. Bu yaklaşım, AB vatandaşlığının oluşumu ve güvenlik merkezli göç kontrolü politikaları yoluyla kurumsallaştırılmıştır. Amsterdam Atlaşması sonrası dönemde AB'nin insan haklarının evrenselliği ilkesini olumlaması bu yaklaşımın sorunlu görünmesine yol açmıştır. Bu nedenle, AB örneği kimlik merkezli (tikel) politikalarla insan haklarının evrenselliği arasındaki çelişkinin açımlanması bakımından ilgi çekici ve önemlidir. Ayrıca, insan haklarının evrenselliği ve tikelci yaklaşım arasındaki gerilim insan haklarının yaşama geçirilmesiyle ilgili evrensel bir sorunu da açığa çıkarmaktadır; insan haklarına siyaseten dayatılan kısıtlamalar, baskın olmayan grupları, onları hedef alan güce karşı korunmasız kılmaktadır.

Anahtar Kelimeler: *Avrupalı Kimliği Merkezli Yaklaşım, İnsan Hakları, Evrensellik, Avrupa Birliği, Yoksun Bırakma, Üçüncü Ülke Vatandaşları.*

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Introduction

Human rights had been envisaged and represented as universal. However, this ideal is not fully achieved yet. The global reach and enforcement of human rights still depends on "domestic constitutionalisation of human rights." (Klug, 2005: 96). The promotion of universal human rights through this process is described as "new constitutionalism." While the "old constitutionalism" is defined by the concern to limit the monarch's power by law in Europe and U.S in the 17th and 18th centuries, the "new constitutionalism" is grounded on "the rights revolution as it has progressed from the 1948 United Nations Universal Declaration on Human Rights." (Halliday and Osinsky, 2006: 464). Looking from the positive side to the progressive process of "globalisation of human rights" through "new constitutionalism," it can be argued that we are living in an era of "rights explosion" which "has become a central part of the phenomena of globalisation." (Klug, 2005: 87). However, what limits and inhibits the rise of a global political community adhering to the same human rights principles and law is the opposition to the universality of human rights expressed through culturalist and particularist discourses that sanction widespread abuses. The claim that there are 'different' traditions/cultures in which a differentiated, nuanced conception of rights is necessary unfortunately loses its moral appeal when we consider severe ends suffered by various groups under the pretence of cultural autonomy. The violations of the fundamental rights of designated groups such as women, children, minorities, apostates, non-believers and homosexuals in different parts of the world are open testimony to the social and political consequences of particularist limitations imposed by various states on human rights. These particularist state policies, justified in the terrain of cultural autonomy, bring about oppression and marginalisation for specific groups.

It is evident that Asian and Islamic states led such a culture-based opposition to the universality of human rights. As Cerna explains in the context of the 2nd World Conference on Human Rights (held in Vienna in 1993), it is 'primarily from the Asia' that concerns were expressed with respect to 'the private rights' through the discourse of 'different cultural heritages'. (Cerna, 1994: 746). This 'private sphere', involved the issues as 'religion, culture, the status of women, the right to marry and divorce and to remarry, the protection of children, the question of choice as regards family planning, and the like'. (Cerna, 1994: 746). Parekh also notes that 'leaders of almost all East Asian countries insist that some of the rights included in the United Nations and other Western-inspired declarations of human rights are incompatible with their values, traditions and

self-understanding, and that Western governments should be more tolerant of their attempts to define and prioritise them differently'. (Parekh, 1999: 154). In a similar vein, Halliday pointed out Islamic states as having a 'particular position on certain questions pertaining to the field of human rights' in the Vienna Conference and in its preliminary regional meetings. (Halliday, 1995: 152). As he follows, this position is shaped by a specific understanding of 'what constitutes a "right" and its derivation from divine, rather than human or natural law bases', and 'restrictive ideological and legal regulations regarding several specific issues within the rights field'. Halliday emphasises that these specific issues are especially related with 'the rights of women, the rights of non-believers, the rights of people deemed to be apostates, and the question of punishments'. (Halliday, 1995: 153).

These critiques, generally, tend to identify particularist limitations on human rights with the cases of 'non-Western societies.' However, there is another particularism, European particularism that undermines the universality of human rights in the case of the European Union with the same consequences that certain groups face oppression and marginalisation. This time it is immigrants and asylum-seekers, so-called 'aliens,' who are denied certain rights. Moreover, there are various attempts by the member-states and the EU to limit and sometimes prevent their access to the rights regime constituted by the European Union through an emerging system of surveillance and control. This system operates beyond the logic of boundary control in its focus on the population as to differentiate and target those who are regarded as 'aliens' leaving their fundamental rights unprotected. The European particularism leading to this bifurcation of the rights in the EU is institutionalised through constitution of the citizenship of the EU and the immigration and asylum policies. Interestingly, what makes this particularism identifiable and problematic is the formal recognition of the universality of human rights by the EU in the post-Amsterdam era. In various documents like 'the Charter of Fundamental Rights of the European Union' (2000) and 'the Council Directive concerning the status of third-country nationals who are long-term residents' (2003) the tension between the commitment to the universality of human rights and the concern for limiting access of 'non-Europeans' to the rights regime of the EU reveals itself. This paper aims to disclose this tension and the ways in which a European particularism undermines the universality of human rights in the EU from a universalist perspective.

While there is a blooming critical literature on the migration and asylum policies of the EU and the emerging system of control and surveillance in the

post-Schengen Europe, which this study derives from, European particularism behind these policies goes without saying. It is this persisting particularism that punctures the formal recognition of and commitment to the universality of human rights in the EU in the post-Amsterdam era. The contradiction between European particularism and universality of human rights is a constitutive one as it structures a certain tendency to deny the non-citizens a coherent set of rights in the EU.

The recent works identifying certain processes and actors involved in the migration and asylum policies of the EU generating securitarian practices which keep immigrants, asylum-seekers and refugees under focus as 'usual suspects' are important in this context. The securitization of migration in the EU in the process of 'spillover of the economic project of the internal market into an internal security project' (Husymans, 2000), the move of the migration control bureaucrats to the transnational venue provided by the evolving EU to escape from the national judicial constraints (Guiraudon, 2003), the logic of "Schengenland" as to create an enhanced capacity for controlling "bad movement" (Crowley, 2003) indicate some of these processes.

Securitarian migration and asylum policies limiting and controlling access of 'aliens' to the European space are accompanied by a series of surveillance policies over the population in the European space which is differentiated in terms of their rights. These latter policies operate as to prevent 'the aliens inside' from enjoying the EU citizenship rights and welfare services. Moving the controls (over both of customs and the movement of people) from the border to all of the national territory (Anderson and Bigo, 2003) and shifting down the responsibility to draw the line between insiders and outsiders to the "gatekeepers" of the welfare state (Van Der Leun, 2006) are emblematic of these policies of surveillance. Groenendijk's study on the Netherlands and Germany is instructive with respect to the former tendency. In the wake of the ratification of Schengen Implementation Agreement (1994) that eliminated internal border controls, new tasks were drafted for the border police in both the Netherlands and Germany. In the Netherlands, this new task was called 'mobile control of aliens.' In Germany the special federal police force responsible from border controls were granted new powers like 'identity checks in trains, railway stations and airport all over Germany, in case they have information that the place is generally used for illegal entry'. Moreover their authority 'to perform checks within the 30 km. zone were extended'. (Groenendijk, 2003: 136, 138-139). The impact of the logic of moving the controls from the border to the territory at large, with the "the aliens" under focus, on the civil liberties is well summed up by Groenendijk:

> "With the powers of the border police to operate within the territory comes the internalization of dual legal regimes, one designed for the citizen aimed at finding the balance of civil liberties and state power, the other designed for foreigners with no claim on the state and to whom no duty of protection is owed, the objects of state power without a corresponding obligation to respect civil liberties". (Groenendijk, 2003: 146).

While it is obvious that this evolving system of control and surveillance operates selectively by targeting non-citizens, what makes them more problematic from the perspective of human rights is that those who are targeted do not have a coherent set of rights recognized by the EU. That is, their rights are not consistently and coherently protected and reinforced by the EU law. As emphasised by Guiraudon, the jurisprudence of the European Court of Justice on third-country nationals 'has not been based on human rights but on freedom of services or association treaty provisions'. (Guiraudon, 2003: 276). Therefore an institutionalised European particularism both organises a system of control and surveillance directed on the basis of an 'a priori decision on whom to target' (Crowley, 2003: 35) and deprives those who are targeted of a coherent set of rights recognised by the EU law. Hence, it is the contention of this paper that European particularism needs to be problematised in its own right from the perspective of universality of human rights. It is through this engaged perspective that we can reveal and locate particularism, this time in the case of the EU, in terms of its social and political consequences. It makes specific groups vulnerable and defenceless against the power that targets them.

In this engagement, cosmopolitan political morality developed by Caney is affirmed in this paper. Within the terms of this outlook the division between the citizens and non-citizens in the rights regime of the EU is untenable. Even if we accept the EU citizenship rights as 'special rights' and the fundamental rights of the non-citizens as an outcome of a 'minimalist' approach, this design fails the test of the 'three minimal desiderata of a sound theory of human rights'. They are 'criteria to determine what civil and political human rights persons have, the criterion of domestic-compatibility and criterion of coherence'. (Caney, 2006: 65). In this context there is a need for a moral justification about the line drawn between human rights and other rights; the reason why a full package of rights are affirmed for some but denied to others; and the coherency of the proposed minimal rights justifying that 'they did not entail any-more-than-minimal rights'. (Caney, 2006: 84-85). As will be seen throughout the paper what characterises post-Amsterdam EU is more of an unresolved tension and inconsistency between

a European particularism and the universality of human rights than an elaborate and morally justified rights regime.

The Case of the European Union: Between Particularism and Universalism

A reference to the commitment to human rights is a late achievement in the development of the founding treaties of the European Communities. It is only with the Amsterdam Treaty (in force as of 01.05.1999) that it was proclaimed that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.[1] Therefore, throughout the nineties the EU had been criticised by the human rights scholars in terms of 'the gap between the political rhetoric of commitment to human rights and the unwillingness to provide the Union with the means to make that rhetoric a living reality…' (Alston and Weiler, 1999: 13). In the absence of a legal basis in the original Treaties for a 'policy of defending human rights' the European Court of Justice elevated 'the constitutional traditions common to the Member States concerning the protection of fundamental rights to the Community level by transforming them into general principles of law'. (Leben, 1999: 87). Moreover, European Convention on Human Rights, which had been ratified by all member states, was another source in deriving the relevant general principles for safeguarding the human rights within the Community. Yet, this latter leverage had a limited use within the legal practices of the Community as the European Court of Justice in its Opinion 2/94 held that 'as Community law now stands, the Community has no competence to accede to the Convention.' (Toth, 1997: 491).[2]

That's why the Amsterdam Treaty is welcomed as the beginning of a 'new era' in developing the Union towards becoming an active promoter of human rights. In the annual report of the European Parliament on respect for human rights in the European Union in 1998-1999,[3] it is underlined that 'a new legal and

[1] This is an amendment for the paragraph 1 of the Article F in the Maastricht Treaty of 1992. The original paragraph read as 'The Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy'. The emphasis regarding the respect for the national identities have been expressed in the new paragraph 3 added by the Amsterdam Treaty which said that 'The Union shall respect the national identities of its Member States.'

[2] This would change as the Treaty of Lisbon, which entered into force on 1 December 2009, enables the Union to accede to the Convention.

[3] European Parliament, Session Document A5-0050/2000.

political context' is created by the Treaty of Amsterdam. It is cited in the report that 'the new Treaty formally establishes that the European Union is founded on respect for human rights, fundamental freedoms and the rule of law…' On this basis, the EP notes that 'respect for human rights, fundamental freedoms and the rule of law should also therefore be a guiding principle for the Union's policies such as the implementation of an area of freedom, security and justice and the social, foreign and development policies…as well as functioning of its institutions.'

This reference to 'the implementation of an area of freedom, security and justice' points to another new beginning opened up by the Amsterdam Treaty. It shifted asylum and immigration from the intergovernmental third pillar to the Community (first) pillar. As a result, a new Title IV (in the First Pillar) is created and named as 'visas, asylum, immigration, and other policies related to the free movement of persons'. This meant that a common migration and asylum policy is going to be devised at the community level. In the Treaty, the need for a policy framework of asylum and immigration is proposed as a component of developing 'an area of freedom, security and justice'.[4]

In this context, the Amsterdam Treaty incorporated the Schengen *acquis* as the basis of the projected common policy framework in the first pillar. The Schengen Agreement is basically about the surveillance of the internal space constituted by the abolition of checks on persons at internal boundaries and the control of the common external boundary by the parties to the Agreement. This involves common rules and practices on the issuance of visas, residence permits, extradition and common immigration policies. The focus of this system designed by the Agreement is specifically 'aliens'; that is free movement inside is to be secured through controlling the access and movement of 'aliens' to and within the internal space. Under Title I (Definitions), article 1 of the Agreement, two definitions, in the very beginning, indicate this. *Alien* is described as 'any person other than a national of a Member State of the European Communities'. The second category is named as *alien for whom an alert has been issued for the purposes of refusing entry*. According to the Agreement, this 'shall mean an alien

[4] In one of the amendments, put into force by the Amsterdam Treaty, for the article B of the Treaty on European Union, it is stipulated that one of the objectives that the Union shall set itself is 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating crime.' (The Amsterdam Treaty, 1999).

for whom an alert has been introduced into the Schengen Information System in accordance with Article 96 with a view to that person being refused entry'. Schengen Information System (SIS), as established by Title IV of the Agreement, is a 'joint information system' which enables the authorities, 'by means of an automated search procedure', to have access 'to alerts on persons and property for purposes of border checks and other police and customs checks…' Article 92 of the Agreement, while explaining the SIS, specifically refers to 'aliens' with reference to article 96. Article 96 is about storing 'the data on aliens for whom an alert has been issued for the purposes of refusing entry'. In the same article it is stipulated that 'decisions [issuing an alert] may be based on a threat to public policy or public security which the presence of an alien in national territory may pose'. Accordingly, 'this situation may arise' for two reasons; 'a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year' and 'b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences…or in respect of whom there is clear evidence of **an intention to commit such offences in the territory of a Contracting Party**'.[5] (emp. is added).

It is evident that even the assumed intention of 'aliens' may be a ground for refusing the entry, hence protecting the free movement rights of the EU citizens from external incursions. So, the Treaty established a formal link between the abolition of the internal border controls enhancing the free movement of EU citizens and a securitarian and particularist approach that emphasised the surveillance and control of the EU space against those who are (to be) denied access to that space. As a result, the Amsterdam Treaty initiated a process in which two different logics apparently stood in an uneasy, even contradictory relationship; a Union having human rights as the basis for its policies and implementations and a Union which is obsessed with the control and surveillance of its rights-based space against 'aliens'. The tension in this connotation is that 'aliens' are already inside. They are the immigrants, third-country nationals, who do not have a coherent and uniform set of rights in comparison to the EU citizens. The Maastricht Treaty of 1992 had constituted the citizenship of the EU which provided 'additional' rights to the nationals of the member states. The Amsterdam Treaty confirmed that 'every person holding the nationality of a Member state shall be a citizen of the Union'. There are four specific provisions and rights attached to the citizenship of the EU: Freedom of movement and residence throughout the Union, the right to vote and stand as a candidate in municipal

[5] Convention Implementing the Schengen Agreement, 1990.

elections and in elections to the European Parliament in the state where he/she resides, protection by the diplomatic and consular authorities of any Member State where the state of which the person is a national is not represented in a non-member country, the right to petition and the European Parliament and apply to the Ombudsman. While there is no explicit reference to 'European identity' in the Treaty in the context of European citizenship and the associated rights there is such an overt emphasis in the EU Guide to the Treaty. It is said that 'the aim of European citizenship is to strengthen and consolidate European identity by greater involvement of the citizens in the Community integration process'.[6] This involvement in the Community integration process is made possible via the rights pertaining to the single market. As followed, 'thanks to the single market, citizens enjoy a series of general rights in various areas such as the free movement of goods and services, consumer protection and public health, equal opportunities and treatment, access to jobs and social protection'. So, it is implied that, what is aimed is the integration of the 'nationals' of the Member States sharing a common European identity which is to be 'strengthened' through the enjoyment of these specific rights.

While these rights were generated by the European integration and constituted by the EU, the integration may be achieved and sustained through the enjoyment of these rights. However, third-country nationals with no rights as such were excluded from the integration process. Third-country nationals have no European community rights. As Bhabha stressed, this underlying division between the citizens/nationals and non-citizens/non-nationals led to a 'multi-tiered system of rights, to mobility, to family reunion, to eligibility for social security payments, which is profoundly discriminatory and politically problematic'. (Bhabha, 1998: 713).

This discrepancy between the uniform set of rights attributed to the EU citizenship and the opposite case for third-country nationals has become more puzzling in the post-Amsterdam era, given the commitment to the human rights ideals. In order to overcome this gap, Tampere European Council in 1999, which was on the creation of an area of freedom, security and justice, took the following decision;

> "The legal status of third country nationals should be approximated to that of Member State nationals. A person, who has resided legally in a Member State for

[6] 'The Amsterdam Treaty: a Comprehensive Guide' is an EU document accessed via http://europa.eu.int/ scadplus/leg/en/s5000.html

> a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens…"[7]

Moreover this Council meeting initiated the process for "drawing up a draft Charter of fundamental rights of the EU." Unfortunately, neither the Charter of Fundamental Rights of the European Union proclaimed in December 2000 nor the Council Directive on the status of long-term resident third-country nationals of 2003 resolved the problem.

The solemn proclamation of the Charter of Fundamental Rights of the European Union by the European Parliament, the Council and the Commission in December 2000 has been one of the most important steps in the post-Amsterdam era in terms of specifying the rights the EU is committed to. In its Preamble it is stated that this Charter reaffirms the rights 'as they result, in particular, from the constitutional traditions and international obligations common to the Member states, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the social charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights'.[8] Therefore, the Charter includes, or gathers, almost all the rights and freedoms that had been referred in the political and legal 'heritage' of Europe. By this proclamation, it is noted that, '[T]he Union therefore recognises the rights, freedoms and principles set out hereafter'. As a result, the Charter is expected to clarify the legal and political commitments of the Union to human rights and freedoms. Although the legal status of the Charter then remained uncertain, it is emphasised initially after its proclamation that the legal actors within the Community, such as the Court of First Instance and the advocates general of the Court of Justice, started to take the Charter into account in their practices. (Ménendez, 2002) However the most important development that would provide a firm legal status to the Charter is the incorporation of this document into the Treaty of Lisbon.[9]

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[7] Presidency Conclusions Tampere European Council 15 and 16 October 1999

[8] The Charter of Fundamental Rights of the European Union was solemnly proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000.

[9] 'The Draft Treaty Establishing A Constitution of the EU' (2003) had incorporated the Charter as a part. But it failed ratification. The Treaty of Lisbon entered into force on 1 December 2009.

Yet, the particularist tendency and its divisive impact on the universality of human rights, leading to social and political exclusion of non-citizens from the European integration, as emphasised above, is retained and in a sense consolidated in this Charter. In the Preamble this tension between the all-inclusive nature of universal human rights and the exclusive character of the European citizenship is revealed in an uneasy formulation. It is stated that;

> "[C]onscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

With good intentions, this paragraph can be interpreted by saying that EU suggests a model for the universal recognition and enforcement of human rights for its citizens in their specific individuality. However, given the existence of large numbers of non-citizens within, the paragraph expresses the uneasiness in justifying the particularist monopolisation of 'some' fundamental rights only for 'the citizens', or 'the Europeans'. While the former sentence is an expression of moral appreciation of the universality of human rights the latter reveals the limitations imposed on the universal human rights through exclusive citizenship rights and asylum and migration policies which are increasingly identified with the process of creation of 'an area of freedom, security and justice'. Therefore, although the Charter, to its credit, lists the fundamental rights, mostly valid for every person, some rights are limited with 'the European citizenship' which mostly coincides with the economic, social and political activities that take place at the Union level.

In the article 15 of the Charter, 'freedom to choose an occupation and right to engage in work', there are three points. Firstly, it is stated that 'everyone has the right to engage in work and to pursue a freely chosen or accepted occupation'. Secondly, it is specified that 'every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'. Hence this right can only be used by the 'citizens' at the Union level. Thirdly, it is added that 'nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of the citizens of the Union'. However this remains to be a 'conditional' right even if the strict rules for work permit are overcome by 'non-citizens'. In Article 34, 'social security and social assistance', it is stated that 'everyone residing and moving legally within the European Union is entitled to

social security benefits and social advantages in accordance with Community law and national laws and practices'. Although this provision may not seem that exclusive for 'non-citizens', the difficulties in obtaining residence and mobility rights make it quite difficult especially for the migrant workers, some of them working illegally, to enjoy this social right. Article 39, 'right to vote and to stand as a candidate at elections to the European Parliament', says that 'every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State'. Article 40 repeats the same political right of 'the citizens' at the municipal elections. In the Article 45, 'freedom of movement and of residence', it is specified that 'every citizen of the Union has the right to move and reside freely within the territory of the Member States'. Again, a universal human right, freedom of movement and of residence, is provided only for the citizens at the Union level. Article 46 states the right of diplomatic and consular protection for "the citizens" of the Union in case 'the member state of which he or she is a national is not represented' in a third country.

In sum, it can be concluded that the economic, social and political rights generated by the formation of the EU, are mostly specified for the exclusive use of 'the citizens of EU' in principle. Therefore, the Charter is punctured by this particularism into two different realms: on the one hand there are the fundamental rights that are for everyone, reflecting the principle of universalism of human rights, on the other there are 'specific' rights of 'the citizens' leading to the exclusion of 'non-citizens' from some fundamental rights such as the right to mobility and residence, the right to work, the right to social security and political rights. As has been emphasised with reference to the Amsterdam Treaty, it is only through the use of these 'particular' rights of 'the citizens of Europe' that a social, economic and political integration can be realised. The association between the European identity and the integration of the citizens means the exclusion, hence the oppression, of large numbers of non-citizens, 'third country nationals', from and within the European integration.

While the Charter reiterated the exclusion of third-country nationals from the rights constituted by the EU 'the Council Directive concerning the status of third-country nationals who are long-term residents' fell behind the call of the Tampere Council for the approximation of the rights of 'long-term resident third-country nationals' to that of the EU citizens. The scope of the Directive is limited with the residence rights in another member-state within the EU. However, the Directive is more about the conditions and limitations on the enjoyment of this

right by third-country nationals than being a step towards the equal treatment. According to the Directive, 'member states shall grant long-term resident status to third-country nationals who are resided legally and continuously within its territory for five years…' Still, 'to acquire long-term resident status, third-country nationals should prove that they have adequate resources and sickness insurance to avoid becoming a burden for the Member State'. Moreover, 'third-country nationals who wish to acquire and maintain long-term resident status should not constitute a threat to public policy or public security'. Furthermore, the member states are granted several flexible leverages through which this status could easily be nullified. For instance, in the article 14, it is stated that 'member states may examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities'. It is even stated that 'for reasons of labour market policy, Member States may give preference to Union citizens…'[10] According to article 15, '[M]ember States may require third-country nationals to comply with integration measures, in accordance with national law…'[11]

The Treaty of Lisbon confirms that the gap in the rights regime of EU concerning the third-country nationals persists. Though the Treaty is important in giving EU law status to the Charter of Fundamental Rights of EU and enabling the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, it does not constitutionalise the rights of third-country nationals. Constitutionalisation, in the EU context, is described as the emergence of a '…vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entitities, public and private, within the sphere of application of EC law'. (Rittberger and Schimmelfennig, 2006: 1148). As Lavenex extensively discusses, the case of third-country nationals represents failed constitutionalisation in the process of European integration. (Lavenex, 2006) In the Treaty of Lisbon, in the article 63 of new Title IV (Area of Freedom, Security and Justice) it is stated, with respect to third-country nationals, that '…the EP and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the definition of the

[10] The full quotation is; 'For reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third country nationals who reside legally and receive unemployment benefits in the Member States concerned'. Although it may appear neutral this article subverts the objective of fair treatment of third-country nationals, which is why this directive is put into force, by legalizing the discrimination.

[11] Council Directive 2003/109/EC of 25 November 2003.

rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States'.[12] So, it still remains to be seen if the third-country nationals would have their EU law rights comparable to the EU citizens.

Towards a System of Surveillance?

The particularist conception of some fundamental rights through a division of universal rights into different tiers is not simply the replication of the common practice of the nation-states in attaching the rights to the citizenship. It separates a category of Europeanness with full access to the fundamental rights while large numbers of 'migrants, illegal workers, asylum-seekers', so-called aliens, are denied some fundamental rights and excluded from the integration process. As a result, European particularism is not simply a repetition of the 'national' particularism in attaching the rights to the citizenship but also it is an expression of the closure of the social, economic and political integration, taking place at the EU level, to the 'outsiders', even if they are within the EU space. This closure is constructed through imposing identity-based specific limitations upon the enjoyment of the universal rights and freedoms. The human rights problems which this system brings about can be disclosed at two levels.

Firstly, the exclusion of 'non-Europeans' from the EU citizenship rights coincides with the erection of new surveillance institutions and practices in the EU as an outcome of the concerted actions of the member states to establish and 'safeguard,' first, single market, then 'the area of security, freedom and justice' against the 'outsiders'. The persistent concern with the control of extra-EU migration and asylum in the wake of the disappearance of the internal borders proved to be one of the underlying dynamics of European integration. In the post-Amsterdam era, the consolidated European particularism regarding the citizenship rights and migration and asylum policies in the institutional venues of the EU reveals a logic of simultaneous control of both the boundary and the population, hence territory at large, as embodied in the SIS (Schengen Information System), EUROPOL and SIRENE (Supplementary Information Request at the National Entry), rather than an obsessive concern with an image of reified boundary demarcating 'inside' from 'the outside'. As is well-known, the outsiders, including those without EU citizenship rights and those with differential and

[12] Treaty of Lisbon amending the Treaty on on European Union and the Treaty establishing the European Community.

conditional access to certain rights, are already in the EU and all boundaries are bound to be permeable. Therefore, it is possible to point out both the sophistication and multiplication of the agencies of the boundary control and surveillance practices over the population in terms of the persistent attempt to designate 'the outsiders' (within) who 'should' either be denied any access to the rights regime of the EU or whose access 'should' be checked in terms of the imposed conditions and criteria of eligibility. As Guiradon and Lahav had explained, the migration control is achieved not only through 'shifting up' in terms of new intergovernmental venues but also through shifting 'down' and 'out'. In terms of 'shifting out,' a 'remote control' policy is aimed by imposing 'carrier sanctions or international cooperation with neighbouring and sending countries'. While 'shifting down' involves the incorporation of the local authorities in the migration control who would be more restrictive and reactionary regarding aliens' rights due to the electoral pressures or 'fears of sanction'. (Guiradon and Lahav, 2000: 177-178) Moreover, the mutual relationship between the control of the territory and the control over the rights regime of EU requires a more extensive surveillance across the labour market and social security system on the one hand, and residence, family union and movement of third country nationals on the other. In such an extensive system of control even the employers and the welfare officers turn to be the agents of boundary control (Crowley, 2001: 26-27).

It is the 'similar definitions of adversary' that gives coordination to such an extensive system of surveillance including a variety of agents from security forces to the employers and local authorities. As Bigo put forward, 'the immigrant is the archetypal outsider' in this configuration. (Bigo, 2000: 91) The association between European identity and the citizenship rights of the EU can be invoked at that moment in terms of the coincidence of an invoked identity boundary and the focus of this extensive surveillance system. It is in relation to third country nationals and migrants that Europeans are defined as a 'homogenous body'. (Bigo, 2002: 80) Therefore, the particularist monopolisation of certain rights as European citizenship rights lies at the heart of this edifice of surveillance and suppression. It is both the legal ground and the rationale of this sophisticated system of territorial control operating with 'a logic of differential suspicion' (Crowley, 2001: 25) and oriented to the designation of 'outsiders'. As has been argued throughout the paper, the culturalist and/or particularist limitations imposed on human rights lead to the suppression of select groups (non-dominant as it goes without saying) within the society by providing a pretext of legal justifiability. The European particularism puncturing the system of rights in the politico-legal domain of the

EU lies behind the continuous suppression of non-Europeans within the territorial space of the EU who remain to be 'the suspicious outsiders'. In this context, it can be concluded that even if the exclusive character of the EU citizenship rights would not mean the denial of human rights of non-citizens, that is if it is seen as a repetition of the 'practice as usual' regarding the constitution of citizenship and corresponding set of exclusive rights, the extensive system of territorial and social control built into the rights regime of the EU is structurally bound to lead to continuous human rights problems for those who are 'targeted'.

Secondly, it can be argued that the constitution of the exclusive citizenship rights at the EU level is itself problematic from the human rights perspective in a way it is not in terms of the citizenship of nation-states. Article13/I of UNHR states that '[E]veryone has the right to freedom of movement and residence within the borders of each state' and the citizenship rights of the nationals does not, in principle, prevent the free movement of non-nationals within the polity of nation-states. However, this is not the case in the EU. Free movement rights of the EU citizens is accompanied with the controls over the movement of non-citizens. Therefore, the constitution of the EU citizenship rights does not only generate positive rights for the citizens but also it entails suppressive controls for non-citizens, hence limitation of their human rights. What is more, it is also possible to argue that if we are to take EU citizenship rights at the same level with that of national citizenship rights in terms of the common pattern of exclusiveness, then we should also take the EU itself as a polity comparable to the nation-state. In this case, the deficit of human rights would be much more apparent. Just by taking the UNHR and ECHR as the reference, it can be illustrated that the make up of the EU citizenship rights limits the human rights of the non-citizens in terms of family union, social security, freedom of residence and movement, right to work and free choice of employment. Those non-citizens who are within the same polity are denied some of these rights.

Conclusion

It appears that pre and post Amsterdam moments were vital in shaping the rights regime of the EU. There were possibilities for breaking up the connection between European identity, the citizenship of the EU and the EU system of rights. First, there was the possibility of 'denizenship'. Geddes reminds us that 'the idea that Europeanised denizenship with free movement rights extended to include legally resident TCNs was mentioned in the Commission's 1998 Action Plan on free movement, immigration and asylum'. (Geddes, 2003: 145). Moreover, 'the

Charter of Fundamental Rights of the European Union' and 'the Council Directive concerning the status of third-country nationals who are long-term residents' could have taken different shapes by remaining true to their promises. Yet, what persisted through these moments was an entrenched European particularism that consistently impeded the enforcement of universal human rights at the EU level.

While this resistance to an inclusive, universal rights regime is generally related to popular opposition, recent studies suggest otherwise. In the researches of Statham and Geddes (2006) and Ellerman (2006) it is concluded that the elite positions or the bureaucrats are more "restrictive" and the public attitudes are more 'nuanced', even at times sympathetic to the cause of the immigrants when faced with 'high human costs'. The elites structuring the EU immigration policies and limiting the inclusiveness of universal human rights are known to be the immigration officials who went transnational in their attempt to avoid national judicial constraints. Guiraudon refers to their 'professional identity' in explaining 'the bias towards control and policing'. (Guiraudon, 2003: 277-278). However, what may be suggested in the end of this paper is that these elites, also share, or converge in, a European particularism which has now both discursive and institutional basis in the EU policies. Tentative references to European identity, assumed to be shared by the citizens of the EU, at the discursive level and an institutionalised distinction between the citizens and 'the others' in terms of their rights provide an ideological and institutional terrain in the EU for devising and justifying particularist, securitarian and control-oriented policies on the conception of rights.

A cosmopolitan political morality depending on the principle of the universality of human rights would provide a sound basis to expose such gaps in the conception of rights across different states and societies. Although a philosophical and theoretical debate still continues on how to reconcile universal human rights with different cultures and moralities, in the modern world of complex political organisations and global capitalism the protection of human rights is more a political issue than a cultural one. As has been argued throughout this paper, the culturalist or particularist specifications imposed on human rights lead to the exclusion and oppression of 'disenfranchised individuals' and 'non-dominant groups' not only in 'non-Western' but also in the Western societies. Given these widespread and persistent practices of marginalisation and oppression across different 'cultures' and societies, the principle of the universality of human rights turns into a political and moral standpoint in the endless struggle for political equality and social and economic rights.

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