

WALDEMAR HOFF<sup>1</sup>

# The Immigration Crisis: A Stress Test of the European Legal Culture

## Abstract

Mass migrations entail cultural changes in host nations. These also include the legal culture. Ours is the culture founded on the idea of equality and respect for individual rights, most profoundly expressed during the Great French Revolution. This culture is currently under pressure from migrants bringing in their own vision of society and law. Some of it promote the inequality of men and women, reluctance to recognize secular law as law and disregard for democracy as a man-made order of things. The changes are hard to resist as the newcomers enjoy the protection of formalistically understood human rights. The need to respect the culture of the new arrivals, rooted in our legal culture, works as a centrifugal force. To respect everybody's needs a cohabitation of conflicting values is being tolerated. For example, it is morally wrong that known terrorists and Somalian pirates receive compensation for minor procedural violations by order of European courts from the same taxpayers who were exposed to their vile efforts. What suffers is equality and democracy and trust in the rule of law. We are standing on the crossroads and some measures have to be taken to protect European legal culture from feudalization where each ethnic group is governed by its own law. One of the measures is to start paying attention to collective human rights of the indigenous nations that built that culture. It is time to apply the Radbruch's doctrine on morally unaccepted effects of both existing laws and certain court decisions. An old adage "no democracy for the enemies of democracy" fits the needs of today.

**Keywords:** migration, legal culture, human rights, równość, democracy, Radbruch

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# Kryzys imigracyjny: stress test europejskiej kultury prawnej

## Streszczenie

Masowe ruchy migracyjne pociągają za sobą zmiany w kulturze narodów przyjmujących imigrantów. Dotyczy to także kultury prawnej. Nasza kultura opiera się na idei równości i szacunku dla praw jednostki, najpełniej wyrażonych w ideach Wielkiej Rewolucji Francuskiej. Ta kultura znalazła się obecnie pod presją migracji, niosącej ze sobą inną wizję społeczeństwa i prawa. Częścią tej wizji jest nierówność kobiet i mężczyzn, niechęć do świeckiego prawa oraz do demokracji jako dzieła człowieka. Zakorzeniona w naszej kulturze prawnej potrzeba uszanowania kultury przybyszów działa jak siła odśrodkowa. Aby zaspokoić potrzeby wszystkich grup ludności, toleruje się współistnienie sprzecznych systemów wartości. Jest coś złego w tym, że terroryści i piraci z Somalii otrzymują na mocy wyroków sądów europejskich odszkodowanie na koszt tego samego podatnika, przeciwko którym wystąpili. Dzieje się to ze szkodą dla równości i demokracji i zaufania do prawa. Stoimy na rozdrożu i trzeba podjąć działania, aby ochronić europejską kulturę prawną przed feudalizacją dopuszczającą istnienie osobnych systemów prawnych dla poszczególnych grup etnicznych. Jednym z rozwiązań jest uszanowanie dla kolektywnych praw człowieka – praw narodów goszczących, które zbudowały tę kulturę. Przyszedł czas, aby zastosować doktrynę Radbrucha przeciwko moralnie nieakceptowalnym prawom i wyrokom sądowym. Stare powiedzenie „nie ma demokracji dla wrogów demokracji” powinno być odpowiedzią na potrzebę chwili.

**Słowa kluczowe:** imigracja, kultura prawna, prawa człowieka, równość, demokracja, Radbruch

## Introductory remarks

The influx of refugees and immigrants<sup>2</sup> to Europe in 2015 and 2016 has shaken the moral, legal and institutional foundations of the EU and its member-states. After almost 70 years of building peace, prosperity and the rule of law in Europe, the sense of a legal and political *fin-de-siècle* is setting in at a fast pace. Regardless of what has caused the flow of a million people across the Mediterranean sea, the European sense of comfort and the hope for perpetual peace is gone. Europeans feel that something they treasure is being imperiled. What is being at stake is the European vision of the rule of law. This article aims to identify the threats to the European legal culture as viewed through the perspective of the recent immigration crisis and some selected means to alleviate them.

Europe has experienced three separate eras that deserved to be referred to as a Golden Age. The first one was the antiquity with its philosophy, drama and architecture, the sense of polity and of *demos*. It was many centuries later that the accomplishments of Greeks and Romans were summed up as the Golden Age. The ancients themselves believed the Golden Age to be the thing of the past. Both Hesiod<sup>3</sup> in his *Works and Days* and Ovid<sup>4</sup> believed the Golden Age, with its peace and tranquility, preceded the corruption of civilization.

The second Golden Age had commenced for Europe with the Gutenberg's invention of print, industrialization and colonization of the globe. Europe literally submitted the world to itself. Apart from the refined accomplishments in the arts and sciences, Europe let itself to be known to the rest of the world as a raw power. The apex of its power was the creation of the British Empire, the largest empire in history, expanding over 35 million square kilometers (Tsarist Russia spanned "only" over 22 million square kilometers).

The third Golden Age was related to the European concept of law. It originated in 1950s when Europeans, weary of the horrors of the Second World War, decided

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<sup>2</sup> The distinction between the immigrants and true refugees is necessary, for even the UN pegs the headcount of real refugees at 60%. However, according to the EU Commissioner 60% of the recent flood of immigrants are merely economic migrants: <http://www.dutchnews.nl/news/archives/2016/01/60-of-refugees-are-economic-migrants-dutch-eu-commissioner/>

<sup>3</sup> *The Theogony*, Classic Books International 2010, *passim*.

<sup>4</sup> *The Metamorphoses of Ovid*, Books by Allen Mandelbaum, San Diego–New York–London 1993, vers 120 et seq.

to reverse the course of history as they knew it, the history of wars and blood. This was to be accomplished by political and economic integration, first, the Coal and Steel Community all the way to the European Union as we know it today. They made an attempt at effecting their own version of the end of history, decades ahead of Fukuyama, by building an area of peace and prosperity, very much like the mythical Arcadia. Their only flaw, as it transpired much later, was that it could survive only in isolation from the outside world, which was a utopian presumption. Isolation ended when the masses of immigrants from non-European countries flocked in, supplying the developing economies of Germany, France and other European countries in the seventies and eighties of the previous century. The events that took place in 2015 are different. Despite Chancellor Merkel's declarations, the incoming masses of immigrants were not prospective workers capable of immediate employment. The lack of language and professional skills rendered most of them incapable of invigorating the aging German society.

Presently, Europeans, overtaken by the size, speed and quality of immigration have the right to ask, if their Arcadia of prosperity and human rights will survive? There developed two approaches to the arrival of a million strong mass of "strangers" in the heart of Europe. The first approves of the change of ethnic and cultural composition of Europe by reference to the (misread) Kantian imperative of hospitality. In his "Perpetual Peace" (1795) Immanuel Kant had defined hospitality as "the right of a stranger not to be treated as an enemy when he arrives in the land of another" which is "not a question of philanthropy but of a right". However, what is conveniently omitted in Kant's reading, is the reservation he makes: „One can refuse to receive him [the stranger] when this can be done without causing his destruction; but so long as he peacefully occupies his place, one may not treat him with hostility" and that „It is not the right to be a permanent visitor that one may demand. (...) „It is only the right of temporary sojourn, a rights to associate, which all men have"<sup>5</sup>.

Kant also demands that the guests behave in a civilized manner. Referring to the merchant nations he states: "The injustice which they show to lands and peoples the visit (which is equivalent to conquering them) is carried by them to terrifying

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<sup>5</sup> It is interesting to see how Kant's ideas are cherry-picked to fit into political needs of today. Apart from the need to be hospitable, the Prussian philosopher also called for freedom of national debt that may create „external friction of states", which "grows beyond sight" and „constitutes a dangerous money power". Contrary to the current practice of "humanitarian interventions" he declared: "No State Shall by Force Interfere with the Constitution or Government of Another State." He was also against the idea of a cosmopolitan, global, state. A philosopher invoking these forgotten passages is hard to find.

lengths". Therefore he praises China and Japan for refusing the right of entry to the British colonial "visitors"<sup>6</sup>.

The conditional hospitality conjured up by Kant invited criticism from Jaques Derrida<sup>7</sup>, who demanded an unconditional access of the new arrivals to the European lands. He even coined an ironic term "hostipitality" meaning hostile hospitality to describe the current policy towards the immigrants. Derrida's words broadly echoed in the media. His position itself, is conveniently devoid of any practical references to governance and organizational ability of the host states. It might have become as well the subject of criticism from Tomas Sowell claiming that intellectuals come up with such brave ideas, because they are not responsible themselves for the consequences of the actions they recommend for the governments<sup>8</sup>.

## Ambiguities under the law

I purposefully refer to ambiguity under the law rather than of the law. The law is clear, under the 1951 Geneva Convention and the ensuing 1967 Protocol the signatory states are obligated to take care of the refugees. Incidentally, it does not lift a moral obligation to do so. For example, Saudi Arabia is not a signatory, and it did not take part in saving of the refugees. However, one could expect that the richest country in the region would take a substantial number of refugees, particularly that Quran commands, in no uncertain terms, assistance to the less fortunate of the same faith. Under the Geneva Convention states must not return refugees whose life and freedom are imperiled because of their race, religion, citizenship or belonging to a certain group<sup>9</sup>. However, refugees must obey the law and its public order regulations (which is consonant with Kant's teachings). Some sections of the Convention are troubling for practical reasons. First, refugees are free to practise their religion and raise their children in that religion. At the time of its signing not much attention was given to the actual content of religious beliefs. If

<sup>6</sup> Kant used the term "commercial nations", which should be interpreted as the English merchants.

<sup>7</sup> J. Derrida, *Acts of Religion*, "Hostipitality", trans. by Gil Anidjar, New York 2002, p. 364; On the origin of the word in question see: "Angelaki Journal of Theoretical Humanities", 5(3), p. 3; J. Derrida, *Hostipitality, On history of „hospitality“ in the West*, see: M.W. Westmoreland, *Interruptions: Derrida and Hospitality*, "Kritike" June 2008, 2(1), pp. 1–10.

<sup>8</sup> T. Sowell, *Intellectuals and Society*, New York 2009, p. 8.

<sup>9</sup> The array of groups tends to expand and subdivide, including such forms of persecution as women being subjected to forced marriages or treatment of single mothers in the Muslim society. See A.I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, "Chicago Journal of International Law" 2015–2016, 16, p. 110.

it is true that in Islam religious rules override national law and international law, or rather render them non-existent, and scholarly works persuade us it is true<sup>10</sup>, then we have an obvious problem with adherence to the rule of law. There is also the problem of normative content. Some principles of Islam like subordination of women or exclusions of homosexuals are obviously irreconcilable with constitutional rights and human rights, the same ones that give refugees their preferred legal status. Secondly, under the Convention, states may remove refugees who violate law and order. There is scarce evidence they do, despite numerous offences against the law. There are signs, however, that the Western attitudes are changing. Thirdly, and most importantly, not all claiming to be refugees actually meet the criteria established in the Convention. Their stubborn drive at Germany and Scandinavia raise suspicion they are simply shopping for a better life<sup>11</sup>, or, perhaps, are instrumental in the fulfillment of colonel Muammar Khadafi's dream of conquering Europe without pulling out a sword. Not everyone who crosses a national border is a refugee by default, as human rights activists suggest. The question is not as simple as the choice between bestowing the status of a refugee on newcomers, or nor. The real issue is that, even if most of them are genuine refugees, still some of them may be an instrument in the hands of international powers, a cannon fodder in the struggle between global powers. The situation causing their massive exodus may have been created artificially to make them flee to Europe, taxing its national welfare systems, draining resources, disrupting daily life and causing social unrest as we see in countless anti-immigrant street demonstrations rolling through the streets of European capitals. In other words, the artificially propelled stream of immigrants is very likely the part of a hybrid war<sup>12</sup> strategy. That immigration is an engine of war had been expressly said by the former Algerian President Houari Boumedienne who in 1974 told the UN General Assembly that the untold millions of immigrants "will burst in to conquer, and they will conquer by populating it [the North] with their children"<sup>13</sup>. The same idea has been confirmed more recently by the demand made by the Libyan National Congress threatening European

<sup>10</sup> The Sharia governs all aspects of life including traffic regulations. The ruler is responsible of implementing Sharia, which I interpret as the exclusion of non-Muslim rulers as rulers, Y. Al-Quaradawi, *Islamic Law in the Modern World*, Riyadh 2000, p. 22.

<sup>11</sup> Only a handful out of the million that crossed the border allowed themselves to be relocated to the less prosperous nations. Reportedly, some went back disappointed at not getting an instant access to the Western standard of living.

<sup>12</sup> W. Murray, P.R. Mansoor, *Hybrid Warfare. Fighting Complex Opponents from the Ancient World to the Present*, Cambridge, 2012; *Understanding hybrid threats*, European Parliament, June 2015, pp. 1–17, 289–305; [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564355/EPRS\\_ATA%282015%29564355\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564355/EPRS_ATA%282015%29564355_EN.pdf)

<sup>13</sup> D. Murray, *The Strange Death of Europe*, Bloomsbury 2017, p. 147.

governments with more refugees should they refuse to recognize it as a legitimate government. More recently Turkey has used immigration as a weapon demanding more money and a speedier integration with the EU in return for taking back some of the refugees. In many non-European centers of power there surfaced threats to wipe out the entire culture, including legal one, very similar to those in the famous Melian Dialogue by Thucydides where "The strong do what they can and the weak suffer what they must"<sup>14</sup>.

## The clash of values

As mentioned above, the greatness of the European civilization rests on its post-war values. The influx of refugees and immigrants is characterized by a hitherto unknown ethnic and cultural diversity. The newcomers do not necessarily believe in the principles that modern Europeans hold dear such as equality of women, religious tolerance and respect for minorities. One is tempted to ask if such diversity poses a threat to the cohesion of European values rooted in the principles of equality, democracy and justice. Historically speaking, the word "immigrant" was predominantly associated with minor cultural differences, the deepest of which was the language barrier. That barrier was usually removed within one generation without special language courses financed by the government. Moreover, it goes without saying that immigrants were to subject themselves unconditionally to the law of the host nation.

New immigrants tend to be more demanding and less prone to accommodate themselves to the laws of the host nations, partially due to the international law. This new assurance produced many cultural conflicts. A few examples of the cultural clash may explain more than abstract theories. In several European capitals the earlier immigrants, already settled in the West, on several occasions took to the streets to demonstrate against democracy and elections for laws should be made by God, not by people. Some interpret Quran as prohibiting true Muslim from taking part in any election, even if it would prove beneficial to the Muslim community<sup>15</sup>. Reading websites of major Muslim associations points to the incompatibility of Islamic law with the Western laws. The Islamic law is regarded as *the* law. Man-made rules are offend its sensibility. The relation between God's law and the secular law is not that of superiority but refusal of recognition. The interpre-

<sup>14</sup> Thucydides, *The History of the Peloponnesian Wars*, Book V, verse 89, [in:] J.L. Goldsmith, E.A. Posner, *The limits of International Law*, Oxford 2005, p. 167.

<sup>15</sup> However, in this respect the Muslim world is divided.



tation of God's law is in the hands of clerics who are not organized hierarchically, therefore susceptible to local variations – ethnical and territorial.

By extension, the refusal to recognize the secular law includes the states that make it. Thus, in Berlin and in other European cities there emerged alternative structures of power have emerged, functioning in parallel to the state. They are based on Sharia law, they have their own legislative, executive and judiciary powers. Some secular judges made an attempt at recognizing sharia law as valid law, so far unsuccessfully<sup>16</sup>, although the official picture may be different from actual practices<sup>17</sup>. If successful they could lay the foundations for a semi-feudal society, where each social class – nobility, peasants, town dwellers and Jews had their own respective law and courts. This would mean the end of the European civilization as shaped by the French Revolution of 1789 with its principle of equality. Certain inroads towards the departure from the principles of the Enlightenment have already been made for example by admission of ritual slaughter of animals, permitted to some religious communities and denied the majority of the population.

The clash is not merely theoretical, it entails intrusion into the traditional culture of the host nation. A borderless Europe fulfils the dreams of generations of intellectuals. The reality is bleaker than the dream: In the famous case of Kokkedal in Denmark, the Muslim community has taken over the local city council and eagerly got around to eliminating Christmas celebrations, including the Christmas tree. Money was not spared, however, to finance the Muslim religious traditions. In many places anti-gay and antisemitic incidents have become rampant and still on the rise. Mass car burnings in French *banlieues* have become almost a routine, just as living with terror has. Danish authorities had to stomp their foot on arranged marriages of adults with children witnessed in refugee camps. However, not every social activity conducted in the name of Islam is contested by Europeans, the chief example being Islamic banking and finances, organized along the orthodox religious precepts<sup>18</sup>.

How the gap between the official version of human rights and reality is growing illustrates the plight of children migrating to Europe. Up until February 2015, some 9000 children of immigrants and refugees in Germany alone were missing, repor-

<sup>16</sup> For example, in France polygamy is an impediment to obtain French nationality. Also, the French Civil Code in Art. 147 prohibits a second marriage unless the first one has been dissolved.

<sup>17</sup> For example, Sharia courts in the UK are widespread and seemingly powerful, see J. Corbin, *Inside Britain's Sharia Courts*, "The Telegraph" 7 April 2013. This goes despite the House of Lords had called such courts "as consensual as rape", see J. Bingham, *Sharia Courts as Consensual as Rape. The House of Lords Told*, "The Telegraph" 20 Oct 2012.

<sup>18</sup> M. Bonca, *Equality Through Profit and Loss Sharing in Islamic Economic*, "Critique of Law" 2010, 3, pp. 31–41.



tedly killed, enslaved or sexually abused. The response of the authorities and of the general public was tepid. No government fell, there were no social protests against their plight, nobody claimed the blame, or apologized for having lured them to the European soil. This example alone can testify to the severe moral crisis in Europe, and, perhaps, to the imminent sunset over the golden Age of Europe of today.

And where there is an action, there is a reaction. Facing the failure of their states, the “natives” of European countries form their own apparatus intended to make up for the official authorities’ impotence in supplying the historical services rendered by states – law and security, thus supplanting the state with a surrogate of their own making. There is an unprecedented proliferation of private security agencies: in Germany alone there emerged 3700 private security firms employing over 170 000 persons, providing over 4.6 billion Euro in turnover<sup>19</sup>. Organizations such as Schwarze Sheriffen are assuming some of the security functions once reserved for the state, which, in the era of privatization of public life, is not entirely shocking. There is a possibility that in a not so distant future they may outdo states and become the centers of power themselves.

Other responses include the prohibition of *hidjab* and *nikaab* in the West<sup>20</sup>, limitation of employment of immigrants in sensitive industries such as airport security, and the highly controversial confiscations of money and other valuables from the refugees by the Danish authorities<sup>21</sup>. All of the above are viewed by Muslim communities and human rights activists as Islamophobia, which contributes further to the souring of the inter-ethnic relations. There is also a tendency, even among the clergy, to view islamization as unavoidable, as famously declared by the Archbishop of Cantenbury<sup>22</sup>. It leads to further feudalization of European law into ethnic sectors in defiance of the principle of equality.

With the clash between cultures being an objective fact and seemingly irremovable, what can be done? The response to the current influx of immigrants

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<sup>19</sup> M. Thiel, *Privatization of public security in Germany – an endless controversy*, “Przegląd Naukowy Disputatio” 2014, 17, pp. 21–22.

<sup>20</sup> For a more philosophical approach to the issue of veiling see J. Borneman, *Veiling and Women’s Intelligibility*, “Cardozo Law Review” 2008–2009, 30, p. 2745–2760; for comparative approach see S. Chackrabarti, *Faith in the Public Sphere*, “Journal of Law and Policy”, 2013–2014, 22, pp. 502–508.

<sup>21</sup> Restrictions are being put in place also outside of Europe. In Japan Muslims are prohibited from practicing religion outside of their own homes and from overtly endeavoring to converting others to Islam.

<sup>22</sup> F. Cranmer, *The Archbishop and Sharia – Law and Justice*, “Christian Law Review” 2008, 160, pp. 4–5.

involves several different models. The Australian model presupposes confiscation of boats and relocation of alleged refugees back home or to a third party nation. The Canadian model offers acceptance of refugees, save single young men, as they are the most likely suspects of terrorism. The German model remains one of total openness so far, even though Chancellor Angela Merkel has recently voiced a sterner approach. There is no unified EU model for the entire Europe since Germany has broken the Dublin convention, causing most nations turn their back on Germany by refusing to cooperate. The effects of the Turkey-EU agreement remain to be seen. In the meantime, the prevailing national model in substantial parts of Europe manifests itself not as much by humanitarian assistance but rather by erecting barb-wired fences on most inter-state borders.

The official German attitude still prevails amongst the European intelligentsia. However, the advocates of total openness fall into three categories. The first, the good hearted people unaware of the long-term consequences of the rapid, expansive, uncontrolled immigration (they will be disappointed for the guests do not share their values). The second, those who perceive the immigrants as a counter-balance against the Church and Christianity (they will be disappointed for the newcomers do not intend to allow a religious vacuum to develop). The third, those who believe that the Westphalian nation-state established in 1648 is the source of all evil (they will be disappointed for nationalism is on the rise in and out of Europe and elsewhere).

The tepid response of the Europeans both in the matters of an unwanted immigration and terrorism has its roots in the German Nazi experience that was spread on the victims too. The sense of guilt for the atrocities of World War II permeates the postwar political discourse and legal thought in and out of Germany. It mandates to view the state as the chief enemy of freedom rather than its shield, despite the fact that nothing outside state constitutions protects the independence of humans. Even the international human rights exist only due state authorization. Hitlerism contorted the interracial relations by the suspicion that any restrictive measures taken towards ethnically different populations qualify as racism. This is why the government, the police, the courts and prosecutors are so eager to forbid or disperse anti-immigrant demonstrations, curtail the freedom of speech, and the right of assembly enshrined in the Human Rights Convention. As an example, in 2015 the president of Warsaw forbade an anti-immigrant manifestation only to see her decision reversed by the administrative court. At the same time the authorities across Europe turn a blind eye when the Islamic part of their population take to the street to protest against general elections as ungodly, or intrude on the lifestyle of "natives". Some view such a passivity and resignation as a sign of losing the lawfare, a war where the enemy uses humanitarian law to restrict the ability

of the West to defend itself<sup>23</sup>. The striving to avoid the war at any cost has brought about a generation of politicians such as Will Brandt and Olaf Palme who believed that disarmament and passivity are the answers. Unfortunately, history proved otherwise, and even if the Cold War has subsided, at least for a while, other dangers are looming on the horizon, making wars and civil unrest more likely than ever. Instead of the end of history we are more likely to brace up for a new conflict and face reversal to the cave age. Robert Kagan with his "The Return of History and the End of Dreams" has turned out to be more of a prophet than Francis Fukuyama preaching the end of history.

## Conclusions

The present predicament of the European nations and of the EU has several causes, one of them being the decline of a nation state without which Europe is on its way of becoming a no-man's land. The traditional state functions such as the protection from external aggression, fending off wars, passing and execution of law and order, protection of borders should be reinstated. Europeans need to take the second look at the human rights they invented. While the idea remains lofty and worth pursuing it has also fallen prey to many abuses. Human rights cannot be applied indiscriminately and somewhat mechanically to anyone who meets purely formal criteria. It was morally wrong to grant compensations to the Somali pirates and as it was to compensate the Lockerbee terrorists. One is tempted to invoke the Radbruch doctrine mutated for the current circumstances<sup>24</sup>. Gustav Radbruch claimed that inhuman laws must not be obeyed, and they do not enjoy any validity. He referred to the laws of the Third Reich, but his words are as valid today as they were back then. Radbruch's ideas are widely accepted, although his doctrine is not officially universally accepted, with Poland being one of such countries<sup>25</sup>. Time has become ripe to expand this doctrine on morally unaccepted effects of both

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<sup>23</sup> The concept of lawfare was popularized by general Ch. Dunlap, jr., *Lawfare Today: A Perspective*, "Yale Journal of International Affairs" 2008, 2, p. 146; idem, *Does lawfare need and apologia?*, "Case Western Reserve Journal of International Law" 2010–2011, 43, pp. 123–126; O.F. Kittry, *Lawfare and US National Security*, "Case Western Reserve Journal of International Law" 2010–2011, 43, passim; on different uses of the term lawfare see W.G. Werner, *The Curious Career of Lawfare* "Case Western Reserve Journal of International Law", 2010–2011, 43, pp. 63–65.

<sup>24</sup> J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, "Cardozo Law Review" 2007–2008, 29, pp. 673–674.

<sup>25</sup> The Polish Constitutional Tribunal, unlike its German counterpart, has never referred to the Radbruch doctrine, holding on to positivism. Such a position paved the way to the recognition of the socialist law as valid law long after the political transformation.

existing laws and certain court decisions. An old adage “no democracy for the enemies of democracy” fits the needs of today. Paradoxically, the Radbruch doctrine must be turned against the abuses that are ingrained in the rights culture to protect it from itself. For example, one can question as counterproductive some of the humanitarian exceptions provided for in international law<sup>26</sup>. For example, those put on the lists of alleged terrorist have certain rights such the right to appeal against the very decision that puts them on the list, which entails freezing of their bank assets. This in turn may deprive such a person of the means of subsistence. Thus the law spurned by the Kadi II decision of the European Court of Justice<sup>27</sup> has created a situation whereby certain individuals may be terrorists (meaning: known as such to the authorities, although courts may find differently due to lack of evidence) and still be protected by the law of the nation they openly wish to annihilate. It seems to be no more humanitarian then giving social assistance to the returning ISIS fighters as once practiced by the Swedish government.

Europe’s legal culture is not destroyed as of now, yet its demise is unavoidable if decisive steps are not taken within a relatively short range of time. Europe must adopt measures to preserve its heritage of equality, freedom and brotherhood harking back to the French Revolution, and even earlier to the Magna Carta of 1215. Along with democracy those principles form the cornerstones of European civilization. Equality is not an abstract notion. It specifically refers to the equality of men and women, respect for minorities, and racial relations. Unfortunately, the European culture, including legal one, has been increasingly tested and pressured by the confrontation with other cultures that do not respect any of the above. Feudalization of law, where some classes of people enjoy different scope of freedom must not be allowed, not even under the disguise of respecting multiculturalism. The law has to be applied uniformly for all, just as intended to, when the EU was created. Politicians should remember that law is not just what has been entered into the books of law. Social reality inconsistent with the law as written obliterates such law. Law is embedded and preserved in the living human beings. They carry with them the vision of the society of and of the law. Some of those visions are neither compatible, nor reconcilable with the visions cherished by the host nations, which invites a head on collision.

Finally, our vision of human rights must include the rights of the host nations. They have the right to safely practice their beliefs, to continue their lifestyle without

<sup>26</sup> J. Gurulé, *Unfunding Terror. The Legal Response to the Financing of Terrorism*, Edward Elgar 2008, pp. 250–251; G. Hakimdavar, *A Strategic Understanding of UN Economic Sanctions. International Relations, Law and Development*, Routledge 2014, pp. 150–151.

<sup>27</sup> Joint cases C-584/10 P, C-593/10 P, C-595/10 P of 18.07.2013, C-260/2014, p. 2.

being accused of insulting the feelings of the newcomers, just by being what they are. They should be listened to when they object to immigration policy of their respective governments, even if their views are not to the liking of the intellectual elites, always prone to see reality in the abstract, or to see the abstract as tangible reality. If their rights are not respected by the authorities and by the newcomers, they will become refugees themselves within their homelands, a strange kind of stationary refugees deprived of their cultural environment, without moving away. And they will not take it smoothly, as one can grasp from the rapid political advances of PEGIDA, Alternative für Deutschland in Germany and Marine Le Pen movement in France. Chances are that the unbalanced immigration policy coupled with the uncontrolled flow of large masses of people will brew a social conflict and dismantle the delicate fabric of human rights and democracy, once the pride of Europe. Furthermore, formalism in applying human rights and detachment from reality will bring disaster.

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