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HUMAN RIGHTS IN THE NEW PACT ON MIGRATION ON ASYLUM OF EUROPEAN UNION: AN OPEN SOCIETY OR CLOSED SOCIETY

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Summary: I. Presentation. II. Measures against Covid and Human Rights. III. Constitutional and International Principles of Application. IV. The New Pact on Migration and Asylum of European Union: Backgrounds. 1. Backgrounds. 2. The current Pact of Migration and Asylum of 2008: Goals and Achievements. V. Premises of the New Pact. A fresh start on Migration “Building confidence and striking: A new Balance between Responsibility and Solidarity”. VI. Legal Assessment of the Proposal on the New Pact. VII. Conclusion.

I. Presentation

This paper is structured into two parts, which are closely related: first, the analysis of the parliamentary and governmental measures against the covid-19 pandemic; and second, the future regulatory framework about freedom of movement and other rights in the European area, according to the new European pact on migration and asylum.

The parliamentary and governmental measures (of the Government of the Nation and the 17 regional governments) adopted in Spain to face the health situation and its impact on human rights, have been approved under the so-called declaration of the state of alarm that regulates the Spanish Constitution in article 116, with intense influence from the Grundgesetz of Germany. In Spain, the state of alarm can only be declared by the National Government for a maximum period of 15 days, although this situation can be extended by the Congress of Deputies (equivalent to the Bundestag in Germany).

In accordance with the Spanish Constitutional regulation, the rights-limiting measures (home confinement/lockdown, territorial confinement, virtual or blended education at all teaching levels, closed labor activity) have not suspended any fundamental right. The Spanish law on the state of alarm is contained in the Organic Law 4/1981, of June 1, which prohibits the suspension of fundamental rights during the application time of the state of alarm. In addition, this law establishes that all limitations of rights must be proportional, justified, motivated, reasonable and subject to judicial control¹⁷. Generally since the beginning of the pandemic, all restrictions on fundamental rights

¹⁷ M. Revenga Sánchez; J.J. Fernández Alles, „Reflexiones constitucionales (españolas y europeas) a propósito de la pandemia“, *Revista del Centro de Estudios Constitucionales*, VI, 11, 2020, pp. 1-7.

have been justified by the need to preserve the health and life of citizens. In Spain, the management of the pandemic has not been efficient or handled swiftly. Not only has this led to intense economic, social and labor damages, but also to governmental and parliamentary activities which have been carried out within the limits established by the Constitution and the laws.

In March 2020 the country-wide state of alarm, which lasted until April 2020 and was approved by Parliament, caused by the coronavirus pandemic was first declared by the government in Spain. The second state of alarm was declared in October 2020 and extended until May 2021.¹⁸ During the last state of alarm delegating emergency powers to regional authorities for as long as six months. These prolonged “states of alarm” have limited the following rights: a) Freedom of movement: entry and exit of Spain, lockdown at home, perimeter lockdown (district, city, province, region) and national lockdown; b) Right of education: limited to e-learning teaching in primary, secondary and university education, or blended education teaching using virtual learning environments; and c) Right of health (primary care health by phone).

In addition, the Spanish Constitutional Court still has to must resolve an appeal presented by the National Government against a regional law (Autonomous Community of Galicia) that establishes compulsory vaccination.

II. Measures against Covid and Human Rights

The human rights concerned by governmental measures in Spain are mainly the following:

1. The right to health: It is guaranteed under the Universal Declaration of Human Rights (1948), provides the right to access healthcare, the right to access information in correlation with healthcare, the ban of discrimination in the provision of medical services, the freedom to decline non-consensual medical treatment and other important guarantees¹⁹. Furthermore, the right to health provides that health facilities, goods and services should be available in sufficient quantity, accessible to everyone without discrimination, and affordable for all, even marginalized groups; acceptable, respectful medical ethics as well as culturally, scientifically and medically appropriate, and of good quality²⁰.

¹⁸ M. Revenga Sánchez; J.J. Fernández Alles, „Los engranajes del Estado de Derecho a la prueba del coronavirus“, J.I. Ugartemendia and A. Saiz Arnaiz (Eds), ¿Está en peligro el Estado de Derecho en la Unión Europea? IVAP, Oñate, 2021, pp. 281-302.

¹⁹ World Health Organisation, „The Right to Health“, <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health>, pp. 3 y 9.

²⁰ V. Digidiki and J. Bhabha, „Perspective EU Migration Pact Fails to Address Human Rights Concerns in Lesbos, Greece“, Health and Human Right Journal, 22-2, 2020, pp-291-296, <https://www.hhrjournal.org/2020/12/perspective-eu-migration-pact-fails-to-address-human-rights-concerns-in-lesvos-greece/>, World Health Organisation, „The Right to Health“, cit., p. 7.

2. *Freedom of movement*: Border controls and quarantines must be proportionate. The Restriction of the the right of freedom of movement, may be justified under international law only if they are proportionate, time bound, undertaken for legitimate aims, strictly necessary, voluntary wherever possible and applied in a non-discriminatory way²¹. Quarantines must be imposed in a safe and respectful manner. The rights of those under quarantine must be respected and protected, including ensuring access to health care, food and other necessities²².

The Siracusa Principles, adopted by the UN Economic and Social Council in 1984 and UN Human Rights Committee general comments on states of emergency and freedom of movement, provide authoritative guidance on government responses that restrict human rights for reasons of public health or national emergency. Any measures taken to protect the population that limit people's rights and freedoms must be lawful, necessary and proportionate. States of emergency need to be limited in duration and any curtailment of rights needs to take into consideration the disproportionate impact on specific populations or marginalized groups.

3. *Right of education*: Many countries have closed schools since the Covid-19 outbreak, disrupting the learning and education of hundreds of millions of students. In period of crisis, schools provide children with a sense of stability and normalcy and ensure children have a routine and are emotionally supported to cope with a changing situation. Schools also provide important spaces for children and their families to learn about hygiene, appropriate handwashing techniques, and coping with situations that will break routines.

Without access to schools, this prime responsibility falls upon parents, guardians, and caregivers. When schools are closed, government agencies should step in to provide clear and accurate public health information through appropriate media.

To ensure education systems respond adequately, UNESCO has recommended that:

a) States “adopt a variety of hi-tech, low-tech and no tech solutions to assure the continuity of learning”. In many countries, teachers already use online learning platforms to complement normal contact hours in classrooms for homework, classroom exercises, and research, and many students have access to technological equipment at home (however, not all countries, communities, families or social groups have adequate internet access, and many children live in places with frequent government-led internet shutdowns.

²¹ Amnesty International, „Explainer: seven ways the coronavirus affects human rights“, <https://www.amnistia.org/en/news/2020/02/13530/explainer-seven-ways-the-coronavirus-affects-human-rights>; European Commission, Proposal for a council recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic: COM/2020/499 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0499&from=en..>

²² Amnesty International, *ibidem*.

- b) Online learning should be used to mitigate the immediate impact of lost “normal school” time. Schools deploying educational technology for online learning should ensure the tools protect children rights and as well as their privacy.
- c) Governments should attempt to recover missed in-person class time once schools reopen.
- d) Governments must adopt measures to mitigate the disproportionate effects on children who already experience barriers to education, or who are marginalized for various reasons (for example girls, disabled children, children affected by their location or their family situation). Governments need to focus on adopting strategies that support all students equally through closures. For example, monitoring those students who are most at risk due to above-mentioned disadvantages. Moreover, it needs to be ensured that students receive printed or online materials on time. Particular, attention is warranted in ensuring students with disabilities, who may require adapted accessible material, receive this²³.

4. *Right of expression and information*: Constitutions, treaties and laws guarantee freedom of expression and guarantee access to critical information under human rights laws, and governments, public administrations, legislators as well as courts have the obligation to protect the right to freedom of expression, including the right to seek, receive and impart truthful information²⁴. Restrictions, suspensions and limitations legitimately imposed on freedom of expression for reasons of public health or security cannot endanger the essential content of this right. Courts, legislators, governments and public administrations are responsible for providing the information necessary for protection and promotion of rights and freedoms, including the right to health²⁵. In this sense, the Committee on Economic, Social and Cultural Rights regards as a “core obligation” providing “education and access to information concerning the main health problems in the community, including methods of preventing and controlling them”²⁶.

²³ European Agency for Special Needs and Inclusive Education, „Country information for Spain – Systems of support and specialist provisions.“, <https://www.european-agency.org/country-information/spain/systems-of-support-and-specialist-provision>.

²⁴ United Nations, Human Rights, Office of the Higher Commissioner. „COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International experts“, <https://www.ohchr.org/en/NewsEvents/Pages/Display-News.aspx?NewsID=25729&LangID=E..>

²⁵ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

²⁶ United Nations, Committee on Economic, Social and Cultural Rights. Twenty-second sesión. Geneva, 25 April-12 May 2000. Agenda item 3. Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights. General Comment No. 14 (2000). The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), <https://www.hrw.org/news/2020/06/29/protecting-economic-and-social-rights-during-and-post-covid-19; and the Convention on the rights of persons with disabilities>.

Health data is constitutionally relevant because the dissemination, transmission or publication of information online can imply a significant risk for the rights of affected people (moral integrity, image, honor, privacy ...), especially for people who are in positions of vulnerability or marginalization in society.²⁷ In the current context of the pandemic, various governments, especially Spain, have failed to uphold the right to freedom of expression, taking regulatories and measures against journalists and healthcare workers. This ultimately limited effective communication about the onset of the disease and undermined trust in government actions. International treaties establish that a “rights-respecting” response to Covid-19 needs to ensure that accurate and up-to-date information about the virus, access to services, service disruptions, and other aspects of the response to the outbreak is readily available and accessible to all.

The United Nations has established the following recommendations regarding Covid-19 and the relationship between governments and the people.

- a) governments should fully respect the rights to freedom of expression and access to information, and only restrict them as international laws permit.
- b) governments should ensure that the information they provide to the public regarding Covid-19 is accurate, timely, and consistent with human rights principles.
- c) rights-based legal safeguards should govern the appropriate use and handling of personal health data.
- d) all information about Covid-19 should be accessible and available in multiple languages, including for those with low or no literacy.

5. *Rights of females*: Outbreaks of disease often have gender impacts because Covid-19 is disproportionately affecting women in several ways. For this purpose, when education is moved online:

- a) governments and education providers should monitor participation and retention of students in online courses for a gendered impact and respond quickly with strategies to retain and reengage women and girls if their participation falls off²⁸;
- b) they should also address the particular risks of job losses to women who may take on additional caregiving during school closures; and
- c) measures designed to assist workers affected by the pandemic should ensure the assistance of workers in informal work and service industries, who are predominantly women.

²⁷ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

²⁸ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

III. Constitutional and International Principles of Application

According to the principles proclaimed by international and comparative constitutional laws, Human Rights Watch remembers that restrictions on rights for reasons of public health or national emergency²⁹:

- a) In any case, the restrictions, suspensions and limitations must be lawful, justified, suitable, necessary and proportionate.
- b) limitations such as mandatory quarantine or isolation of symptomatic persons must, as a minimum, be carried out in accordance with the nation's Constitution and laws.
- c) Measures must be strictly necessary to achieve a legitimate objective, based on scientific evidence, proportionate to achieve that objective, not arbitrary or discriminatory in their application, of limited duration, respectful of human dignity, and subject to jurisdictional control.
- d) Long-term quarantines and indeterminate confinements rarely comply with these principles and are often imposed hastily, without ensuring the protection of quarantined persons (especially populations at risk) and due parliamentary scrutiny.
- e) In any cases, urgent quarantines and confinements are difficult to control by courts and parliamentary bodies and are often arbitrary or discriminatory in their application.

Freedom of movement under constitutional and international human rights law protects the right of everyone to leave any country, to enter their own country of nationality, and the right of everyone who is legally in a country to move freely throughout the country (article 13 of Universal Declaration of Human Rights)³⁰. Restrictions on these rights can only be imposed when lawful, for a legitimate purpose, and when the restrictions are proportionate, including the consideration impacts. Travel regulations and restrictions on freedom of movement cannot be discriminatory, nor can they affect the dignity and safety of individuals or have the effect of denying individuals the right to seek asylum or violating the prohibition of the return to places where they face persecution or torture³¹. If quarantines or closures are imposed, governments and public administrations are obliged to guarantee access to food, water, medical care, and healthcare. Many seniors and people with disabilities depend on continued public services and support in the home and community. Ensuring continuity of these public services and operations means that public agencies, community organizations, health care providers and other essential service providers are able to continue performing essential functions to meet the needs of older people and people with disabilities. Government measures should minimize or avoid the interruption of services and the interruption of social services aimed at people with disabilities and the elderly, which

²⁹ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

³⁰ Universal Declaration of Human Rights, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

³¹ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

may lead to health outcomes that are detrimental to the physical and moral integrity of people, including death³².

In these cases, Human Rights Watch informs that governments have an obligation to minimize the risk of occupational accidents and diseases including by ensuring workers have health information and adequate protective clothing and equipment. This involves providing healthcare workers and others involved in Covid-19 with proper infection control training and proper protective equipment. Combating the spread of Covid-19 also demands that:

- a) health facilities have adequate water, sanitation, hygiene, healthcare waste management, and cleaning; and governments must take steps to make health care available to all, accessible without discrimination, affordable, respectful of medical ethics, culturally appropriate, and of good quality³³.
- b) health workers have the right to an occupational risk prevention system and to access adequate protective equipment and social protection programs for family members who die or become ill as a result of their work, ensuring that these programs include informal workers³⁴.

IV. The New Pact on Migration and Asylum of European Union: Background

1. Background

In Covid-19 pandemic context, the European Union has presented the future regulatory framework for freedom of movement and other rights in the European area, according to the new European pact on migration and asylum, also presented by the EU Commission in September 2020, and adopted by the Council of the EU on December 2020. According this document, several facts are very relevant in this matter³⁵:

- a) Member States issued around 3 million first residence permits to third-country nationals in 2019 and, since 2015.
- b) 600,000 people have been rescued at sea by Member States within frontex operations.

³² Human Rights Watch, „Protecting Economic and Social Rights During and Post-Covid-19. Questions and Answers on Economic and Social Assistance“, <https://www.hrw.org/news/2020/06/29/protecting-economic-and-social-rights-during-and-post-covid-19>, and The Convention on the rights of persons with disabilities, https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf.

³³ Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

³⁴ Ibidem.

³⁵ EUROSTAT, „Residence permits – statistics on first permits issued during the year“, <https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=456573>.

- c) in 2019, the main reason for a first residence permit being issued in the European Union was for employment-related reasons (1.2 million first residence permits).
- d) 1,82 million illegal border crossings were recorded at the EU external border at the peak of the refugee crisis in 2015 (by 2019 this had decreased to 142,000).
- e) the number of asylum applications peaked at 1.28 million in 2015 (in 2019 was 698,000).
- f) on average, around 370,000 applications for international protection are rejected every year, but only around a third of these persons are returned home; g) the European Union hosted some 2.6 million refugees at the end of 2019, equivalent to 0.6% of the EU population; and h) in 2019, almost 21 million third-country nationals were legally residing in the EU, equivalent to 4.7% of its population³⁶.

The interesting and incorrect interpretation of these facts has degenerated into a debate about migration as a false cause of the current European crisis and in an electoral manipulation. In this times of globalization, three of the five states that voted against the Global Compact for safe, orderly and regular migration at the United Nations General Assembly in December 2018 were members of the European Union. Five of the 12 countries that abstained from vote were also members of the EU: Austria, Hungary, Poland, Estonia, Bulgaria and Republic Czech.

To face this complex context, the theoretical principles that inspire New Pact on Migration and Asylum of European Union are: responsibility, solidarity, comprehensive and integral management of migration, and cooperation with third states³⁷ (origin and transit states). However, its effective inspiring principles are hard border control, outsourcing, utilitarian approach of people (talent as a requirement for entry and authorization) and voluntary character of solidarity measures: flexibility in solidarity.

The New Pact and the debate on these principles are incorporated in the Conference on the future of Europe (2021), as a proposal of the European Commission and the European Parliament, announced in the end of 2019, with the aim of looking at the medium to long term future of the EU and what reforms should be made to its policies and institutions. In Communication from the Commission on a New Pact on Migration and Asylum, from 23 September 2020, President von der Leyen affirmed: ‘We will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must

³⁶ European Commission, „Statistics on migration to Europe“, https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en, European Commission, „A-mended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU“, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611>.

³⁷ European Commission, „New Pact on Migration and Asylum: Questions and Answers“, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707.

be able to rely on the solidarity of our whole European Union... Everybody has to step up here and take responsibility”³⁸.

The new pact on Immigration and Asylum of the European Union will replace the current pact on Immigration and Asylum of 2008, communicated on June 24, 2008, by the Commission and adopted by the Council of the EU on September 24, 2008, that was approved in accordance with “a spirit of solidarity and mutual responsibility between the Member States and of cooperation with other countries outside the EU”. The current pact of 2008 was linked to the “Global Approach on Migration and the Stockholm Program “An open and secure Europe serving and protecting the citizens”³⁹, which replaced the “The Hague Program” (2004- 2009) in 2010. The “Hague Program” superseded the “Tampere Program” (1999-2004).

With the background of the “Tampere Program” and “The Hague Program” councils adopted the “Global Approach to Migration Program” in December 2005. Its fundamental principles are to ensure demographic and labor needs of the member states; mutual responsibility and solidarity between states and cooperation with third states; contribution to the economic development of Europe; link with the external relations of the European Union, global management of migrations; migratory activity exclusively within the law; joint, coherent and unitary management of migration and development cooperation, which includes cooperation with the States of origin, transit and destination; recognition of the current inability of the European Union to receive all migrants “with dignity”; the premise that poorly controlled migration policy can damage the social cohesion of destination States⁴⁰. This problem directly concerns the organization of educational, social, health, employment, and accommodation services, as well as a legal system of protection against criminal networks; in the common European area of free movement, especially after Schengen, access to the territory of one member state implies access to the territory of the other member states. The free movement requires a common migration policy: immigration, integration, and asylum, which includes a common visa policy, harmonization of border control and asylum rules, legal emigration conditions, the fight against irregular immigration and the creation of the Frontex Agency⁴¹.

³⁸ European Commission, 16 September 2020, „State of the Union Address by President von der Leyen at the European Parliament Plenary“, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

³⁹ The Stockholm Programme „An open and secure Europe serving and protecting the citizens“ was adopted by the European Council in December 2009, and provided a framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010-2014.

⁴⁰ Council of European Union, Presidency, No prev, Doc. 15582/05 ASIM 64 RELEX 747, „Global approach to migration: Priority actions focusing on Africa and the Mediterranean“, <https://data.consilium.europa.eu/doc/document/ST-15744-2005-INIT/en/pdf>.

⁴¹ European Commission, Migration and Home Affairs, Common European Asylum System, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

As the next stage in this process, as laid out in the “Green Paper of 6 June 2007” concerning the future of the European asylum system, the European Commission proposed to increase the possibilities for applying for asylum. This could be completed by improving the legal protection for asylum seekers by making their application at the border easier. To achieve this the evaluation of the relevant documents presented by asylum seekers, and the appeal procedures need to be reconsidered. To re-assess certain procedural mechanisms worked out in the first phase, such as the concepts of safe country of origin, safe third country and European safe third country; clarification of the concepts used to define grounds for protection; convergence of the rights and benefits linked to the protection granted, especially those concerning residence permits, social security and health care, education and employment; establishment of a uniform status that would apply to all persons eligible for refugee status or subsidiary protection; to define the status granted to persons who are not eligible for international protection; to establish a system for the mutual recognition of national decisions relating to asylum⁴².

2. The current Pact of Migration and Asylum of 2008: Goals and Achievements

The current pact of 2008 regulates the legal aspects of immigration, assumes the priorities, needs and reception capacities determined by the member states and promotes the integration of immigrants. Other goals of the pact⁴³ are the control the irregular immigration and promotion of voluntary returns to the countries of origin or transit of immigrants. It is vital to improve border controls to increase their effectiveness; establish a European framework for asylum and to create a global collaboration with non-EU countries to promote synergies between migration and development. In accordance with these approaches and objectives, the European Union has implemented some relevant achievements, for example, Directive 2008/115/EC (16 December 2008) of the European Parliament and of the Council regulating procedures in member states for returning illegally staying third-country nationals. Another example is the Directive 2009/50/EC (25 May 2009), regulating the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. Important to mention is Directive 2011/98/EU (13 December 2011) implemented by the European Parliament and Council, regulating on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state. The Common European Asylum System (CEAS) sets minimum standards for the treatment of all asylum seekers and applications across the European Union; governance of the Schengen area; the European Border Surveillance System (Eurosur) to prevent cross-border crime; new

⁴² Commission of the European Communities. Green Paper on the future Common European Asylum System. 6 June 2007.

⁴³ European Council, European Pact on Immigration and Asylum, 24 September 2008, <https://data.consilium.europa.eu/doc/document/ST-13440-2008-INIT/en/pdf>.

tasks and resources provided to the Frontex Agency or significant steps in the field of return policy using best practices by member states and operational cooperation across the European Union and in the fight against the exploitation of immigrants.

To fulfill these achievements, the following financing instruments were approved for the period 2014-2020: the Asylum, Migration, and Integration Fund (FAMI); and the Fund for Internal Security (FSI).

V. Premises of the New Pact. A fresh start on Migration “Building confidence and striking: A new Balance between Responsibility and Solidarity”

Under the motto A fresh start on migration “Building confidence and striking: a new balance between responsibility and solidarity”, the new pact is conceived from nine premises⁴⁴. 1. Complexity: Immigration policy is a complex issue, with many facets that must be weighed together; 2. The safety of people seeking international protection or a better life; 3. The concerns of countries at the EU’s external borders, which worry that migratory pressures will exceed their capacities and which need solidarity from others; 4. The concerns of other EU Member States, which are concerned that, if procedures are not respected at the external borders, their own national systems for asylum, integration or return will not be able to cope in the event of large flows; 5. Based on a holistic assessment, the Commission proposes a fresh start on migration: building confidence through more effective procedures and striking a new balance between responsibility and solidarity; 6. It aims to create more efficient and fair migration processes, reducing unsafe and irregular routes and promoting sustainable and safe legal pathways to those in need of protection; 7. Begin to apply the Migration Preparedness and Crisis Blueprint; 8. Integrated border management mixed or hybrid migration: formed, at the same time, by migrants and people who require protection; and 9. Creation of Asylum expert teams, who could travel for a specified period of time to assist Member States in case of need.

Regarding asylum policy, the reform of the common European asylum system aims to establish a common framework that contributes to the comprehensive approach to asylum and migration management, make the system more efficient and more resistant to migratory pressure, eliminate pull factors as well as secondary movements and support the most affected member states.

Regarding border security, the new pact proposes an integrated border strategy and more effective procedures, with a new screening in case of irregular arrival. This consists of identification, health, and security check, individual assessment, and human

⁴⁴ European Commission, „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity“, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

right monitoring⁴⁵. Flexible location (can also take place in other locations and two possible scenarios: negative decision likely (security risk) and positive decision likely (unaccompanied children and families). In particular, the new integrated border procedure foresees a new screening for anyone arriving irregularly to direct them into the right procedure, seamless system for arrival to either return or integration, border procedures (rapid identification of the procedure within 5 days, prior evaluation, asylum or prior return -screening- compared to the 12 weeks of the current asylum procedure; legal guarantees and monitoring system to ensure full respect for rights since the beginning to the end of the procedure); the regulation on the European Border and Coast Guard with capacity of 10. 000 operational staff; and information systems for border and migration management Confidence in EU rules: monitoring of and support to national authorities, European monitoring of national systems to ensure consistency on the ground (Commission, peer reviews by other Member States, Frontex vulnerability assessments, new EU Agency for Asylum monitoring); special monitoring of effective access to asylum and respect for fundamental rights by Member States and the Fundamental Rights Agency; Fully-fledged EU Agency for Asylum offering stronger support, more support from Frontex; investment in good asylum procedures and in effective returns; asylum law reforms proposed in 2016 to be adopted (stronger rights, more efficiency); new EU Agency for Asylum for monitoring and guidance; improved IT system (Eurodac) to support screening, asylum and return processes; set of new tools on returns and more support from Frontex newly appointed EU Returns Coordinator and a High Level Network coordinating national action sustainable return and reintegration strategy to help countries of origin.

The new pact includes certain reforms. Regulation on Asylum and Migration Management, regulation on control and the regulation on asylum procedures; regulation on the EU Asylum Agency ; revision Eurodac Regulation and finalize negotiations on the EU Blue Card Directive; revision of Directive 2003/109/EC (25 November 2003) concerning the status of third-country nationals who are long-term residents; Directive 2011/98/EU of the European Parliament and of the Council (13 December 2011), on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; and new Regulation on the European Border and Coast Guard.

⁴⁵ European Commission, „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity“, cit.; S. Angenendt, N. Biehler, R. Bossong, D. Kipp and A. Koch, „The New EU Migration and Asylum Package: Breakthrough or Admission of Defeat?“, SWP, 46, 2020, pp. 2-4, https://www.swpberlin.org/fileadmin/contents/products/comments/2020C46_EUMigrationandAsylum Package.pdf..

VI. Legal Assessment of the Proposal on the New Pact

The European Commission affirms that managing migration is a shared European responsibility, which makes it essential that member states' policies are coordinated. In this regard, the new Pact proposes a constant and effective solidarity with member states with many arrivals and "under pressure" or "at risk", but this common solidarity reserve of national contributions is based on voluntary commitments and therefore not mandatory. The Commission, on its own initiative or upon request, would determine if a national system is under pressure or at risk. Then, Commission sets out what other member states must do to help the member state in need or at risk. They could accept some asylum seekers into their own state, therefore relocating from the member state in difficulty with the final (destination country receives EU funding). Another opinion is to take responsibility for returning the asylum-seekers to their countries of origin or to take other operational measures to help.

This regulation is completed with the pledging that, once the evaluation is carried out, other member states contribute to its "equitable participation". The calculation for "equitable participation" is 50% based on GDP and 50% based on population. It is the prerogative of the national government to decide whether to accept relocated migrants or sponsor returns.

If the pledges received fall more than 30% short of the total number of relocations or sponsored returns necessary member states that did not pledge are requested to cover at least half of their 'fair share' (in relocations or return sponsorship). The Commission adopts implementing act (Legal confirmation) to confirm contributions and make them legally binding with solidarity and collective responsibility for disembarked persons location for people rescued at sea and vulnerable groups. If unsuccessful, Commission to adopt a legal act requiring member states to either contribute to relocation or other measures. If, after all these measures, still not enough relocation places open up, Commission to apply a correction as in the standard solidarity mechanism.

Regarding its future planning, the Commission would establish a set of commitments from the member states based on the annual projection of needs. If there are not enough pledges (30% deficit), the Commission will call the solidarity procedure.

However, due to the uncertainty concerning the practical acceptance of the new procedure, the new pact proposes a legally binding process for EU countries to develop, plan and prepare a system together, all reinforced with a policy of constant guidance and support, making national systems more efficient, flexible and resilient.

In regards to the asylum policy, an accelerated border procedure is proposed with nationality criteria to quickly examine the asylum applications of people from countries with low recognition rates, which has been doctrinally criticized for being potentially discriminatory and contrary to the criteria of the right of asylum and the principle of non-refoulement. In any case, the proposed procedure would not apply to

unaccompanied children or families with children under 12 years of age, and situations of vulnerability would be assessed on a case-by-case basis.

VII. Conclusion

Taking as a reference context this preparatory phase of the new European Pact on Immigration and Asylum, which replaces the before-mentioned pact of 2008, we must reflect about the rights most harmed by Covid-19 and on the new pact. Both are closely linked to the current process of constitutional reform of the European Union (Conference on the future of Europe) and its commitments to the open society model invoked by the founding fathers seven decades ago.

In this context the EU has presented the future regulatory framework for freedom of movement and other rights in the European area, according to the new Euro-pean pact on migration and asylum. The Commission states that the current system no longer works and proposes to improve the overall system. The proposal includes looking at ways of improving cooperation with the countries of origin and transit, ensuring effective procedures, integration of refugees and return of those with no right to stay. In particular, the Commission proposes to introduce an integrated border procedure which, for the first time establishes a pre-entry screening including identification of all people crossing the EU's external borders without permission or having been disembarked after a search and rescue operation. This procedure would also involve a health and safety control procedure, fingerprinting and registration in the Eurodac database. After identification, people could be directed to the planned procedure, either at the border for certain categories of applicants or in an ordinary asylum procedure. As part of this border procedure, swift decisions on asylum or return will be made, providing quick certainty for people whose cases can be examined rapidly. At the same time, the proposal innovates other procedures and defend stronger monitoring and operational support from EU agencies, an European digital infrastructure for migration management, a common EU system for returns, a more effective legal framework, a stronger role of the European Border and Coast Guard, and a newly appointed EU Return Coordinator with a network of national representatives to ensure consistency across the EU. In addition, the Commission of EU recommends a change of paradigm in cooperation with non-EU countries and, to this end, promotes tailor-made and mutually beneficial partnerships with third countries.

Confirmed by the Commission the restrictive approaches about migration and asylum, its strong controls and its preference for limited mobility to qualified workers, the new proposal on the European Pact confronts us with the problem about the type of society we want: closed or open, with the following challenges: a) achieving a new balance to reconcile the tensions between the rule of law (including the requirements established by constitutional jurisprudence and international treaties, in particular, jurisprudence of the ECHR), the economic capacity of the European Unión and the and the national interests of the Member States; b) to define what society do we want to choose:

inclusive or closed? What do Europeans want to be in the global context? and c) To answer an unavoidable question: Are we ready to make individual and collective sacrifices to achieve a democratic, inclusive, and competitive Europe? These questions must be answered for us, and our responses will determine the future of Europe.