



THE UNIVERSITY *of* EDINBURGH  
Edinburgh Law School

***'Liberty Versus Security Under Illiberal Constitutionalism: The Legality of  
Criminalising Humanitarian Assistance in Hungary and Greece'***

**Dissertation in Law**  
**Programme of Study:** LLM Human Rights  
**Exam Number:** B197318  
**Word Count:** 9.996

## TABLE OF CONTENTS

<b>1</b>	<b>Introduction</b> .....	1
<b>2</b>	<b>The Decay of Democracy, the Downfall of Europe? Illiberal Challengers to the Transnational Legal Order</b> .....	4
	2.1 The Rise of Hybrid Regimes within the EU's Liberal Order .....	4
	2.2 Illiberal Constitutionalism: Conceptualising the Oxymoron .....	6
<b>3</b>	<b>A Democratic Coup d'État: Restricting Fundamental Rights within Constitutional Confines</b> .....	10
	3.1 Civil Society Restrictions in the Name of National Security .....	10
	3.2 The Criminalisation of Humanitarian Assistance under the Guise of Anti-Smuggling Rhetoric .....	13
<b>4</b>	<b>Filling the Research Gap: The Legally Permissible Balance Between Liberty and Security Under Illiberal Constitutionalism</b> .....	18
	4.1 Research Design .....	18
	4.2 Methodology .....	20
	4.3 Case Selection .....	21
<b>5</b>	<b>The Legal Basis for the Criminalisation of Humanitarian Assistance: National Law Provisions in Greece and Hungary</b> .....	24
	5.1 Hungary's Bill Amending Certain Laws Relating to Measures to Combat Illegal Immigration .....	24
	5.2 The Greek Immigration and Social Integration Code .....	27
<b>6</b>	<b>Outsmarting the International Legal Regime? A Legal Analysis of Illiberal Constitutionalism's Ability to Legalise Human Rights Violations</b> .....	31
	6.1 Legal Limits for Human Rights: The Interplay of Nativism and National Security	31
	6.2 Accounting for the Use of Nativism to Restrict Fundamental Rights: Populism's Link with Illiberalism.....	37

**7 Conclusion ..... 41**

Appendix

Bibliography ..... 44

Primary Sources ..... 55

*Applicable Legal Framework* ..... 55

*Relevant Case Law* ..... 57

Secondary Sources ..... 58

## 1 Introduction

With the end of the Cold War and the apparent triumph of the liberal democratic order, the “end of history” had been famously proclaimed.<sup>1</sup> Notwithstanding this definitive prognosis, the past fifteen years have shown a marked regression in the quality of democracy, specifically its feature of liberal constitutionalism and associated checks and balances on executive power.<sup>2</sup> This trend is especially worrying, given its occurrence within the normative context of the European Union (EU), which has built its brand on an adherence to liberal democracy and the respect for human rights.<sup>3</sup> Accordingly, substantive liberal democratic features have been diluted to a significant extent under the guise of constitutional form – a phenomenon dubbed illiberal constitutionalism – while the EU has not been able to enforce norm compliance.<sup>4</sup> In this context, constitutional guarantees to safeguard civil society’s operational space have been commonly infringed upon, resulting in the increased interference of the state by means of imposing administrative difficulties, limiting access to resources, and, in a most recent trend, criminalising certain civil society activities.<sup>5</sup>

The criminalisation of humanitarian assistance, which is one of the gravest restrictions of civic space by means of the criminal law, has notably occurred in the context of the securitisation of immigration acting as a response to the 2015 migration crisis. As a result, the balance between security and liberty has been markedly skewed in favour

---

<sup>1</sup> Francis Fukuyama, *The End of History and the Last Man* (Penguin Books Ltd 1993).

Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 9.

<sup>2</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 86.

Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 3.

<sup>3</sup> Dariusz Adamski, “The Social Contract of Democratic Backsliding in the ‘New EU’ Countries” (2019) 56 *Common Market Law Review* 626.

Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 86.

<sup>4</sup> Gábor Halmai, “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 35.

<sup>5</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 967.

of the former.<sup>6</sup> As previous studies of illiberal constitutionalism have pointed out the tools used by illiberal governments to restrict liberal guarantees of fundamental rights, the present dissertation aims to add to this field by assessing the legal limits of this phenomenon. Through the lens of Human Rights Law as a measure of permissible practices, the following dissertation thus aims to investigate *to what extent does the criminalisation of humanitarian assistance legally restrict constitutional guarantees of fundamental rights?*

The significance of this study results from illiberal constitutionalism's ability to circumvent to a substantial degree the liberal democratic checks and balances by diluting constitutional safeguards against executive overreach. Hence, the motive of this paper is to inspect governments' ability to employ illiberal constitutionalism to shirk international legal obligations and legally restrict fundamental rights. As previous studies have pointed out, the context of the securitisation of immigration allows for the use of national security as a justification to restrict fundamental freedoms. While International Law permits deviations from the existing human rights framework in the instance of threats to public security, it is not clear to what extent this is legally possible.<sup>7</sup> In other words, the aim of this study is to explore the legally permissible skewing of the balance between security and liberty in the context of illiberal constitutionalism.

For this purpose, the present study will assess the extent to which fundamental rights can be legally restricted in favour of security by placing the legislative frameworks criminalising humanitarian assistance in the context of international human rights law on individual rights and freedoms, specifically the International Covenant on Civil and Political Rights (ICCPR). Adding to existing research, this dissertation will thus look at the 'how' rather than the 'what' of illiberal constitutionalism, aiming at providing an in-depth understanding of illiberal practices to enable the development of an effective response to the regression in democratic quality across Europe. A comparative benchmarking approach will be applied, having selected the cases of Hungary and

---

<sup>6</sup> Dimitris Skleparis, "(In)securitization and illiberal practices on the fringe of the EU" (2016) 25 European Security 92.

<sup>7</sup> Elizabeth A. Wilson, "Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis" (2016) 8 Journal of Human Rights Practice 335.

Greece to be studied according to a most different systems design with the common denominator being the criminalisation of humanitarian assistance. The results of the following legal analysis will then be able to provide an assessment of the extent to which the transnational legal order can restrict illiberal constitutionalism and effectively safeguard human rights in terms of balancing liberty against security.

The following dissertation will commence by presenting the relevance of illiberal constitutionalism by situating it in the wider legal and political context of the international order. Based on the findings of previous research, the workings of this phenomenon will be outlined. The literature review will move on to single out the practice of civil society restrictions as an important constituent of illiberalism. Moreover, this circumstance will be put into the context of the securitisation of immigration, by means of criminalising humanitarian assistance, and the resulting skewing of the balance between liberty and security. Pointing out the existing research gap to be filled and reiterating the value added by this dissertation, the research design will outline the applied methodology and justify the case selection. Subsequently, the relevant legislative framework will be unpacked to provide an understanding of the varied instances of illiberal constitutionalism across the emerged democratic spectrum. As the focal point of this dissertation, the legal analysis will then proceed to put the outlined provisions into context of international law by applying the human rights framework relevant to the realisation of civil society's operational space. A discussion of the findings will follow, pointing towards a link between illiberalism, populism, and nativism, that warrants further study. The conclusion will summarise the content and findings of the present dissertation, stating the international legal regime's ability to provide for certain safeguards of the balance between liberty and security.

## 2 The Decay of Democracy, the Downfall of Europe? Illiberal Challengers to the Transnational Legal Order

### 2.1 The Rise of Hybrid Regimes within the EU's Liberal Order

In the past decade, there has been a marked decline in more countries' democratic performance than any overall improvement.<sup>8</sup> This regression has been the result of a gradual process of "hollowing out" democratic institutions by means of disabling the checks and balances emblematic of liberal constitutionalism.<sup>9</sup> This downwards trend has led to a significant number of states falling within the grey area between democracy and fully-fledged authoritarian regime.<sup>10</sup> As a result, some countries' political systems have thus been designated as Hybrid Regimes.<sup>11</sup> Alternatively, the academic literature has referred to these countries as "Democratorships [which] are, as the term implies, suspended between democracy and dictatorship with features of both".<sup>12</sup> Accordingly, this regime type falls short in realising substantive democratic features such as fair elections as well as the protection and guarantee of civil rights as the judiciary is curtailed and political pluralism is limited.<sup>13</sup> This dissertation will employ the term hybrid regimes, for the purpose of coherence with the main body of existing literature.

---

<sup>8</sup> Kim Lane Scheppele, "Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight" in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 3.

<sup>9</sup> Dariusz Adamski, "The Social Contract of Democratic Backsliding in the 'New EU' Countries" (2019) 56 *Common Market Law Review* 626.

Ivan Krastev, "Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline" (2018) 97 *Foreign Affairs* 49.

Attila Ágh, "The Triple Crisis in Hungary: The "Backsliding" of Hungarian Democracy After Twenty Years" (2013) 13 *Romanian Journal of Political Sciences* 25.

Nany Bermeo, "On Democratic Backsliding" (2016) 27 *Journal of Democracy* 5.

Séan Hanley, & Milada Anna Vachudova, "Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic" (2018) 34 *East European Politics* 279.

<sup>10</sup> Kim Lane Scheppele, "Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight" in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 3.

<sup>11</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland" (2018) 20 *German Law Journal* 1150.

Andras Bozóki & Daniel Hegedűs, "An externally constrained hybrid regime: Hungary in the European Union" (2018) 25 *Democratization* 1173.

<sup>12</sup> Kim Lane Scheppele, "Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight" in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 4.

<sup>13</sup> Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 976.

Hybrid regimes have been prevented from fully regressing into an autocratic state because governments face limitations to erasing the constraints on their power. These restrictions are provided for by international legal norms. As liberal democracy has become the norm propagated by the developed world, so has its feature of liberal constitutionalism and the related protection of fundamental rights, through positive and negative obligations of the state, become part of the international normative framework within which states exist.<sup>14</sup> In other words, while there are different variations of democracy, ranging from parliamentary or presidential systems to federal or unitary states, they all have a “non-negotiable [set of] features”, such as constitutional protections of basic rights and the rule of law, in common.<sup>15</sup> These form the transnational legal order – “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions” – within which governments operate.<sup>16</sup> Scheppele has investigated how this liberal consensus can be challenged without openly deviating from it, finding that liberal democratic institutions can be used to dilute associated norms to a significant extent without enacting openly illiberal changes.<sup>17</sup>

In the process, democratic institutions such as legislative and judicial oversight are restricted, electoral procedures may be changed in favour of incumbents, and channels of information like the media are captured by partisans.<sup>18</sup> Ironically, these

---

<sup>14</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1141.

Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 9.

<sup>15</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 9.

Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 88.

<sup>16</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 4.

<sup>17</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 9.

<sup>18</sup> Bugarič, B., “Central Europe’s Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism” (2019) 17 *International Journal of Constitutional Law* 597.

Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 89.

Dariusz Adamski, “The Social Contract of Democratic Backsliding in the ‘New EU’ Countries” (2019) 56 *Common Market Law Review* 625-6.



changes are enacted by using the very tool meant to safeguard the transnational legal order in the national context: the constitution. Hence, governments enact illiberal changes by means of legislation modifying the constitution, as well as the wider political and legal landscape as a result – a phenomenon called illiberal constitutionalism.

The disregard for democratic principles is especially concerning in the context of the European Union, since the regional organisation champions the values of liberal democracy, including the respect for human rights, the rule of law, and civic participation.<sup>19</sup> As there has been no evident remedy for the phenomenon that is illiberal constitutionalism, the legitimacy of liberal norms and the EU is being called into question.<sup>20</sup> Thus, as the violations of core European values continue uninhibitedly, this warrants the need for a deeper insight into the workings of these newly emerging hybrid regimes to be able to develop ways of effectively responding to this trend.

## 2.2 Illiberal Constitutionalism: Conceptualising the Oxymoron

Since the transnational legal order acts as a constraining factor on illiberalism, preventing countries from fully regressing into authoritarianism, governments are

---

Agnes Batory, “Populists in government? Hungary’s ‘system of national cooperation’” (2016) 23 *Democratization* 294.

Licia Cianetti, James Dawson, & Seán Hanley, “Rethinking ‘Democratic Backsliding’ in Central and Eastern Europe: Looking beyond Hungary and Poland” (2018) 34 *East European Politics* 245.

Seán Hanley & Milada Anna Vachudova, “Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic” (2018) 34 *East European Politics* 279.

Maurits J. Meijers & Harmen van der Veer, “MEP Responses to Democratic Backsliding in Hungary and Poland. An Analysis of Agenda-Setting and Voting Behaviour” (2019) 57 *Journal of Common Market Studies* 838.

<sup>19</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 86.

Gábor Halmai, “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 35.

Tanja A. Börzel & Frank Schimmelfennig, “Coming Together or Drifting apart? The EU’s Political Integration Capacity in Eastern Europe” (2017) 24 *Journal of European Public Policy* 278.

James Dawson, & Seán Hanley, “What’s Wrong with East-Central Europe?: The Fading Mirage of the ‘Liberal Consensus’” (2016) 27 *Journal of Democracy*, 30.

<sup>20</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 976.

Gábor Halmai, “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 35.

forced to operate within the limitations provided by the constitution as a formative feature of liberal democracy. The mechanism to describe acts of illiberalism under the guise of constitutional form is known in the literature under a multitude of terms. The most sensible of these options is “illiberal constitutionalism”, though this term is often criticised for its oxymoronic delineation of the concept.<sup>21</sup>

With constitutions being a core feature of liberal democracy, the primary argument for the aforementioned criticism is that “constitutionalism cannot be anything but liberal”.<sup>22</sup> Thus, utilising such an oxymoron to refer to relevant practices would assign a sense of legitimacy to them, as falling within the realm of democracy when in fact they are anything but democratic.<sup>23</sup> Others argue that “these governments are not acting in an undemocratic way at all”, since they make apt use of democratic procedures, no less with illiberal outcomes.<sup>24</sup> Hence, the literature greatly varies in naming the phenomenon, ranging from “modern authoritarianism” over “populist constitutionalism” to “autocratic legalism”.<sup>25</sup> This dissertation will nonetheless adhere to the term illiberal

---

<sup>21</sup> Tímea Drinóczy & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1140.

Gábor Attila Tóth, „Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism“ in Maurice Adams, Anne Meuwese, & Ernst Hirsch Ballin (eds) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017) 386.

Kim Lane Scheppele, “Autocratic Legalism” (2018) 85 *University of Chicago Law Review* 545.

Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019).

<sup>22</sup> Tímea Drinóczy & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1149.

<sup>23</sup> Gábor Halmai, “Populism, Authoritarianism, and Constitutionalism” (2019) 20 *German Law Journal* 296.

Gábor Attila Tóth, „Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism” in Maurice Adams, Anne Meuwese, & Ernst Hirsch Ballin (eds) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017) 386.

Gábor Halmai, “The making of ‘illiberal constitutionalism’ with or without a new constitution: the case of Hungary and Poland” in David Landau & Hanna Lerner (eds) *Comparative Constitution Making* (Elgar 2019) 302.

Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP 2017) 88.

Jan-Werner Müller, ‘The Problem With “Illiberal Democracy”’ (*Social Europe*, 27 January 2016) <<https://socialeurope.eu/the-problem-with-illiberal-democracy>> accessed 10 July 2022.

<sup>24</sup> Tímea Drinóczy & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1150.

<sup>25</sup> Paul Blokker, ‘Populist constitutionalism’ (*Verfassungsblog on matters constitutional*, 4 May 2017) <<https://verfassungsblog.de/populist-constitutionalism/>> accessed 10 July 2022.

Kim Lane Scheppele, “Autocratic Legalism” (2018) 85 *University of Chicago Law Review* 545.

Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019).

Steven Levitsky & Lucan Ahmad Way, “The Myth of Democratic Recession” (2015) 26 *Democracy* 45.

Larry Diamond, “Facing Up to the Democratic Recession” (2015) 26 *Journal of Democracy* 142, 148.

Jacques Ruprik, “The Specter Haunting Europe: Surging Illiberalism in the East” (2016) 27 *Journal of Democracy* 133.

Mark Tushnet, “Authoritarian Constitutionalism” (2015) 100 *Cornell Law Review* 438.

constitutionalism as it fittingly highlights the existing paradox of democratic regression and rise of illiberalism in light of the transnational legal order being informed by liberal democratic norms.<sup>26</sup> But how exactly is illiberal constitutionalism employed in practice?

Illiberal constitutional practices entail that “democratic mechanisms are used [and] democratic rules are observed – at least formally” but with the objective of disabling core liberal democratic features such as checks on executive power through judiciary oversight and constitutional protection of fundamental rights.<sup>27</sup> Hence, legislation making changes to the constitutional *status quo* is enacted in order to dilute existing liberal democratic norms, all while adhering to constitutional form but hollowing out its content, a process fittingly described by Scheppele as using “constitutional tactics for anti-constitutional purposes”.<sup>28</sup> Thus, while remaining formally and procedurally lawful, and seemingly liberal, legislation is *substantively* illiberal as it “[bypasses] the structural constraints imposed by liberal democracy [and] deeply alter[s] the nature and functions of its institutions”.<sup>29</sup>

This practice of undercutting and hollowing out liberal democratic norms passes through the legislative process without much fanfare but results in a significant impact on the essence of democratic quality.<sup>30</sup> Hence, constitutional illiberalism has been

---

Bojan Bugarić, “A Crisis of Constitutional Democracy in Post-Communist Europe: ‘Lands In-Between’ Democracy and Authoritarianism” (2015) 13 *International Journal of Constitutional Law* 219.

<sup>26</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1150.

<sup>27</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1150.

Petra Bárd, ‘The Hungarian “Lex NGO” before the CJEU: Calling an Abuse of State Power by its Name’ (*Verfassungsblog on matters constitutional*, 27 January 2020) <<https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name/>> accessed 19 July 2022.

<sup>28</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 5.

<sup>29</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 90, 98.

Kim Lane Scheppele, “Autocratic Legalism” (2018) 85 *University of Chicago Law Review* 545.

Pablo Castillo-Ortiz, “The Illiberal Abuse of Constitutional Courts in Europe” (2019) 15 *European Constitutional Law Review* 48.

Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1141.

<sup>30</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1151.

referred to as a “democratic coup d’état”, essentially overthrowing the existing order from within by adhering to its very rules and formalities.<sup>31</sup> The result is a diminished respect for core features of liberal democracy, such as the rule of law and human rights.<sup>32</sup> Illiberal constitutionalism poses as a problem to the substance of the transnational legal order by propagating a hollowed-out version of liberal democracy. Hence, by inversely reinforcing a primary focus on the formal aspect of constitutions as part of the legal order, the practice of illiberal constitutionalism justifies substantive deviations from the *status quo*.<sup>33</sup> This circumstance widely results in a negative relationship between the practice of constitution-writing and actual respect for liberal democratic norms.<sup>34</sup>

The most common feature of illiberal constitutionalism addresses the checks on executive power.<sup>35</sup> As a result, constitutional courts are curtailed in their jurisdiction, resulting in their limited ability to “protect individual rights and freedoms”.<sup>36</sup> Moreover, those in power may enact illiberal policies to skew the political playing field in their favour by controlling access to the media and civic participation by means of civil society activity, often in the name of national security, essentially curtailing any possibility for opposition.<sup>37</sup> This results in a balancing act between national security and the adherence to liberal democratic norms, with the former clearly being given prevalence by illiberal governments with the aim of strengthening their hold on power.

---

<sup>31</sup> Ozan O. Varol, “The Democratic Coup d’etat” (2012) 52 Harvard International Law Journal 292.

Nancy Bermeo, “On Democratic Backsliding” (2016) 27 Journal of Democracy 7.

<sup>32</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 German Law Journal 1151.

<sup>33</sup> Kim Lane Scheppelle, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 5.

<sup>34</sup> Kim Lane Scheppelle, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 5.

<sup>35</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 German Law Journal 1141.

Kim Lane Scheppelle, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 5.

<sup>36</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 Perspectives on Politics 90.

<sup>37</sup> Jennifer Raymond Dresden & Marc Morjé Howard, “Authoritarian Backsliding and the Concentration of Political Power” (2015) 23 Democratization 1122.

### 3 A Democratic Coup d'État: Restricting Fundamental Rights within Constitutional Confines

#### 3.1 Civil Society Restrictions in the Name of National Security

The restriction of civil society – “a sphere of autonomy separate from the state” – is not only a common feature of autocracies, but also occurs in illiberal or hybrid regimes.<sup>38</sup> While instances of this practice have always been able to be singled out, the past decade has exhibited the emergence of a worrying trend in systematic repression and restriction of civil society beyond authoritarian regimes.<sup>39</sup> This development is of specific concern in the European Union, as the persistence of hybrid regimes – and associated restrictions of civil society – in the Union’s liberal normative framework signifies potential weaknesses of the transnational legal order.<sup>40</sup> More specifically, this is the case in terms of its ability to enforce compliance as well as governments’ ability to exploit said structural weaknesses and slowly digress towards an illiberal regime without counter action being taken.

In the context of the emerging challenges to the transnational legal order, the study of civil society in hybrid regimes is of interest due to the distinct pressures on this space.<sup>41</sup>

---

<sup>38</sup> Leah Gilbert & Payam Mohseni, “Disabling dissent: the colour revolutions, autocratic linkages, and civil society regulations in hybrid regimes” (2018) 24 *Contemporary Politics* 454.

Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 968.

Serik Beimenbetov, “State Regulation of Organized Civil Society in Hybrid Regimes: A Systematic Assessment of Cross-National Variations in the Regulation of Civil Society Organizations in Seven Post-Soviet Countries” (2021) 8 *Central Asian Affairs* 121.

<sup>39</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 967.

Chris van der Borgh & Carolijn Terwindt, “Shrinking operational space of NGOs – a framework of analysis” (2012) 22 *Development in Practice* 1066.

Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratship” in Plain Sight” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 3.

Civicus, “State of Civil Society Report 2016” (2016) 2.

United Nations, “Lawful civil society groups “are not enemies of democracy, but key allies”, Says UN expert’ (*UN News – Global Perspectives Human Stories*, 26 October 2015) <<https://news.un.org/en/story/2015/10/513752-lawful-civil-society-groups-are-not-enemies-democracy-key-allies-says-un-expert>> accessed 24 July 2022.

<sup>40</sup> Nienke Grossman, “Populism, International Courts, and Women’s Human Rights” (2020) 35 *Maryland Journal of International Law* 106.

<sup>41</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 976.

Chris van der Borgh & Carolijn Terwindt, *NGOs under Pressure in Partial Democracies* (Palgrave Macmillan 2014) 11.

These result from the previously outlined practice of illiberal constitutionalism, which causes a divergence in the “constitutional acknowledgement of civil rights and their de facto implementation”.<sup>42</sup> While, according to the transnational legal order, the space for civil society is to be safeguarded by the rights to freedom of association and expression, these are curtailed in context of illiberal constitutionalism.<sup>43</sup> Hence, as a close relationship exists between human rights and democracy, the “weakening of one may directly affect the other”.<sup>44</sup> This represents a worrying trend of civil society being perceived by governments as a problem – especially since civil society serves as a source of legitimacy for governments in terms of providing for a space to realise one’s freedom of opinion, regardless of whether it is critical of the government.<sup>45</sup>

The increasing limitations of the functionality of this space have been extensively reported on by Non-Governmental Organisations (NGOs) to raise awareness for the negative impact of government policies on their ability to operate effectively.<sup>46</sup> Policy analyses have pointed out a general trend of governments imposing administrative hurdles and restrictions that, for example, hinder organisations from accessing resources.<sup>47</sup> Organisations have been forced to register as foreign-funded, creating an air of stigmatisation surrounding their activities as politicians frame them as agents of foreign influence.<sup>48</sup> Moreover, politicians have propagated smear campaigns, resulting in widespread harassment of activists and civil society organisations, also deterring potential donors from engaging further.<sup>49</sup> This has primarily occurred in the

---

<sup>42</sup> Chris van der Borgh & Carolijn Terwindt, *NGOs under Pressure in Partial Democracies* (Palgrave Macmillan 2014) 11.

<sup>43</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 969.

<sup>44</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 978.

<sup>45</sup> United Nations, “Lawful civil society groups “are not enemies of democracy, but key allies”, Says UN expert’ (*UN News – Global Perspectives Human Stories*, 26 October 2015) <<https://news.un.org/en/story/2015/10/513752-lawful-civil-society-groups-are-not-enemies-democracy-key-allies-says-un-expert>> accessed 24 July 2022.

<sup>46</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 967.

<sup>47</sup> Amnesty International, “Hungary: Living Under the Sword of Damocles – The Impact of LexNGO on Civil Society in Hungary” (2021) EUR 27/3968/2021.

<sup>48</sup> Amnesty International, “Hungary: Living Under the Sword of Damocles – The Impact of LexNGO on Civil Society in Hungary” (2021) EUR 27/3968/2021 12.

<sup>49</sup> Amnesty International, “Hungary: Living Under the Sword of Damocles – The Impact of LexNGO on Civil Society in Hungary” (2021) EUR 27/3968/2021.

Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe 39-40.

context of organisations' activity in "advocacy and public criticism of the government" or their engagement in "politically sensitive and contentious issues", such as immigration.<sup>50</sup> In this context, it has been pointed out that governments are significantly limiting the operational space for civil society in an attempt to control it.<sup>51</sup>

The academic literature has added to this by looking at the tools used by governments to enact these illiberal policies.<sup>52</sup> Buyse's contribution on hybrid regimes has established a direct link between the restriction of civil society and illiberal constitutionalism as human rights are still safeguarded on paper with the constitutionally enshrined freedoms of, for example, assembly and freedom of expression seemingly guaranteeing a space for civil society to call its own.<sup>53</sup> However, in practice these rights are curtailed by policies that place "limitations on creation and registration, on functioning and activities, and on access to resources".<sup>54</sup> Nonetheless, the reasons for enacting these policies are diverse, ranging from counter-terrorism motives of intercepting possibly suspicious activities to the simple objective of limiting space for a mobilised opposition.<sup>55</sup> The common factor here is that the national interest or security is claimed to be at stake, accounting for the relevance of looking into the permissible balance between liberty and security under illiberal constitutionalism.<sup>56</sup>

---

<sup>50</sup> Amnesty International, "Hungary: Living Under the Sword of Damocles – The Impact of LexNGO on Civil Society in Hungary" (2021) EUR 27/3968/2021 13.

<sup>51</sup> Article 19, 'Article 19, European Centre for Non-Profit Law, International Centre for Non-Profit Law, and World Movement for Democracy delivered the following joint oral statement to the 25<sup>th</sup> Session of the UN Human Rights Council' (*Article 19*, 11 March 2014) <<https://www.article19.org/resources/joint-statement-promotion-protection-civic-space/>> accessed 25 July 2022.

<sup>52</sup> Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 967.

<sup>53</sup> Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 976.

<sup>54</sup> Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 970.

<sup>55</sup> Leah Gilbert & Payam Mohseni, "Disabling dissent: the colour revolutions, autocratic linkages, and civil society regulations in hybrid regimes" (2018) 24 *Contemporary Politics* 454.

Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 976.

Darin Christensen & Jeremy M. Weinstein, "Defunding Dissent: Restrictions on Aid to NGOs" (2013) 24 *Journal of Democracy* 87-8.

Tímea Drinóczi & Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland" (2018) 20 *German Law Journal* 1067.

Serik Beimenbetov, "State Regulation of Organized Civil Society in Hybrid Regimes: A Systematic Assessment of Cross-National Variations in the Regulation of Civil Society Organizations in Seven Post-Soviet Countries" (2021) 8 *Central Asian Affairs* 122.

Christopher Heurlin, "Governing Civil Society: The Political Logic Of NGO-State Relations under Dictatorship" (2010) 21 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 225.

<sup>56</sup> Dimitris Skleparis, "(In)securitization and illiberal practices on the fringe of the EU" (2016) 25 *European Security* 92.

### 3.2 The Criminalisation of Humanitarian Assistance under the Guise of Anti-Smuggling Rhetoric

One of the most egregious instances of limiting the space for civil society and thereby directly infringing upon the liberal democratic norm of safeguarding fundamental liberties is by criminalising specific civil society activities. The most well-documented and contemporary relevant example is the criminalisation of humanitarian assistance. This has occurred in the context of the securitisation of immigration, causing “acts of assistance and solidarity [to collide] with European migration policies”.<sup>57</sup> The increasing securitisation of immigration in recent years has been the result of the 2015 migration crisis, which saw a large influx of migrants seeking refuge in Europe.<sup>58</sup> This development has been perceived as a direct threat to the European Union’s internal order regarding free movement as provided for by the Schengen Agreement, since free movement “cannot come at the expense of security”.<sup>59</sup> This perception is emblematic of the way migration is framed as a security threat. This is because immigration is an issue in which the notion of ‘us versus an Other’ is a salient topic, providing the opportunity for looking at people through the exclusionary lens of either being part of the in- or out-group, which are defined in ethnic and cultural terms.<sup>60</sup>

---

<sup>57</sup> Amnesty International, “Punishing Compassion – Solidarity on Trial in Fortress Europe” (2020) EUR 01/1828/2020 8.

Barry Buzan, Ole Waever & Japp de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner 1998) 26.

<sup>58</sup> Michela Ceccorulli, “Back to Schengen: the collective securitisation of the EU free-border area” (2019) 42 *West European Politics* 302.

Jef Huysmans, *The Politics of Insecurity, Fear, Migration and Asylum in the EU* (Routledge 2006).

Mary Bosworth & Mhairi Guild, “Governing Through Migration Control: Security and Citizenship in Britain” (2008) 48 *British Journal of Criminology* 703.

Georgios Karyotis, “Securitization of Migration in Greece: Process, Motives, and Implications” (2012) 6 *International Political Sociology* 390.

<sup>59</sup> European Commission, ‘Border Crossing’ (*Migration and Home Affairs*, n.d.) <[https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing_en)> accessed 11 August 2022.

Michela Ceccorulli, “Back to Schengen: the collective securitisation of the EU free-border area” (2019) 42 *West European Politics* 302.

<sup>60</sup> Valeria Bello, “The spiralling of the securitisation of migration in the EU: from the management of a ‘crisis’ to the governance of human mobility?” (2022) 48 *Journal of Ethnic and Migration Studies* 1328.

Carlo Berti, “Right-wing populism and the criminalization of sea-rescue NGOs: the ‘Sea-Watch 3’ case in Italy, and Matteo Salvini’s communication on Facebook” (2021) 43 *Media, Culture & Society* 539.

Alison Gerard & Sharon Pickering, “Crimmigration – Criminal justice, refugee protection and the securitisation of migration” in Bruce A. Arrigo & Heather Y. Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014) 589.



In this context of 'othering', immigrants are often framed as "[committing] more crimes than the native population", perpetuating a negative view of immigrants in general as well as fuelling the association of immigration with an increased risk of terrorism, which lies at the base of perceiving migration as a threat to public order and security, therefore causing the securitisation of immigration.<sup>61</sup> This development has led to the increased criminalisation of migrants, and the act of immigration itself, causing a further dichotomy to emerge between legal and illegal immigrants which, in turn, further fuels an exclusionary mindset towards immigrants.<sup>62</sup> Hence, the interplay of the social construction of migration as a threat and the resulting criminalisation of irregular migration has given rise to an extended securitisation framework, targeting not only those seeking refuge but also those intending to help them access it as governments are attempting to eliminate "the perceived enabling or 'pull' factors for migrants".<sup>63</sup>

As the securitisation of immigration has led to Union-wide policies that attempt to implement an ironclad hold on immigration by intensifying the provisions for detention of migrants, border security, as well as the criminalisation of irregular migration, this has "spurred many self-funded volunteers, autonomous solidarity movements and more established civil society groups to action".<sup>64</sup> Utilising the civic space, volunteers and civil society organisations are filling the humanitarian gap created by the

---

<sup>61</sup> Carlo Berti, "Right-wing populism and the criminalization of sea-rescue NGOs: the 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook" (2021) 43 *Media, Culture & Society* 535.

Eleanor Gordon & Henrik Kjellmo Larsen, "'Sea of blood': the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea" (2022) 46 *Disasters* 3.

Christian Lamour, "Mass media and border securitization in Europe: Investigating the metropolitan 'Mediapolis' in an era of right-wing populism" (2019) 41 *Journal of Urban Affairs* 535.

Gabriel Popescu, *Bordering and Order the Twenty-first Century: Understanding Borders* (Rowman & Littlefield Publishers 2011).

<sup>62</sup> Carlo Berti, "Right-wing populism and the criminalization of sea-rescue NGOs: the 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook" (2021) 43 *Media, Culture & Society* 535.

Alison Gerard & Sharon Pickering, "Crimmigration – Criminal justice, refugee protection and the securitisation of migration" in Bruce A. Arrigo & Heather Y. Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014) 588.

<sup>63</sup> Eleanor Gordon & Henrik Kjellmo Larsen, "'Sea of blood': the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea" (2022) 46 *Disasters* 4.

Brunilda Pali, 'Europe as Terraferma: against the criminalisation of solidarity' (*security praxis*, 5 May 2017) <<https://securitypraxis.eu/terraferma-solidarity-not-crime/>> accessed 25 June 2022.

<sup>64</sup> Mariana Gkliati, 'Proud to Aid and Abet Refugees: The Criminalization of "Flight Helpers" in Greece' (*Border Criminologies*, 23 May 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>> accessed 10 July 2022.

aforementioned policies to help those seeking refuge in the EU.<sup>65</sup> However, this very space for civil society to operate in has become increasingly hostile as the European Union has declared a “war on smuggling”, aiming at restricting the facilitation of immigration by criminalising “irregular migrants and those that assist them”.<sup>66</sup> As a result, the non-governmental sector has been faced with operational difficulties, harassment, and prosecution.<sup>67</sup>

This criminalisation is provided for in the European Council’s “Facilitators Package”, consisting of the Facilitation Directive and the associated Council Decision, which together define the offence of facilitating illegal immigration as well as the regulatory framework to prevent and punish the act thereof.<sup>68</sup> Specifically, the Directive orders Member States to adopt measures that criminalise “[intentional assistance to] a person who is not a national of a Member State to enter, transit or reside on the territory of a Member State and intentional assistance for financial gain to non-nationals to reside within the territory of an EU Member State in breach of the laws of the State concerned”.<sup>69</sup>

The adoption of the criminalisation of humanitarian assistance as provided for by the Facilitation Directive into national legislation has resulted in “greater policing of NGO

---

<sup>65</sup> Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe 40.

Vasilios N. Makrides, „Contested Civic Spaces in Greece in the Context of Foreign Immigration and the Refugee Crisis of 2015” (2022) Nonprofit Policy Forum 1.

Mariana Gkliati, ‘Proud to Aid and Abet Refugees: The Criminalization of “Flight Helpers” in Greece’ (*Border Criminologies*, 23 May 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>> accessed 10 July 2022.

<sup>66</sup> Mariana Gkliati, ‘Proud to Aid and Abet Refugees: The Criminalization of “Flight Helpers” in Greece’ (*Border Criminologies*, 23 May 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>> accessed 10 July 2022.

Amnesty International, “Punishing Compassion – Solidarity on Trial in Fortress Europe” (2020) EUR 01/1828/2020 8.

<sup>67</sup> Laura Schack & Ashley Witcher, “Hostile hospitality and the criminalization of civil society actors aiding border crossers in Greece” (2021) 39 EPD: Society and Space 477.

<sup>68</sup> International Commission of Jurists, “Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU” (2022) icj Briefing Paper 14. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17.

Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1.

<sup>69</sup> International Commission of Jurists, “Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU” (2022) icj Briefing Paper 14. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17 Article 1(1)(b).

activities, with regulations vaguely framed and not uniformly implemented, [resulting] in the arbitrary application of the law”.<sup>70</sup> The academic literature on this topic has thus been primarily concerned with pointing out the insufficiencies provided by the EU legal framework as it disproportionately criminalises those providing humanitarian assistance by classing them as human smugglers or traffickers.<sup>71</sup> Moreover, it has been found that the rhetoric of preventing smuggling has been used as a front to limit migrants from being able to access asylum procedures with the help of civil society organisations.<sup>72</sup> Thus, the literature has identified the political drivers of criminalising humanitarian assistance in terms of politicising immigration by means of framing migrants as a cultural and economic threat, as previously elaborated, and the “scapegoating effect [this type of policy] produces, since it fails to address the root causes of migration”.<sup>73</sup>

Ironically, the civil society actors being prosecuted under an ill-fitting legal framework are trying to defend the fundamental rights that the government should be protecting

---

<sup>70</sup> Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe 40.

Stuart Casey-Maslen, *The Right to Life Under International Law – An Interpretative Manual* (CUP 2021) 578.

International Commission of Jurists, “Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU” (2022) icj Briefing Paper 17.

<sup>71</sup> Felix Bender, “Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU” in Elzbieta M. Godziak, Izabella Main, & Brigitte Suter (eds), *Europe and the Refugee Response – A Crisis of Values?* (Routledge 2020) 61-2.

Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe 42.

Lina Vosyliūtė & Carmine Conte, “Crackdown on NGOs and volunteers helping refugees and other migrants” (2019) Research Social Platform on Migration and Asylum (ReSOMA) Final Synthetic Report.

<sup>72</sup> Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe 42.

<sup>73</sup> Valeria Bello, “The spiralling of the securitisation of migration in the EU: from the management of a ‘crisis’ to the governance of human mobility?” (2022) 48 *Journal of Ethnic and Migration Studies* 1328.

Carlo Berti, “Right-wing populism and the criminalization of sea-rescue NGOs: the ‘Sea-Watch 3’ case in Italy, and Matteo Salvini’s communication on Facebook” (2021) 43 *Media, Culture & Society* 539.

Alison Gerard & Sharon Pickering, “Crimmigration – Criminal justice, refugee protection and the securitisation of migration” in Bruce A. Arrigo & Heather Y. Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014) 589.

Mariana Gkliati, ‘Registering Humanity: The EU’s Plan to Halt Citizen-led Response to the Migration Crisis’ (*Border Criminologies*, 21 March 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/registering>> accessed 10 July 2022.

Eleanor Gordon & Henrik Kjellmo Larsen, “‘Sea of blood’: the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea” (2022) 46 *Disasters* 3.

in the first place.<sup>74</sup> Hence, the criminalisation of humanitarian assistance corresponds to the wider trend of civil society restrictions by means of illiberal constitutionalism as fundamental rights of freedom of assembly and expression continue to be protected by the constitution, but they are significantly limited in practice, under the guise of anti-smuggling objectives. This has adverse effects not only on the ability of civil society actors to operate effectively, but it also leads to the violation of migrants' human rights.<sup>75</sup> On the contrary, the criminalisation of humanitarian assistance and its consequences have spurred on more civil society organisations and individual actors to shine a light on these issues, drawing the topic of migration and its framing as a national security issue into the public eye.<sup>76</sup> In this context, policy reports with the aim of raising awareness for the plight of civil society have been limited to descriptive accounts, while instances of law-oriented research has been concerned with pointing out the violations of international legal protections for humanitarian workers, which ties in with the literature focusing on the insufficiencies of the Facilitation Directive.<sup>77</sup> The following dissertation will go beyond existing research by adding a more in-depth understanding of how illiberal constitutionalism functions in practice by means of conducting a legal analysis of the legislative framework governing the criminalisation of humanitarian assistance in order to determine the extent to which illiberalism is legally possible.

---

<sup>74</sup> Brunilda Pali, 'Europe as Terraferma: against the criminalisation of solidarity' (*security praxis*, 5 May 2017) <<https://securitypraxis.eu/terraferma-solidarity-not-crime/>> accessed 25 June 2022.

International Commission of Jurists, "Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU" (2022) icj Briefing Paper 13.

<sup>75</sup> Eleanor Gordon & Henrik Kjellmo Larsen, "'Sea of blood': the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea" (2022) 46 *Disasters* 13.

Expert Council on NGO Law, "Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States" (2019) Conference of INGOs of the Council of Europe 39-40.

<sup>76</sup> Eleanor Gordon & Henrik Kjellmo Larsen, "'Sea of blood': the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea" (2022) 46 *Disasters* 3.

Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 967.

<sup>77</sup> Elizabeth A. Wilson, "Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis" (2016) 8 *Journal of Human Rights Practice* 329.

Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 967.

Expert Council on NGO Law, "Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States" (2019) Conference of INGOs of the Council of Europe 42.

## 4 Filling the Research Gap: The Legally Permissible Balance Between Liberty and Security Under Illiberal Constitutionalism

### 4.1 Research Design

The study of civil society encompasses multiple research angles, ranging from public policy to historic perspectives.<sup>78</sup> Regarding the contemporary matter of civil society restrictions in light of the wider trend of illiberal constitutionalism, policy analyses have been the main medium of reporting on the issue. Hence, previous policy papers and academic studies have pointed out the tools used to restrict civil society, acknowledging the wide array of tactics existing within the illiberal toolkit, ranging from bureaucratic hurdles to the outright criminalisation of certain activities, as well as the reasons for the restriction of civic space – a fundamentally liberal norm. Hence, it has been found that national security concerns and the associated securitisation of immigration against the background of the 2015 migration crisis has been the prevalent reasoning for restrictions placed on fundamental rights pertaining to the realisation of civil society's operational space.

Illiberal practices have been previously studied, leading to the finding that the liberal consensus can be challenged without openly deviating from it, as liberal democratic institutions can be used to dilute associated norms to a significant extent without enacting openly illiberal changes.<sup>79</sup> Accordingly, it has been determined that “as long as illiberal policymaking does not contravene the letter of the law, illiberals in power will be able to portray their actions as fully legitimate”.<sup>80</sup> The problem arising from this circumstance is that illiberal constitutionalism is able to actively distort the transnational legal order and the underlying consensus on liberal democratic norms. Hence, illiberal constitutionalism threatens the respect for the rule of law and human

---

<sup>78</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 96.

<sup>79</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight)” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 9.

<sup>80</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 91.

rights, by propagating a hollowed-out version of liberal democracy.<sup>81</sup> Thus, by inversely reinforcing a primary focus on the formal aspect of constitutions as part of the legal order, the practice of illiberal constitutionalism justifies substantive deviations from the *status quo*.<sup>82</sup>

This is especially worrying in the context of the European Union, which champions liberal democratic values such as the respect for the rule of law and human rights. Hence, the occurrence of illiberal constitutionalism within the EU undermines not only these norms but also the Union's legitimacy as it has not been able to prevent or counteract the illiberal turn of Member States.<sup>83</sup> While it has been pointed out that the transnational legal order is able to restrict illiberal governments from turning into a full authoritarian regime, the extent to which this is possible is unclear.<sup>84</sup> In other words, it is unknown what the legal limits of illiberalism are.

The limits to which fundamental rights can be restricted are especially relevant in context of the securitisation of immigration as this development has led to a balancing act between liberty and security as illustrated by the restriction of civil society by means of criminalising humanitarian assistance for the purpose of limiting immigration. As national security is commonly employed as a justification to restrict individual liberties and fundamental rights, the instance of the criminalisation of humanitarian assistance presents itself as a convenient subject to analyse the extent to which the restriction of civic space by means of illiberal constitutionalism is legally possible. This is of importance when trying to effectively respond to the trend of illiberal constitutionalism and enforce adherence to liberal norms such as the respect for human rights.

---

<sup>81</sup> Tímea Drinóczi & Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland" (2018) 20 German Law Journal 1151.

<sup>82</sup> Kim Lane Scheppele, "Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight" in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 5.

<sup>83</sup> Gábor Halmai, "From Pariah to a Model? Hungary's Rise as an Illiberal Member State of the EU" in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 35.

<sup>84</sup> Elizabeth A. Wilson, "Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis" (2016) 8 Journal of Human Rights Practice 335.

As the literature has pointed out, “autocratisation is a process”.<sup>85</sup> Accordingly, previous studies have shown the vast divergence in illiberal governments’ extent of restricting civic space and the resulting pressures on civil society actors.<sup>86</sup> Hence, in order to account for different degrees of illiberal constitutionalism the present dissertation will conduct a comparative study of two countries at opposite ends of the newly emerged democratic spectrum, ranging from liberal to illiberal. An analysis encompassing a wider array of cases is beyond the scope of the present study.

This research design will enable this study to assess how the process of a turn towards illiberalism unfolds by benchmarking specific practices used to restrict fundamental rights by countries on different democratic levels. The common denominator for this analysis will be the criminalisation of humanitarian assistance in the broader context of the securitisation of immigration. The findings of this research will then contribute to a better understanding of illiberal practices under the guise of constitutionalism. As previous research has extensively covered the individual human rights affected by illiberal constitutionalism, this dissertation will spend less time covering this aspect, rather focusing on the legal justifications for said restrictions of human rights.

## 4.2 Methodology

In order to uncover the extent to which the criminalisation of humanitarian assistance legally restricts constitutional guarantees of fundamental rights, this dissertation will conduct a legal analysis of the legislative framework governing the criminalisation of humanitarian assistance. This instance of restricting fundamental liberties is illustrative of illiberal practices while signifying the imbalance between liberty and security. Due to the criminalisation of humanitarian assistance, fundamental rights that pertain to the

---

<sup>85</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 96.

<sup>86</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 974.

Chris van der Borgh & Carolijn Terwindt, “Shrinking operational space of NGOs – a framework of analysis” (2012) 22 *Development in Practice* 1066.

Serik Beimenbetov, “State Regulation of Organized Civil Society in Hybrid Regimes: A Systematic Assessment of Cross-National Variations in the Regulation of Civil Society Organizations in Seven Post-Soviet Countries” (2021) 8 *Central Asian Affairs* 124.

realisation of civil society activity have been significantly restricted and an important hallmark of liberal democracy has been diminished. To provide a better understanding of the practices of illiberal constitutionalism, the legal justifications for the curtailment of fundamental freedoms will be assessed against the parameters of permissible human rights restrictions provided for by International Law. Hence, International Human Rights Law will be employed as a measure of permissible practices of governments' illiberal conduct.<sup>87</sup> The International Covenant on Civil and Political Rights (ICCPR) will function as the operationalisation of the human rights framework applicable to the given situation. This is the case because the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms' – commonly shortened to Declaration on Human Rights Defenders – providing specific safeguards of civil society's operational space is based on the framework of the ICCPR.<sup>88</sup> Hence, with the objective of analysing the extent to which illiberal governments' restrictive policies are legal, the following dissertation thus aims to point out the ways in which the transnational legal order is able to constrain illiberal constitutionalism. By being able to gauge specific aspects of illegality within the illiberal constitutional setup, one is then able to decipher integral problems within the existing legal order that need to be strengthened to counteract the illiberal turn. Due to the novelty of this approach, the following analysis will be of an exploratory nature.

#### 4.3 Case Selection

The cases to be studied for this analysis are Hungary and Greece. Both “are still members of a regional community built on democracy, rule of law, and human rights.”<sup>89</sup> However, as the literature has pointed out, both countries have significantly limited the enjoyment of fundamental rights by restricting the operational space for civil society

---

<sup>87</sup> Antoine Buyse, “Squeezing civic space: restrictions on civil society organizations and the linkages with human rights” (2018) 8 *The International Journal of Human Rights* 968.

<sup>88</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (9 December 1998) UNGA A/RES/53/144.

<sup>89</sup> Tímea Drinóczy & Agnieszka Bień-Kacała, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2018) 20 *German Law Journal* 1150.



by means of punishing humanitarian assistance in the context of migration.<sup>90</sup> This illiberal development has occurred by means of procedurally legal methods, enacting legislation that prioritises national security over individual liberties. Beyond the commonality of illiberal constitutionalism, the cases differ in their extent to which they adhere to liberal norms in general. Hungary has been classified by Freedom House as 'partly free' in terms of its respect for political rights and civil liberties.<sup>91</sup> This evaluation is based on a series of indicators pursuant to liberal democratic norms such as the conditions of the electoral process, the degree of political pluralism, the freedom of opinion and expression, and individual as well as associational rights.<sup>92</sup> Using this very methodology, Greece has scored much higher in these categories and has therefore been classified as 'free'.<sup>93</sup> As this classification is illustrative of the countries' democratic quality, it is further evident that Hungary and Greece are two sides of the same coin. Hence, while they are both democracies on paper, they differ vastly in their substantive adherence to liberal values. As the present study is poised to take a comparative approach based on a most different systems design, Hungary and Greece thus fittingly present themselves to investigate the extent of legal human rights restrictions in the context of the securitisation of immigration.

While Hungary and Greece face the commonality of being a first haven for migrants arriving in Europe, and having enacted restrictive legislation in the context of the securitisation of immigration as a result, they are nonetheless at different ends of the spectrum of democratic quality. Hungary's illiberal practices have long been a thorn in the European Union's side, and it has been described as one of the most significant examples of autocratisation, albeit being the most successful, within the EU's liberal order.<sup>94</sup> Most notably, Hungary is the only, previously considered to be stable,

---

<sup>90</sup> International Commission of Jurists, "Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU" (2022) icj Briefing Paper 32. Eleanor Gordon & Henrik Kjellmo Larsen, "'Sea of blood': the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea" (2022) 46 *Disasters* 4.

<sup>91</sup> Freedom House, 'Freedom in the World 2022: Hungary' (*Freedom House*, n.d.) <<https://freedomhouse.org/country/hungary/freedom-world/2022Y>> accessed 6 August 2022.

<sup>92</sup> Freedom House, 'Freedom in the World Research Methodology' (*Freedom House*, n.d.) <<https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology>> accessed 6 August 2022.

<sup>93</sup> Freedom House, 'Freedom in the World 2022: Greece' (*Freedom House*, n.d.) <<https://freedomhouse.org/country/greece/freedom-world/2022>> accessed 6 August 2022.

<sup>94</sup> Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 87.

democracy that has declined to “the level of a non-democratic system as a hybrid regime” in Europe.<sup>95</sup> Hence, the Hungarian case warrants further study of illiberal constitutionalism. On the other hand, in the context of restricting civil society and associated fundamental rights, Greece has become relevant due to contemporary legal proceedings against humanitarian workers.<sup>96</sup> While, there are multiple instances of civil society restrictions in Europe, the current case before the Greek court has been described as “currently the largest case of criminalization of solidarity in Europe” (*sic*).<sup>97</sup> Hence, the present dissertation aims to mix the scientific relevance of studying the Hungarian hybrid regime with the topical relevance of the Greek criminalisation of humanitarian assistance.

---

Felix Bender, “Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU” in Elzbieta M. Godziak, Izabella Main, & Brigitte Suter (eds), *Europe and the Refugee Response – A Crisis of Values?* (Routledge 2020) 59.

David Art, “The Myth of Global Populism” (2022) 20 *Perspectives on Politics* 2.

Agnes Batory, “Populists in government? Hungary’s ‘system of national cooperation’” (2016) 23 *Democratization* 283.

Dariusz Adamski, “The Social Contract of Democratic Backsliding in the ‘New EU’ Countries” (2019) 56 *Common Market Law Review* 628.

Ivan Krastev, “Eastern Europe’s Illiberal Revolution: The Long Road to Democratic Decline” (2018) 97 *Foreign Affairs* 50.

<sup>95</sup> András Bozóki & Dániel Hegedüs, “An Externally Constrained Hybrid Regime: Hungary in the European Union” (2018) 25 *Democratization* 1176.

<sup>96</sup> Human Rights Watch, ‘Greece: Life-Saving on Trial’ (*Human Rights Watch*, 11 November 2021) <<https://www.hrw.org/news/2021/11/11/greece-life-saving-trial>> accessed 4 July 2022.

<sup>97</sup> Human Rights Watch, ‘Greece: Life-Saving on Trial’ (*Human Rights Watch*, 11 November 2021) <<https://www.hrw.org/news/2021/11/11/greece-life-saving-trial>> accessed 4 July 2022.

## 5 The Legal Basis for the Criminalisation of Humanitarian Assistance: National Law Provisions in Greece and Hungary

### 5.1 Hungary's Bill Amending Certain Laws Relating to Measures to Combat Illegal Immigration

The criminalisation of humanitarian assistance and the associated restriction of fundamental rights is part of a larger restructuring of the constitutional framework that has taken place in Hungary since 2010.<sup>98</sup> As the Hungarian governing party *Fidesz*'s parliamentary supermajority had enabled “a programme of institutional change”, this resulted in the overhaul of the 1989 constitution.<sup>99</sup> Hungary's new constitution, dubbed the Fundamental Law, may be procedurally in accordance with the rules of constitution-writing, while constituting a noteworthy break with liberal norms.<sup>100</sup> Accordingly, the rule of law and protections for fundamental rights have been significantly limited as the Constitutional Court's jurisdiction has been weakened, while constitutional protections for individual rights have been placed under certain restrictions.<sup>101</sup> In this wider context of illiberal constitutionalism, as signified by the diminishing of checks and balances on executive power, the securitisation of immigration and its social construction as a threat to national security has led to changes to the Hungarian Asylum Law as well as resulted in the criminalisation of humanitarian assistance as per ‘Bill No. T/333 amending certain laws relating to measures to combat illegal immigration’.<sup>102</sup>

---

<sup>98</sup> Gábor Halmai, “Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary” (2020) 14 *Law & Ethics of Human Rights* 97.

Kim Lane Scheppelle, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight)” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 7.

Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 94.

Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppelle, “From Separation of Powers to a Government without Checks: Hungary's Old and New Constitution” in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

<sup>99</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 87.

<sup>100</sup> Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppelle, “From Separation of Powers to a Government without Checks: Hungary's Old and New Constitution” in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

<sup>101</sup> Gábor Halmai, “Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary” (2020) 14 *Law & Ethics of Human Rights* 105.

<sup>102</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee).

Humanitarian assistance has been criminalised in Hungary under the pretence of it furthering illegal immigration as well as overburdening the asylum system in the Member State.<sup>103</sup> The corresponding legislative Bill No. T/333 has thus effectively amended Hungary's Criminal Code, adding Section 353/A to sustain that

*“anyone who conducts organizational activities in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded, [...] is punishable by confinement for the misdemeanour”.*<sup>104</sup>

This provision expands upon the existing criminal act of facilitating illegal immigration by enabling border-crossings in violation of the existing legal framework through the provision of aid as per Criminal Code Section 353.<sup>105</sup> Hence, not only the act of actively aiding a person to cross-the border outside of applicable legal provisions, but also the wider concept of organised activity to help someone access the Hungarian asylum system is criminalised. The understanding of organisational activity specified by Bill No. T/333 considers anyone who “prepares or distributes information materials or commissions such activities” or “builds or operates a network” for the purpose of lodging an asylum claim to fall within the limits of activities criminalised by the present legislation.<sup>106</sup> This rather broad conceptualisation has been further specified by the Hungarian Constitutional Court, interpreting organisational activity to constitute

---

<sup>103</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) 10.

<sup>104</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 6, point 9, section 11.

<sup>105</sup> Act C of 2012 on the Criminal Code – Büntető Törvénykönyvről szóló 2012. évi C. törvény (13 July 2012) Magyar Közlöny (Hungarian Government Journal No. 92) Section 353(1).

<sup>106</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 6, point 9, section 11.

International Commission of Jurists, “Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU” (2022) icj Briefing Paper 31.

European Commission for Democracy Through Law (Venice Commission) & OSCE Office for Democratic Institutions and Human Rights, “Joint Opinion on the so-called ‘Stop Soros’ Draft Legislative Package which Directly Affect NGOs” (25 June 2018) CDL-AD(2018)013.

actions by organisations, in terms of legal entities, rather than merely individuals or volunteers.<sup>107</sup> Hence, fundamental rights such as the freedom of association and assembly, and the freedom of the right to expression, which also entails the freedom to “impart information”, are curtailed by means of criminalising humanitarian assistance.

It is important to note that the legal provisions on the criminalisation of humanitarian assistance correspond to wider changes made to the Hungarian Asylum Law as part of a declaration of a national crisis since 2015 due to migration being framed as a threat to public order and security.<sup>108</sup> Accordingly, the possibility for an asylum application to be lodged has been spatially limited to two transit zones at the Hungarian border to Serbia.<sup>109</sup> Moreover, in context of amendments to the asylum law enacted by Bill No. T/333, any asylum application will be automatically considered inadmissible if “the applicant arrived via a country where they had *not* been subjected to persecution [...] or if the adequate level of protection is provided in the country through which they had arrived in Hungary” (emphasis added).<sup>110</sup> This results in the inadmissibility of asylum-seekers arriving at the only two border checkpoints, as Serbia had been previously declared to be considered a safe country by the Hungarian government.<sup>111</sup> Since the criminalisation of humanitarian assistance is based on conducting activity that would allow the initiation of the asylum procedure by a person whose application

---

<sup>107</sup> Constitutional Court Decision 3/2019 on the Support of Illegal Immigration (III. 7.) AB (7 March 2019) Alkotmánybíróság – Hungarian Constitutional Court, para 44.

<sup>108</sup> Case C-821/19 *European Commission v Hungary* [Judgement] (16 November 2021) Court of Justice of the European Union ECLI:EU:C:2021:930, para 49.

Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 4, point 5, section 7.

Gábor Halmai, “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 35.

Felix Bender, “Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU” in Elzbieta M. Godziak, Izabella Main, & Brigitte Suter (eds), *Europe and the Refugee Response – A Crisis of Values?* (Routledge 2020) 61-2.

<sup>109</sup> Case C-821/19 *European Commission v Hungary* [Judgement] (16 November 2021) Court of Justice of the European Union ECLI:EU:C:2021:930, para 49.

<sup>110</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 4, point 5, section 7.

Act LXXX of 2007 on Asylum (25 June 2007, amended 2018) The Government of Hungary (unofficial translation by Afford Fordító- és Tolmácsiroda Kft., proofread by UNHCR Hungary Unit), Section 51(f).

<sup>111</sup> Gábor Halmai, “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Kettman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017) 36-7.

would be considered inadmissible, as per Criminal Code Section 353/A and Asylum Act Section 51(f), this results in *any* organisational activity to aid migrants at the Hungarian transit zones becoming automatically illegal.<sup>112</sup> Thus, while *de jure* only certain acts of humanitarian assistance, i.e. organised activity to impart information and facilitate immigration, are outright criminalised, the wider context of the Hungarian asylum law permits the *de facto* criminalisation of humanitarian assistance to refugees in general. This use of procedurally valid legal frameworks that in their substance shirk liberal norms, is illustrative of illiberal constitutionalism.

In line with the broader context of the securitisation of immigration, these restrictions of fundamental rights have been legitimised by claims of national security concerns. Hence, Bill No. T/333 supplies elaborate justifications for the necessity of criminalising humanitarian assistance, stating that

*“in connection with illegal immigration, the abusive use of the asylum procedures and the organisational activity promoting the stay in the country, is increasingly threatening public order and public security, justifies having to deal with such practices by means of the most rigorous public authority, i.e. criminal sanctioning”.*<sup>113</sup>

This framing of immigration as a security threat reinforces the othering of non-nationals and turns the border into a contentious space that personifies the distinction between an in- and out-group.

## 5.2 The Greek Immigration and Social Integration Code

In contrast, the Greek government has enacted a less expansive, but similarly intricate, framework to curb the facilitation of illegal immigration under the pretence of

---

<sup>112</sup> Act LXXX of 2007 on Asylum (25 June 2007, amended 2018) The Government of Hungary (unofficial translation by Afford Fordító- és Tolmácsiroda Kft., proofread by UNHCR Hungary Unit), Section 51(f). Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) 10.

<sup>113</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 10, section 11.

national security concerns. As Greece has experienced a similarly large influx of migrants as Hungary, immigration has been a salient topic in the political arena for a long time. While the law on asylum and immigration projects the “message that migration is a threat that has to be curtailed”, the legal justifications for the resulting need to restrict fundamental rights are decidedly left to ambiguity.<sup>114</sup> Moreover, contrary to Hungary, Greece has not enacted an outright criminalisation of humanitarian assistance. Rather, it has taken a more abstruse route to reach the goal of curtailing immigration, though with the substantive outcome of restricting fundamental rights.

As a response to the persisting arrival of migrants at its shores, the Greek government had introduced the ‘Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island’, hereinafter referred to simply as the Joint Ministerial Decision.<sup>115</sup> The Joint Ministerial Decision stipulates the creation of a Coordinating Committee being responsible for “the control and close monitoring of NGOs and volunteers operating on the island of Lesbos”.<sup>116</sup> This includes not only the formal registration but also the continuous screening of NGO activity as well as “independent volunteers”.<sup>117</sup> In this context, the Greek provisions are more thorough than the Hungarian Government Bill as it not only includes organised activity but also sporadic actions by individuals. The Joint Ministerial Decision clearly outlines that the authorities’ approval and official registration are necessary for civil society actors to operate in the field of humanitarian aid.

---

<sup>114</sup> Georgios Karyotis & Dimitris Skleparis, “Migrant Lived Experiences and Resistance to the Securitisation of Migration in Greece: The Modern ‘300’” GPSG Working Paper #18 4.

<sup>115</sup> Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic <<https://www.statewatch.org/news/2016/jan/greek-doc.pdf>> accessed 7 July 2022.

<sup>116</sup> Mariana Gkliati, “When volunteers became smugglers: The criminalization of “Flight Helpers” in Greece’ (*Leiden Law Blog*, 31 May 2016) <<https://leidenlawblog.nl/articles/when-volunteers-became-smugglers-the-criminalization-of-flight-helpers-in-g>> accessed 10 July 2022.

Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic <<https://www.statewatch.org/news/2016/jan/greek-doc.pdf>> accessed 7 July 2022.

<sup>117</sup> Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic 1300.

This administrative setup serves as the basis for the categorisation of civil society activity as permissible and not permissible, the factors for authorities' approval being unknown. Not being officially approved and registered, however, has serious consequences for civil society actors as they may face "charges of smuggling and complicity in a criminal organisation".<sup>118</sup> These criminal prosecutions are made as per another piece of legislation, Law No. 4251 or the 'Immigration and Social Integration Code'.<sup>119</sup> Based on Article 30 of the Immigration and Social Integration Code, any natural person providing uncontrolled passage into the EU to a non-Greek national without required documentation, such as passports and visas, can be convicted on charges of smuggling.<sup>120</sup> Exceptions exist for the "rescue of people at sea or transport of people in need of international protection as required by international law".<sup>121</sup> However, to be able to claim the application of these exceptions, civil society actors must be properly approved and registered in order to be allowed to conduct rescue activities or provide humanitarian assistance to those in need of protection, as specified by Law No. 4686.<sup>122</sup> The difficulty arising from this interplay lies in the administrative hindrances imposed on civil society actors, which often lead to them being unaware of the procedures and requirements for them to be allowed to officially conduct such activities.<sup>123</sup>

---

<sup>118</sup> Mariana Gkliati, "When volunteers became smugglers: The criminalization of "Flight Helpers" in Greece' (*Leiden Law Blog*, 31 May 2016) <<https://leidenlawblog.nl/articles/when-volunteers-became-smugglers-the-criminalization-of-flight-helpers-in-g>> accessed 10 July 2022.

Mariana Gkliati, 'Proud to Aid and Abet Refugees: The Criminalization of "Flight Helpers" in Greece' (*Border Criminologies*, 23 May 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>> accessed 10 July 2022.

<sup>119</sup> Law No. 4251 Immigration and Social Integration Code and other provisions (1 April 2014) Government Gazette of the Hellenic Republic No. 80 <[https://www.mfa.gr/images/docs/ethnikes\\_theoriseis/2015/metanast.pdf](https://www.mfa.gr/images/docs/ethnikes_theoriseis/2015/metanast.pdf)> accessed 9 July 2022.

<sup>120</sup> Law No. 4251 Immigration and Social Integration Code and other provisions (1 April 2014) Government Gazette of the Hellenic Republic No. 80, Article 30(1), (3).

<sup>121</sup> Law No. 4251 Immigration and Social Integration Code and other provisions (1 April 2014) Government Gazette of the Hellenic Republic No. 80, Article 30(6).

<sup>122</sup> Amnesty International, "Greece: Regulation of NGOs Working on Migration and Asylum Threatens Civic Space" (2020) EUR 25/2821/2020.

Law No. 4686 Improvement of Immigration Legislation, amendment of provisions of laws 4636/2019 (A'169), 4375/2016 (A'51), 4251/2014 (A'80) and other provisions (12 May 2020) Government Gazette of the Hellenic Republic, Article 58.

<sup>123</sup> Expert Council on NGO Law, "Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States" (2019) Conference of INGOs of the Council of Europe 39.

Journalists' Information Office of the Northern Aegean, 'Press Release' (*Hellenic Republic Ministry of Citizen Protection*, 28 August 2018) <[http://www.astynomia.gr/index.php?option=ozo\\_content&lang&perform=view&id=81285&Itemid=2129](http://www.astynomia.gr/index.php?option=ozo_content&lang&perform=view&id=81285&Itemid=2129)> accessed 7 August 2022.



Similar to the legal situation in Hungary, this results in extensive restrictions of civil society by *de facto* criminalising acts of solidarity that are not sanctioned by the government. However, an important difference lies in the fact that Greek legislation is not concerned with the outright criminalisation of humanitarian assistance, but it conducts the effective criminalisation of civil society activity by strategically placing administrative hurdles. Hence, while both Hungary and Greece adhere to the rulebook of illiberal constitutionalism by enacting procedurally valid legislation that substantively infringes upon liberal norms, they do so from different perspectives. In other words, while Hungary criminalises humanitarian assistance – no less by framing it as smuggling – in the wider context of restrictive asylum laws, Greece imposes insurmountable red tape on civil society organisations, non-conformity to which is hounded with criminal persecution.

## 6 Outsmarting the International Legal Regime? A Legal Analysis of Illiberal Constitutionalism's Ability to Legalise Human Rights Violations

### 6.1 Legal Limits for Human Rights: The Interplay of Nativism and National Security

The foregoing outline of the legal framework governing the criminalisation of humanitarian assistance in Hungary and Greece has illustrated that the fundamental liberties pertaining to the realisation of civil society' operational space have been significantly restricted. Moreover, it has been shown that both countries, despite one being classified as a hybrid regime while the other is considered a democracy, employ illiberal constitutionalism. This is the case as both Hungary and Greece have implemented a vast legislative web that, while being procedurally in order, significantly restrict civil society activity, therefore resulting in a decidedly illiberal outcome. While deviating from liberal norms is not in itself illegal, there are specific guidelines provided for by international law that regulate this conduct.

As fundamental liberties are curtailed against the background of the securitisation of immigration, civil society actors providing humanitarian assistance in this context have been referred to as Human Rights Defenders, "a term used to describe people who individually or with others, act to promote or protect human rights."<sup>124</sup> Hence, in light of increasingly hostile asylum systems in Member States, Human Rights Defenders have taken it upon themselves to provide those arriving at the EU's borders with information regarding asylum procedures as well as basic amenities such as water or blankets.<sup>125</sup> The vital importance of civil society activism for the respect of human rights has been recognised and integrated into the international human rights regime by means of the Declaration on Human Rights Defenders.<sup>126</sup>

---

<sup>124</sup> Stuart Casey-Maslen, *The Right to Life Under International Law – An Interpretative Manual* (CUP 2021) 577.

Office of the High Commissioner of Human Rights, *Human Rights Defenders: Protecting the Right to Defend Human Rights – Fact Sheet No. 29* (n.d.) 2.

<sup>125</sup> Amnesty International, "Punishing Compassion – Solidarity on Trial in Fortress Europe" (2020) EUR 01/1828/2020, 27.

<sup>126</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (9 December 1998) UNGA A/RES/53/144 [Declaration on Human Rights Defenders].

While the Declaration is not a legally binding document, it has sustained the status of *opinio juris* due to its far-reaching acceptance as the Declaration was “adopted by consensus by the UN General Assembly”.<sup>127</sup> Moreover, the Declaration encapsulates the existing provisions of the International Covenant on Civil and Political Rights (ICCPR), such as right to liberty and the right to freedom of association.<sup>128</sup> Regarding the restriction of fundamental rights, the Covenant stipulates that

*“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.*<sup>129</sup>

According to the subsequent provisions of the ICCPR, a public emergency is to be synonymous with threats to national security and public order.<sup>130</sup> These need to have been officially declared in order to serve as a legitimate ground for states to derogate from their obligation under the Covenant.<sup>131</sup> However, the “scope of how these human rights may be permissibly ‘limited’ is less clear”.<sup>132</sup> Hence, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has put forward clarifications of the proportionality and necessity of restricting fundamental rights by stating that “restrictive measures must be the least intrusive means to achieve the desired objective and be limited to the associations falling within the clearly identified aspects characterizing terrorism only” (*sic*).<sup>133</sup>

---

<sup>127</sup> Elizabeth A. Wilson, “Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis” (2016) 8 Journal of Human Rights Practice 336.

<sup>128</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 9, 21.

<sup>129</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 4(1).

<sup>130</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 18(3), 19(3)(b), 21, 22(2).

<sup>131</sup> United Nations Human Rights Committee, “General Comment, no. 29, States of Emergency (Article 4): International Covenant on Civil and Political Rights” (2001) CCPR/C/21/Rev.1/Add.11

<sup>132</sup> Elizabeth A. Wilson, “Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis” (2016) 8 Journal of Human Rights Practice 335.

<sup>133</sup> United Nations Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” (2013) A/HRC/23/39, para 23.

In the context of the securitisation of immigration and the resulting criminalisation of humanitarian assistance the balance between liberty and security has been significantly skewed towards the latter. Given the considerable impact on civil society activity and resulting infringement of liberal norms, it is of interest to assess the extent to which this conduct is permissible by International Law. To what extent can the transnational legal order restrict illiberal constitutionalism? Exploring this matter, the following legal analysis of the legislative framework governing the restriction of civil society activity in Greece and Hungary will apply the above legal standards to the instance of the criminalisation of humanitarian assistance. Hence, the research question '*to what extent does the criminalisation of humanitarian assistance legally restrict constitutional guarantees of fundamental rights*' will be answered.

As humanitarian assistance has been criminalised in light of the securitisation of immigration, this points towards the curtailment of fundamental rights in the name of national security. By means of this political framing of immigration, the constraint of civil society's operational space seemingly falls within the permissible parameters of actively restricting human rights. However, as the foregoing outline of the legislative frameworks governing the criminalisation humanitarian assistance has pointed out, the legislative scope is extensive and the legal justifications for this are lacklustre as well as controversial. This raises concerns regarding the proportionality and necessity of these very provisions.

The Joint Ministerial Declaration adopted by Greece implements vast government oversight and control of civil society activities.<sup>134</sup> As Greek Laws No. 4686/2020 and No. 4636/2019 further stipulate, without proper assessment and registration, civil society actors are prohibited from engaging in certain activities that pertain to migration, protection and information thereto, as well as the provision of "material reception conditions".<sup>135</sup> This regulation of civic space thusly inhibits human rights

---

<sup>134</sup> Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic 1300.

<sup>135</sup> Law No. 4686 Improvement of Immigration Legislation, amendment of provisions of laws 4636/2019 (A'169), 4375/2016 (A'51), 4251/2014 (A'80) and other provisions (12 May 2020) Government Gazette of the Hellenic Republic, Article 47, 55, 58.

defenders' right to freedom of expression and the freedom of assembly which, as the Declaration on Human Rights defenders requires, is to be conducted freely.<sup>136</sup>

While national security concerns would pose as a permissible derogation from these stipulations, the Greek legislation has left the reasons for imposing restrictions to ambiguity. Vague references to “the situation that prevails [...] regarding refugee and immigration flows” as well as “emergency needs” and “problems created by the refugee and immigrant flows” do not serve as sufficient legal justification to restrict human rights and the related fundamental freedoms enshrined in the national constitution.<sup>137</sup> This illustrates an instance in which the balance between liberty and security has been illegally skewed towards the latter, as the necessity and proportionality of the measures taken is not properly accounted for.

The situation in Hungary is notably different. The Bill No. T/333 makes clear reference to national security concerns resulting from the exponential influx of migrants, as well as irregular migration and the abuse of the asylum system, which “increasingly [threaten] public order and public security”.<sup>138</sup> Hence, the Hungarian government has found itself in a position to permit the restriction of “organisational activity promoting the stay in the country” to respond to these concerns.<sup>139</sup> While the legal justifications predicate that the legislation is following a legitimate aim, the wider legislative and constitutional setup of the hybrid regime that is Hungary causes doubts as to the actual legality of restricting fundamental rights in this context.

---

Law No. 4636 on International Protection and Other Provisions (1 November 2019) Government Gazette of the Hellenic Republic, Article 66, 69  
Amnesty International, “Greece: Regulation of NGOs Working on Migration and Asylum Threatens Civic Space” (2020) EUR 25/2821/2020.

<sup>136</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 19, 21, 22.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (9 December 1998) UNGA A/RES/53/144, Article 5, 6(b), 8(1).

<sup>137</sup> Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic 1300.

<sup>138</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 10, section 11.

<sup>139</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 8, 10.

This circumstance results from Hungary's overhauling of the constitution in 2010. Therein, significant changes have been made to the definition of the very subjects of the Hungarian constitution.<sup>140</sup> Hence, while the laws of the State have been designated to pertain to Hungary's constituents, there has been a stark contrast drawn between the political community and the Hungarian nation.<sup>141</sup> The nationhood of the Hungarian people has been specifically defined as being bound by Christian values and its religious traditions.<sup>142</sup> Hence, while the Fundamental Law acknowledges "the languages and cultures of nationalities living in Hungary" and the resulting multicultural character of its political community, these individuals are not determined to form part of the Hungarian nation.<sup>143</sup> In connection with the legal reasoning provided for by Bill No. T/333, this circumstance raises doubts as to the legitimacy of the criminalisation of humanitarian assistance.

The use of national security to justify the restriction of fundamental rights is based on the reasoning that "Hungarians want to live in security".<sup>144</sup> This designation of 'Hungarians' has been further refined by the Bill to designate the "Hungarian people".<sup>145</sup> In context of the constitutional provisions, this firmly implements the nativist character of the securitisation of immigration in Hungary. Nativism is defined as "an ideology that holds that states should be inhabited exclusively by members of the native group, and that non-native people and ideas are fundamentally threatening to the homogenous nation-state".<sup>146</sup> Given the claim of restricting fundamental rights for the benefit of national security in concert with the exclusionary conception of the Hungarian nation, the criminalisation of humanitarian becomes a tool to regulate the

---

<sup>140</sup> Gábor Halmai, "The making of 'illiberal constitutionalism' with or without a new constitution: the case of Hungary and Poland" in David Landau & Hanna Lerner (eds) *Comparative Constitution Making* (Elgar 2019) 306.

<sup>141</sup> The Constitution of Hungary (2011, rev. 2016), Preamble.

<sup>142</sup> The Constitution of Hungary (2011, rev. 2016), Preamble.

<sup>143</sup> The Constitution of Hungary (2011, rev. 2016), Preamble.

Gábor Halmai, "The making of 'illiberal constitutionalism' with or without a new constitution: the case of Hungary and Poland" in David Landau & Hanna Lerner (eds) *Comparative Constitution Making* (Elgar 2019) 306.

<sup>144</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 8, General reasoning.

<sup>145</sup> Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) page 8, General reasoning.

<sup>146</sup> Cas Mudde, 'Why Nativism, not populism, should be declared the word of the year' (*The Guardian*, 7 December 2017) <<https://www.theguardian.com/commentisfree/2017/dec/07/cambridge-dictionary-nativism-populism-word-year>> accessed 15 July 2022.

onslaught of not only immigrants, but immigrants who are portrayed to pose a threat to the dominance of Hungarian's Christian values.

The wider securitisation of immigration in Hungary thus results in the restriction of human rights and the withholding of adequate reception conditions based on discriminatory grounds. As the ICCPR stipulates, restrictions of fundamental rights may only take place in context of an officially proclaimed national emergency – a condition to which Hungarian legislation adheres – so long as the restrictions “do not involve discrimination solely on the ground of race, colour, sex, language, *religion* or social origin” (emphasis added).<sup>147</sup> Given the analysis of existing legal provisions, Hungary's conduct of criminalising humanitarian assistance is not in conformity with its international legal obligations.

This legal analysis clearly illustrates that overstretched the balance between liberty and security is not a characteristic that pertains only to hybrid regimes but also occurs in liberal democracies that selectively utilise illiberal constitutionalism. Hence, both Hungary and Greece rely on the practice of illiberal constitutionalism to criminalise humanitarian assistance, hiding behind the constitutional form of extensive legislative frameworks, while substantively restricting fundamental liberties pertaining to the realisation of civil society activity. Nonetheless, it has been shown that the International Human Rights Law regime serves as an effective mechanism to legally constrain illiberal constitutionalism, having illustrated the parameters of international legal provisions and their applicability to the criminalisation of humanitarian assistance in the context of the securitisation of immigration. In addition to not only the illiberal but also illegal nature of the analysed cases' conduct, illiberal constitutionalism's adherence to procedural aspects is not irrefutable. In this regard, in its recent judgment on Hungary's illiberal practices, the Court of Justice of the European Union has ruled the additional grounds of inadmissibility for asylum-seekers to be in contradiction to applicable regional legal frameworks of the EU.<sup>148</sup> This legal analysis has thus shown that International Human Rights Law does not only serve as a safeguard against the

---

<sup>147</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 4(1).

<sup>148</sup> Case C-821/19 *European Commission v Hungary* [Judgement] (16 November 2021) Court of Justice of the European Union ECLI:EU:C:2021:930, para 34.

arbitrary use of national security-based justifications to restrict fundamental liberties, but the procedural legality of national legislation is ensured through regional legal instruments. Hence, while illiberal constitutionalism poses a normative threat to the legitimacy of the transnational legal order, its procedural and substantive feature can be kept in check to adhere to relevant standards prescribed by the international legal regime, if one only looks close enough.

## 6.2 Accounting for the Use of Nativism to Restrict Fundamental Rights: Populism's Link with Illiberalism

The foregoing outline and legal analysis of the legislative frameworks on the criminalisation of humanitarian assistance in Hungary and Greece have illustrated how restrictive policies are implemented in the context of the securitisation of immigration. However, the legality of these provisions is insufficient as per the standards afforded by International Human Rights Law. Moreover, specifically the instance of Hungary raises concerns due to its employment of a Nativist ideology that underlies its constitutional setup and informs its criminalisation of humanitarian assistance and related legal framework. Considering the benchmarking approach applied by this dissertation to conduct an in-depth study of illiberal constitutionalism, the occurrence of Nativism in the more illiberal of the studied cases warrants possible further insights into illiberal constitutionalism. The following section will provide a discussion of the foregoing analysis' findings by placing them in the wider context of the European political landscape.

Several studies have pointed out the rise of populist politicians and their success at the polls, leading to them winning parliamentary majorities across Europe.<sup>149</sup>

---

<sup>149</sup> Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 89.  
Tjitske Akkerman & Sarah L. de Lange, "Radical Right Parties in Office: Incumbency Records and the Electoral Cost of Governing" (2012) 47 *Government and Opposition* 574.  
Daniele Albertazzi & Duncan McDonnell, *Populists in Power* (Routledge 2015).  
Franz Fallend, "Populism in Government: The Case of Austria" in Cas Mudde & Cristóbal Rovira Kaltwasser (eds), *Populism in Europe and the Americas. Threat or Corrective for Democracy?* (CUP 2012).



Hungary's government, headed by the Orbán-led *Fidesz*, has been successfully riding this populist wave that has washed across Europe in recent years.<sup>150</sup> The concept of Populism has been defined as 'ideational', being "conceived first and foremost as a specific set of ideas", based on the separation of society in two distinct groups.<sup>151</sup> This antagonism commonly portrays the people as a homogeneous group with a common culture, norms, and beliefs, opposite a designated 'Other'.<sup>152</sup>

This ideology, portraying the populace as a normatively uniform and culturally homogeneous group, has been found to enable the usage of a nativist 'us versus them' rhetoric.<sup>153</sup> Nativism is defined as "an ideology that holds that states should be inhabited exclusively by members of the native group, and that non-native people and ideas are fundamentally threatening to the homogenous nation-state."<sup>154</sup> Such a narrative is employed by right- and left-wing populists alike to frame different issues within political discourse in an increasingly xenophobic light. Thereby, the former uses

---

Andrea L. P. Pirro, *The Populist Radical Right in Central and Eastern Europe: Ideology, Impact and Electoral Performance* (Routledge 2015).

Daphne Halikiopoulou, "Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece" (2020) 55 *Intereconomics* 34.

<sup>150</sup> Licia Cianetti, James Dawson, & Seán Hanley, "Rethinking 'Democratic Backsliding' in Central and Eastern Europe: Looking beyond Hungary and Poland" (2018) 34 *East European Politics* 245.

Ivan Krastev, "The Specter Haunting Europe: The Unravelling of the Post-1989 Order" (2016) 27 *Journal of Democracy* 88.

Batory, 2016; Grzymala-Busse, 2019

Takis S. Pappas, "Populists in Power." (2019) 30 *Journal of Democracy* 70.

<sup>151</sup> Cristóbal Rovira Kaltwasser & Paul Taggart, "Dealing with populists in government: a framework for analysis" (2016) 23 *Democratization* 203.

Daniele Albertazzi & Duncan McDonnell, *Twenty-First Century Populism: The Spectre of Western European Democracy* (Palgrave Macmillan 2008).

Carlos de la Torre, *Populist Seduction in Latin America* (2<sup>nd</sup> ed, Ohio University Press 2010).

Kirk Hawkins, *Venezuela's Chavismo and Populism in Comparative Perspective* (CUP 2011).

Cas Mudde, *Populist Radical Right Parties in Europe* (CUP 2007).

Rovira Kaltwasser, C., "Latin American Populism: Some Conceptual and Normative Lessons" (2014) 21 *Constellations* 494.

<sup>152</sup> Gabriella Lazaridis & Anna-Maria Konsta, "Identitarian Populism: Securitisation of Migration and the Far Right in Times of Economic Crisis in Greece and the UK" in Gabriella Lazaridis & Kursheed Wadia (eds), *The Securitisation of Migration in the EU – Debates Since 9/11* (Palgrave Macmillan 2015) 185-6.

<sup>153</sup> Gabriella Lazaridis & Anna-Maria Konsta, "Identitarian Populism: Securitisation of Migration and the Far Right in Times of Economic Crisis in Greece and the UK" in Gabriella Lazaridis & Kursheed Wadia (eds), *The Securitisation of Migration in the EU – Debates Since 9/11* (Palgrave Macmillan 2015) 185-6.

Cas Mudde, *Populist Radical Right Parties in Europe* (CUP 2007).

Cas Mudde, 'Why Nativism, not populism, should be declared the word of the year' (*The Guardian*, 7 December 2017) <<https://www.theguardian.com/commentisfree/2017/dec/07/cambridge-dictionary-nativism-populism-word-year>> accessed 15 July 2022.

<sup>154</sup> Cas Mudde, 'Why Nativism, not populism, should be declared the word of the year' (*The Guardian*, 7 December 2017) <<https://www.theguardian.com/commentisfree/2017/dec/07/cambridge-dictionary-nativism-populism-word-year>> accessed 15 July 2022.

it in context of an anti-immigration stance based on an exclusionary conception of the people, framing anyone not meeting the criteria of the homogenous in-group as part of the out-group and thus creating a sense of unity through national identity.<sup>155</sup> Contrastingly, left-wing populists have been found to refer to the antagonism within the populace – between the common people and the elite – in economic terms, basing their ideology on anti-austerity measures, as well as taking an anti-immigration stance due to the perceived threat of immigrants to the availability of job opportunities for the ‘native’ people.<sup>156</sup> Thus, populists tend to stoke the fire of common fears among the public.

A possible explanation for the use of nativism in Hungary but not in Greece, despite the common practice of securitising immigration, could be the orientation of either government’s populism. Hence, while Hungary’s government has been classified as centre-right, Greek governing parties have been primarily leftist with a strong anti-austerity orientation. The reason for this is the “salience of the materialist cleavage exacerbated by the country’s severe and protracted economic crisis”.<sup>157</sup> As citizens have become dissatisfied with the workings of democracy in the face of crises, due to factors such as the global economy and migration, their support of populists advocating to represent the people against a designated ‘Other’ has increased.<sup>158</sup> This has enabled the “ascent to power of populist strongmen”.<sup>159</sup> Subsequently, the occurrence of Populists in government has led to marked deviations from liberal democratic norms.<sup>160</sup> This is due to the inherent tensions between democracy and

---

<sup>155</sup> Felix Bender, “Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU” in Elzbieta M. Godziak, Izabella Main, & Brigitte Suter (eds), *Europe and the Refugee Response – A Crisis of Values?* (Routledge 2020) 61.

Boldiszár Nagy, “Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation” (2016) 17 *German Law Journal* 1033.

<sup>156</sup> Bart Bonikowski, Daphne Halikopoulou, Erik Kaufmann, & Matthijs Rooduijn, “Populism and nationalism in a comparative perspective: a scholarly exchange” (2018) 25 *Nations and Nationalism* 58. Daphne Halikopoulou, “Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece” (2020) 55 *Intereconomics* 34.

<sup>157</sup> Daphne Halikopoulou, “Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece” (2020) 55 *Intereconomics* 34.

<sup>158</sup> Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (or How to Build a Constitutional ‘Democratorship’ in Plain Sight)” in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 3-4.

Daphne Halikopoulou, “Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece” (2020) 55 *Intereconomics* 34

<sup>159</sup> Takis S. Pappas, “Populists in Power.” (2019) 30 *Journal of Democracy* 70.

<sup>160</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 86.

populism, resulting from the latter's "emphasis on popular sovereignty, [which is] at odds with the constraints that liberal democracy imposes on the exercise on that sovereignty".<sup>161</sup> As the complexities of liberal democracy entail a delicate balance between a majoritarian rule of the people and the protection of individual and minority rights by the constitution, the perceived constraints that the latter arguably places on the former pose a hinderance to populists' claim to legitimacy based on the direct rule of a homogeneous people.<sup>162</sup> Therefore, populists in government are attempting to disable checks and balances as well as "bypass representative institutions" in order to uninhibitedly govern according to popular will, thereby causing a slide towards illiberal governance.<sup>163</sup> In turn, the popular will is determined by socio-political specificities of the national context, influenced by contemporary crises. Hence, the prevalence of right-wing populism in Hungary may function as an explanation for the government's use of a nativist rhetoric in politics and law alike, while this notion is notably absent from the Greek left-wing populism against the backdrop of the economic crisis. As this discussion has pointed out, the closely linked concepts of populism and nativism can be "intrinsic to the logic of illiberal governance".<sup>164</sup> This circumstance points future research towards closer study of the relationship between illiberalism, populism, and nativism. However, this endeavour is at present beyond the scope of this dissertation.

---

<sup>161</sup> Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 86.

<sup>162</sup> Cristóbal Rovira Kaltwasser & Paul Taggart, "Dealing with populists in government: a framework for analysis" (2016) 23 *Democratization* 202.

Cas Mudde, *Populist Radical Right Parties in Europe* (CUP 2007).

Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 88-9. Daphne Halikiopoulou, "Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece" (2020) 55 *Intereconomics* 34.

Michael Freeden, "After the Brexit referendum: revisiting populism as an ideology" (2016) 22 *Journal of Political Ideologies* 1.

Daphne Halikiopoulou, "Right-wing Populism as a Nationalist Vision of Legitimizing Collective Choice" (2019) 54 *The International Spectator* 35.

Bart Bonikowski, Daphne Halikiopoulou, Erik Kaufmann, & Matthijs Rooduijn, "Populism and nationalism in a comparative perspective: a scholarly exchange" (2019) 25 *Nations and Nationalism* 58.

<sup>163</sup> Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 89.

Daphne Halikiopoulou, "Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece" (2020) 55 *Intereconomics* 34.

Michael Freeden, "After the Brexit referendum: revisiting populism as an ideology" (2016) 22 *Journal of Political Ideologies* 1.

Daphne Halikiopoulou, "Right-wing Populism as a Nationalist Vision of Legitimizing Collective Choice" (2019) 54 *The International Spectator* 35.

Bart Bonikowski, Daphne Halikiopoulou, Erik Kaufmann, & Matthijs Rooduijn, "Populism and nationalism in a comparative perspective: a scholarly exchange" (2019) 25 *Nations and Nationalism* 58.

<sup>164</sup> Andrea L. P. Pirro & Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 90.

## 7 Conclusion

By means of a comparative legal analysis of the legislative framework governing the criminalisation of humanitarian assistance in Hungary and Greece, this dissertation has illustrated the differentiated use of illiberal constitutionalism to restrict fundamental rights in two countries at opposite ends of the newly democratic spectrum – ranging from liberal to illiberal. Both cases have implemented extensive legislation which in concert provides for the restriction civil society activity to a significant extent. The commonality of Greece and Hungary is that each has placed civic activities pertaining to immigration under the control and oversight of the government. While Hungary employs national security reasons as a direct justification for the overt criminalisation of organised activities that facilitate unsubstantiated asylum claims, Greece relies primarily on administrative hurdles for civil society actors to be barred from legally operating to facilitate immigration by means of humanitarian assistance.

Corresponding to the applied benchmarking approach, the extent to which Hungary and Greece have restricted fundamental liberties pertaining to civil society's operational space markedly differs. While *de jure* both Hungary and Greece criminalise only certain activities by civil society, the interlocking web of legislation on asylum leads to all activity in the field of immigration being *de facto* criminalised in Hungary. Contrastingly, this is not the case in Greece which rather relies on the imposition of excessive amounts of red tape to curtail civil society actors from being active in aiding refugees.

Moreover, the illegality of this legislation can be ascribed to the effective safeguards on the balance between security and liberty implemented by the International Human Rights regime. While Greece does not present sufficient justification for the restriction of fundamental liberties as per the legally permissible grounds of security concerns, Hungary supplies extensive reference to the importance of the criminalisation of humanitarian assistance to provide for national security. Deeming the latter's legislative conduct to be illegal is reliant on the fact that the Hungarian notion of national security is based on decidedly nativist grounds, violating international legal provisions that limit the restriction of fundamental freedoms based on discriminatory grounds.

The foregoing analysis has thus shown that the international legal regime is able to provide a substantive rulebook to safeguard human rights even under as intricate a practice as illiberal constitutionalism. Hence, despite substantive efforts to restrict fundamental freedoms while hiding under the cover of constitutionalism, this very aspect is significantly regulated by International Law and regional legal instruments that provide for similarly extensive guidelines of permissible practices. Moreover, the international human rights regime is able to provide for the balance between liberty and security by having supplied a seemingly tightknit framework of instances in which human rights may be legitimately restricted. This suggests that the challenge posed by illiberal constitutionalism is much less legal than it is normative.

As the discussion of the findings has pointed out, nativism together with populism is a significant enabler of illiberalism. Hence, it is suggested that socio-political factors exasperated by crises pose a significant challenge to liberal norms *in concert* with elaborate practices such as illiberal constitutionalism. The complex interplay of a populist ideology based on nativism and illiberal changes under the guise of constitutionalism pursued in the name of the people raise concerns for the resilience of the prevailing transnational legal order and related commitment to liberal democratic norms.<sup>165</sup> Such concerns are motivated by the fact that illiberal governance and resulting democratic regression is made possible by the very foundations of liberal democracy as populists have risen to power on the “basis of legitimate parliamentary majorities” and then use a hallmark of liberal democracy – the constitution – to enact illiberal changes.<sup>166</sup> This circumstance warrants a closer engagement of future research with the relationship between illiberalism, populism, and nativism.

---

<sup>165</sup> Nienke Grossman, “Populism, International Courts, and Women’s Human Rights” (2020) 35 *Maryland Journal of International Law* 106.

<sup>166</sup> Andrea L. P. Pirro & Ben Stanley, “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland” (2022) 20 *Perspectives on Politics* 86.

Appendix

## Bibliography

Adamski, D., "The Social Contract of Democratic Backsliding in the 'New EU' Countries" (2019) 56 *Common Market Law Review* 623.

Ágh, A., "The Triple Crisis in Hungary: The "Backsliding" of Hungarian Democracy After Twenty Years" (2013) 13 *Romanian Journal of Political Sciences* 25.

Akkerman, T., & De Lange, S. L., "Radical Right Parties in Office: Incumbency Records and the Electoral Cost of Governing" (2012) 47 *Government and Opposition* 574.

Albertazzi, D., & McDonnell, D., *Populists in Power* (Routledge 2015).

Albertazzi, D., & McDonnell, D., *Twenty-First Century Populism: The Spectre of Western European Democracy* (Palgrave Macmillan 2008).

Art, D., "The Myth of Global Populism" (2022) 20 *Perspectives on Politics* 1.

Bánkuti, M., Halmai, G., & Scheppele, K. L., "From Separation of Powers to a Government without Checks: Hungary's Old and New Constitution" in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

Bárd, P., 'The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name' (*Verfassungsblog on matters constitutional*, 27 January 2020) <<https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name/>> accessed 19 July 2022.

Batory, A., "Populists in government? Hungary's 'system of national cooperation'" (2016) 23 *Democratization* 283.

Bayer, L., "Nazi" talk: Orbán adviser trashes "mixed race" speech in dramatic exit' (*Politico*, 26 July 2022) <<https://www.politico.eu/article/nazi-talk-orban-adviser-trashe-mix-race-speech-dramatic-exit/>> accessed 26 July 2022.

Beimenbetov, S., "State Regulation of Organized Civil Society in Hybrid Regimes: A Systematic Assessment of Cross-National Variations in the Regulation of Civil Society Organizations in Seven Post-Soviet Countries" (2021) 8 *Central Asian Affairs* 120.

Bello, V., "The spiralling of the securitisation of migration in the EU: from the management of a 'crisis' to the governance of human mobility?" (2022) 48 *Journal of Ethnic and Migration Studies* 1327.

Bender, F., "Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU" in Elzbieta M. Godziak, Izabella Main, & Brigitte Suter (eds), *Europe and the Refugee Response – A Crisis of Values?* (Routledge 2020).

Bermeo, N., "On Democratic Backsliding" (2016) 27 *Journal of Democracy* 5.

Berti, C., "Right-wing populism and the criminalization of sea-rescue NGOs: the 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook" (2021) 43 *Media, Culture & Society* 532.

Blokker, P., 'Populist constitutionalism' (*Verfassungsblog on matters constitutional*, 4 May 2017) <<https://verfassungsblog.de/populist-constitutionalism/>> accessed 10 July 2022.

Bonikowski, B., Halikopoulou, D., Kaufmann, E., & Rooduijn, M., "Populism and nationalism in a comparative perspective: a scholarly exchange" (2019) 25 *Nations and Nationalism* 58.

Börzel, T. A., & Schimmelfennig, F., "Coming Together or Drifting apart? The EU's Political Integration Capacity in Eastern Europe" (2017) 24 *Journal of European Public Policy* 278.



Bosworth, M., & Guild, M., "Governing Through Migration Control: Security and Citizenship in Britain" (2008) 48 *British Journal of Criminology* 703.

Bozóki, A., & Hegedűs, D., "An externally constrained hybrid regime: Hungary in the European Union" (2018) 25 *Democratization* 1173.

Bugarič, B., "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism" (2019) 17 *International Journal of Constitutional Law* 597.

Bugarič, B., "A Crisis of Constitutional Democracy in Post-Communist Europe: 'Lands In-Between' Democracy and Authoritarianism" (2015) 13 *International Journal of Constitutional Law* 219.

Buyse, A., "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights" (2018) 8 *The International Journal of Human Rights* 966.

Buzan, B., Waever, O., & de Wilde, J., *Security: A New Framework for Analysis* (Lynne Rienner 1998).

Casey-Maslen, S., *The Right to Life Under International Law – An Interpretative Manual* (CUP 2021)

Castillo-Ortiz, P., "The Illiberal Abuse of Constitutional Courts in Europe" (2019) 15 *European Constitutional Law Review* 48.

Ceccorulli, M., "Back to Schengen: the collective securitisation of the EU free-border area" (2019) 42 *West European Politics* 302.

Christensen, D., & Weinstein, J. M., "Defunding Dissent: Restrictions on Aid to NGOs" (2013) 24 *Journal of Democracy* 77.

Christides, G., & Eberle, L., 'Flüchtlingshelferin Sarah Mardini: Von der Heldin zur Verdächtigen' (*Spiegel Ausland*, 1 September 2018)

<<https://www.spiegel.de/politik/ausland/griechenland-fluechtlingshelferin-von-der-heldin-zur-verdaechtigen-a-1225920.html>> accessed 7 August 2022.

Cianetti, L., Dawson, J., & Hanley, S., "Rethinking 'Democratic Backsliding' in Central and Eastern Europe: Looking beyond Hungary and Poland" (2018) 34 *East European Politics* 243.

Dawson, J., & Hanley, S., "What's Wrong with East-Central Europe?: The Fading Mirage of the 'Liberal Consensus'" (2016) 27 *Journal of Democracy*, 30.

De la Torre, C., *Populist Seduction in Latin America* (2nd ed, Ohio University Press 2010).

Diamond, L., "Facing Up to the Democratic Recession" (2015) 26 *Journal of Democracy* 142.

Dresden, J. R., & Howard, M. M., "Authoritarian Backsliding and the Concentration of Political Power" (2015) 23 *Democratization* 1122.

Drinóczi, T., "The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary" (2019) 16 *MTA Law Working Papers* 1.

Drinóczi, T., & Bień-Kacała, A., "Illiberal Constitutionalism: The Case of Hungary and Poland" (2018) 20 *German Law Journal* 1140.

Fallend, F., "Populism in Government: The Case of Austria" in Cas Mudde & Cristóbal Rovira Kaltwasser (eds), *Populism in Europe and the Americas. Threat or Corrective for Democracy?* (CUP 2012).

Fili, A., "Containment Practices of Immobility in Greece" in Marianna Karakoulaki, Laura Southgate, & Jakob Steiner (eds), *Critical Perspectives on Migration in the Twenty-First Century* (E-International Relations Publishing 2018).

Freedon, M., "After the Brexit referendum: revisiting populism as an ideology" (2016) 22 *Journal of Political Ideologies* 1.

Fukuyama, F., *The End of History and the Last Man* (Penguin Books Ltd 1993).

Gerard, A., & Pickering, S., "Crimmigration – Criminal justice, refugee protection and the securitisation of migration" in Bruce A. Arrigo & Heather Y. Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014).

Gijs, C., & Fota, A., 'Hungary's Viktor Orbán faces growing backlash over "race mixing" comments' (Politico, 25 July 2022) <<https://www.politico.eu/article/romania-slams-hungary-viktor-orban-backlash-race-mixing-comments-unacceptable/>> accessed 26 July 2022.

Gilbert, L., & Mohseni, P., "Disabling dissent: the colour revolutions, autocratic linkages, and civil society regulations in hybrid regimes" (2018) 24 *Contemporary Politics* 454.

Gkliati, M., 'When volunteers became smugglers: The criminalization of "Flight Helpers" in Greece' (*Leiden Law Blog*, 31 May 2016) <<https://leidenlawblog.nl/articles/when-volunteers-became-smugglers-the-criminalization-of-flight-helpers-in-g>> accessed 10 July 2022.

Gkliati, M., 'Proud to Aid and Abet Refugees: The Criminalization of "Flight Helpers" in Greece' (*Border Criminologies*, 23 May 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>> accessed 10 July 2022.

Gkliati, M., 'Registering Humanity: The EU's Plan to Halt Citizen-led Response to the Migration Crisis' (*Border Criminologies*, 21 March 2016) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/registering>> accessed 10 July 2022.

Gordon, E., & Larsen H. K., “‘Sea of blood’: the intended and unintended effects of criminalising humanitarian volunteers assisting migrants in distress at sea” (2022) 46 *Disasters* 3.

Grossman, N., “Populism, International Courts, and Women’s Human Rights” (2020) 35 *Maryland Journal of International Law* 104.

Grzymala-Busse, A., “How Populists Rule: The Consequences for Democratic Governance” (2019) 51 *Polity* 707.

Halikiopoulou, D., “Economic Crisis, Poor Governance and the Rise of Populism: The Case of Greece” (2020) 55 *Intereconomics* 34.

Halikiopoulou, D., “Right-wing Populism as a Nationalist Vision of Legitimizing Collective Choice” (2019) 54 *The International Spectator* 35.

Halikopoulou, D., & Vasilopoulou, S., “Breaching the social contract: crises of democratic representation and patterns of extreme right party support” (2018) 53 *Government and Opposition* 26.

Halmay, G., “Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary” (2020) 14 *Law & Ethics of Human Rights* 97.

Halmay, G., “The making of ‘illiberal constitutionalism’ with or without a new constitution: the case of Hungary and Poland” in David Landau & Hanna Lerner (eds) *Comparative Constitution Making* (Elgar 2019).

Halmay, G., “Populism, Authoritarianism, and Constitutionalism” (2019) 20 *German Law Journal* 296.

Halmay, G., “From Pariah to a Model? Hungary’s Rise as an Illiberal Member State of the EU” in Wolfgang Benedek, Matthias C. Ketteman, Rainhard Klaushofer, Karin Lukas, & Manfred Nowak (eds), *European Yearbook on Human Rights* (Volume 17, NWV 2017).

Hanley, S., & Vachudova, M. A., "Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic" (2018) 34 *East European Politics* 276.

Hawkins, K., *Venezuela's Chavismo and Populism in Comparative Perspective* (CUP 2011).

Heurlin, C., "Governing Civil Society: The Political Logic Of NGO-State Relations under Dictatorship" (2010) 21 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 220.

Huysmans, J., *The Politics of Insecurity, Fear, Migration and Asylum in the EU* (Routledge 2006).

Ivanović, M., Mušanović, M., Ceku, M., Salihović-Gušić, A., & Icoski, M., "Recent developments in human rights and democratisation in South-East Europe during 2019" (2020) 4 *Global Campus Human Rights Journal* 517.

Jaskulowski, K., "The securitisation of migration: Its limits and consequences" (2019) 40 *International Political Science Review* 710.

Krastev, I., "Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline" (2018) 97 *Foreign Affairs* 49.

Krastev, I., "The Specter Haunting Europe: The Unravelling of the Post-1989 Order" (2016) 27 *Journal of Democracy* 88.

Karyotis, G., & Skleparis, D., "Migrant Lived Experiences and Resistance to the Securitisation of Migration in Greece: The Modern '300'" (2014) GPSG Working Paper #18.

Karyotis, G., "Securitization of Migration in Greece: Process, Motives, and Implications" (2012) 6 *International Political Sociology* 390.

Lamour, C., "Mass media and border securitization in Europe: Investigating the metropolitan 'Mediapolis' in an era of right-wing populism" (2019) 41 *Journal of Urban Affairs* 535.

Lamour, C., & Varga, R., "The Border as a Resource in Right-wing Populist Discourse: Viktor Orbán and the Diasporas in a Multi-scalar Europe" (2017) 35 *Journal of Borderlands Studies* 335.

Lazaridis, G., & Konsta, A.-M., "Identitarian Populism: Securitisation of Migration and the Far Right in Times of Economic Crisis in Greece and the UK" in Gabriella Lazaridis & Kursheed Wadia (eds), *The Securitisation of Migration in the EU – Debates Since 9/11* (Palgrave Macmillan 2015).

Levitsky, S., & Way, L. A., "The Myth of Democratic Recession" (2015) 26 *Democracy* 45.

Meijers, M. J., & van der Veer, H., "MEP Responses to Democratic Backsliding in Hungary and Poland. An Analysis of Agenda-Setting and Voting Behaviour" (2019) 57 *Journal of Common Market Studies* 838.

Melissaris, E., 'Legal dehumanising: on the arrest of refugee solidarity activists' (*openDemocracy*, 27 January 2016) <<https://www.opendemocracy.net/en/can-europe-make-it/legal-dehumanising-on-arrest-of-refugee-solidarity-activists/>> accessed 9 July 2022.

Mudde, C. & Rovira Kaltwasser, C., *Populism: A Very Short Introduction* (OUP 2017).

Mudde, C., 'Why Nativism, not populism, should be declared the word of the year' (*The Guardian*, 7 December 2017) <<https://www.theguardian.com/commentisfree/2017/dec/07/cambridge-dictionary-nativism-populism-word-year>> accessed 15 July 2022.

Mudde, C., 'Europe's centre-right is on the wrong track with "good populism"' (*The Guardian*, 30 October 2017)

<[https://www.theguardian.com/commentisfree/2017/oct/30/europe-centre-right-wrong-track-good-populism-nativism?CMP=gu\\_com](https://www.theguardian.com/commentisfree/2017/oct/30/europe-centre-right-wrong-track-good-populism-nativism?CMP=gu_com)> accessed 20 July 2022.

Mudde, C., *Populist Radical Right Parties in Europe* (CUP 2007).

Mudde, C., "The Populist Zeitgeist" (2004) 39 *Government and Opposition* 541.

Müller, J.-W., 'The Problem With "Illiberal Democracy"' (*Social Europe*, 27 January 2016) <<https://socialeurope.eu/the-problem-with-illiberal-democracy>> accessed 10 July 2022.

Nagy, B., "Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation" (2016) 17 *German Law Journal* 1033.

Pali, B., 'Europe as Terraferma: against the criminalisation of solidarity' (*security praxis*, 5 May 2017) <<https://securitypraxis.eu/terraferma-solidarity-not-crime/>> accessed 25 June 2022.

Pappas, T. S., "Populists in Power." (2019) 30 *Journal of Democracy* 70.

Pirro, A. L. P., & Stanley, B., "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland" (2022) 20 *Perspectives on Politics* 86.

Pirro, A. L. P., *The Populist Radical Right in Central and Eastern Europe: Ideology, Impact and Electoral Performance* (Routledge 2015).

Popescu, G., *Bordering and Order the Twenty-first Century: Understanding Borders* (Rowman & Littlefield Publishers 2011).

Rovira Kaltwasser, C., & Taggart, P., "Dealing with Populists in Government: A Framework for Analysis" (2016) 23 *Democratization* 201.

Rovira Kaltwasser, C., "Latin American Populism: Some Conceptual and Normative Lessons" (2014) 21 *Constellations* 494.

Ruprik, J., "The Specter Haunting Europe: Surging Illiberalism in the East" (2016) 27 *Journal of Democracy* 133.

Sadurski, W., *Poland's Constitutional Breakdown* (OUP 2019).

Schack, L., & Witcher, A., "Hostile hospitality and the criminalization of civil society actors aiding border crossers in Greece" (2021) 39 *EPD: Society and Space* 477.

Scheppele, K. L., "Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight)" in Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019).

Scheppele, K. L., "Autocratic Legalism" (2018) 85 *University of Chicago Law Review* 545.

Skleparis, D., "(In)securitization and illiberal practices on the fringe of the EU" (2016) 25 *European Security* 92.

Stanley, B., "The Thin Ideology of Populism" (2008) 13 *Journal of Political Ideologies* 95.

Tóth, G. A., "Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism" in Maurice Adams, Anne Meuwese, & Ernst Hirsch Ballin (eds) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017).

Tushnet, M., "Authoritarian Constitutionalism" (2015) 100 *Cornell Law Review* 391.

Van der Borgh, C., & Terwindt, C., *NGOs under Pressure in Partial Democracies* (Palgrave Macmillan 2014).

Van der Borgh, C., & Terwindt, C., "Shrinking operational space of NGOs – a framework of analysis" (2012) 22 *Development in Practice* 1065.



Varol, O., "The Democratic Coup d'etat" (2012) 52 Harvard International Law Journal 292.

Vasilopoulou, S., & Halikopoulou, D., *The Golden Dawn's nationalist Solution: Explaining the Rise of the Far Right in Greece* (Palgrave 2015).

Vosyliūtė, L. & Conte, C., "Crackdown on NGOs and volunteers helping refugees and other migrants" (2019) Research Social Platform on Migration and Asylum (ReSOMA) Final Synthetic Report.

Wilson, E. A., "Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis" (2016) 8 Journal of Human Rights Practice 329.

## Primary Sources

### Applicable Legal Framework

Act C of 2012 on the Criminal Code – Büntető Törvénykönyvről szóló 2012. évi C. törvény (13 July 2012) Magyar Közlöny – Hungarian Government Journal <[https://thb.kormany.hu/download/a/46/11000/Btk\\_EN.pdf](https://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf)> accessed 1 August 2022.

Act LXXX of 2007 on Asylum (25 June 2007, amended 2018) The Government of Hungary (unofficial translation by Afford Fordító- és Tolmácsiroda Kft., proofread by UNHCR Hungary Unit) <<https://www.refworld.org/docid/4979cc072.html>> accessed 1 August 2022.

Bill No. T/333 amending certain laws relating to measures to combat illegal immigration (May 2018) The Government of Hungary (unofficial translation by the Hungarian Helsinki Committee) <<https://helsinki.hu/wp-content/uploads/T333-ENG.pdf>> accessed 9 July 2022.

Charter of Fundamental Rights of the European Union 2012/C 326/02 (adopted 7 December 2000, entered into force 2009) OJ C326/391.

The Constitution of Greece (1975, rev. 2008) Hellenic Parliament <<https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>> accessed 8 July 2022.

The Constitution of Hungary (2011, rev. 2016) Constitute Project <[https://www.constituteproject.org/constitution/Hungary\\_2016?lang=en](https://www.constituteproject.org/constitution/Hungary_2016?lang=en)> accessed 8 July 2022.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights adopted 4 November 1950, as amended) (ECHR).

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17.

Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (9 December 1998) UNGA A/RES/53/144 [Declaration on Human Rights Defenders].

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applications for international protection (recast) [2013] OJ L180/96.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesbos Island (28 January 2016) Government Gazette of the Hellenic Republic <<https://www.statewatch.org/news/2016/jan/greek-doc.pdf>> accessed 7 July 2022.

Law No. 4251 Immigration and Social Integration Code and other provisions (1 April 2014) Government Gazette of the Hellenic Republic No. 80 <[https://www.mfa.gr/images/docs/ethnikes\\_theoriseis/2015/metanast.pdf](https://www.mfa.gr/images/docs/ethnikes_theoriseis/2015/metanast.pdf)> accessed 9 July 2022.

Law No. 4636 on International Protection and Other Provisions (1 November 2019) Government Gazette of the Hellenic Republic No. 169 <[https://asylumineurope.org/wpcontent/uploads/2019/11/resources\\_internationalprotectionact.pdf](https://asylumineurope.org/wpcontent/uploads/2019/11/resources_internationalprotectionact.pdf)> accessed 10 August 2022.

Law No. 4686 Improvement of Immigration Legislation, amendment of provisions of laws 4636/2019 (A'169), 4375/2016 (A'51), 4251/2014 (A'80) and other provisions (12 May 2020) Government Gazette of the Hellenic Republic No. 96 <<http://www.immigration.gr/2020/05/nomos-4686-2020-beltiosi-metanasteytikhs-nomothesias.html?m=1>> accessed 30 July 2022.

Universal Declaration of Human Rights (adopted 10 December 1948 by United Nations General Assembly Resolution 217 A(III)) (UDHR).

#### Relevant Case Law

Case C-821/19 *European Commission v Hungary* [Judgement] (16 November 2021) Court of Justice of the European Union ECLI:EU:C:2021:930.

Case C-821/19 *European Commission v Hungary* [Opinion of Advocate General Rantos] (25 February 2021) Court of Justice of the European Union ECLI:EU:EC2021:143.

Constitutional Court Decision 3/2019 on the Support of Illegal Immigration (III. 7.) AB (7 March 2019) Alkotmánybíróság – Hungarian Constitutional Court <<https://hunconcourt.hu/dontes/decision-3-2019-on-support-of-illegal-immigration>>.

## Secondary Sources

Amnesty International, “Hungary: Living Under the Sword of Damocles – The Impact of LexNGO on Civil Society in Hungary” (2021) EUR 27/3968/2021.

Amnesty International, “Greece: Regulation of NGOs Working on Migration and Asylum Threatens Civic Space” (2020) EUR 25/2821/2020.

Amnesty International, “Punishing Compassion – Solidarity on Trial in Fortress Europe” (2020) EUR 01/1828/2020.

Article 19, ‘Article 19, European Centre for Non-Profit Law, International Centre for Non-Profit Law, and World Movement for Democracy delivered the following joint oral statement to the 25th Session of the UN Human Rights Council’ (*Article 19*, 11 March 2014) <<https://www.article19.org/resources/joint-statement-promotion-protection-civic-space/>> accessed 25 July 2022.

European Commission for Democracy Through Law (Venice Commission) & OSCE Office for Democratic Institutions and Human Rights, “Joint Opinion on the so-called ‘Stop Soros’ Draft Legislative Package which Directly Affect NGOs” (25 June 2018) CDL-AD(2018)013.

European Commission, ‘Border Crossing’ (*Migration and Home Affairs*, n.d.) <[https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing_en)> accessed 11 August 2022.

European Parliament, “Fit for the Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update” (2018) Policy Department for Citizens' Rights and Constitutional Affairs.

Expert Council on NGO Law, “Opinion on the Compatibility with European Standards of Recent and Planned Amendments to the Greek Legislation on NGO Registration” (2020) Conference of INGOs of the Council of Europe CONF/EXP(2020)4.

Expert Council on NGO Law, “Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States” (2019) Conference of INGOs of the Council of Europe CONF/EXP(2019)1.

Freedom House, ‘Freedom in the World 2022: Greece’ (*Freedom House*, n.d.) <<https://freedomhouse.org/country/greece/freedom-world/2022>> accessed 6 August 2022.

Freedom House, ‘Freedom in the World 2022: Hungary’ (*Freedom House*, n.d.) <<https://freedomhouse.org/country/hungary/freedom-world/2022Y>> accessed 6 August 2022.

Freedom House, ‘Freedom in the World Research Methodology’ (*Freedom House*, n.d.) <<https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology>> accessed 6 August 2022.

Human Rights Watch, ‘Greece: Life-Saving on Trial’ (*Human Rights Watch*, 11 November 2021) <<https://www.hrw.org/news/2021/11/11/greece-life-saving-trial>> accessed 4 July 2022.

International Commission of Jurists, “Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU” (2022) icj Briefing Paper.

Journalists’ Information Office of the Northern Aegean, ‘Press Release’ (*Hellenic Republic Ministry of Citizen Protection*, 28 August 2018) <[http://www.astynomia.gr/index.php?option=ozo\\_content&lang&perform=view&id=81285&Itemid=2129](http://www.astynomia.gr/index.php?option=ozo_content&lang&perform=view&id=81285&Itemid=2129)> accessed 7 August 2022.

Office of the High Commissioner for Human Rights, “Human Rights Defenders: Protecting the Right to Defend Human Rights – Fact Sheet No. 29” (n.d.) OHCHR.

Office of the High Commissioner for Human Rights & Global Migration Group, “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations” (2018) OHCHR.

United Nations, “Lawful civil society groups "are not enemies of democracy, but key allies", Says UN expert' (*UN News – Global Perspectives Human Stories*, 26 October 2015) <<https://news.un.org/en/story/2015/10/513752-lawful-civil-society-groups-are-not-enemies-democracy-key-allies-says-un-expert>> accessed 24 July 2022.

United Nations Special Rapporteur on the situation of human rights defenders, Mary Lawlor, “Preliminary observations and recommendations” (*United Nations Human Rights Special Procedures*, 22 June 2022) <<https://www.ohchr.org/en/press-releases/2022/06/greece-migration-policy-having-suffocating-effect-human-rights-defenders>> accessed 6 August 2022.

United Nations Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” (2013) A/HRC/23/39.

United Nations Human Rights Committee, “General Comment, no. 29, States of Emergency (Article 4): International Covenant on Civil and Political Rights” (2001) CCPR/C/21/Rev.1/Add.11 <<https://digitallibrary.un.org/record/451555?ln=en>>