From Law's Discourse on Refugees to Refugees' Discourse on Law

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ABSTRACT

The aim of this article is to shift the focus from legal discourses on refugees rooted in victimization/securitization narrative, which dominate in the EU, to an alternative perspective on the relationship between refugeeness and law. Instead of the state-centred law's discourse and its impact on the development of refugee subjectivities, the article turns to explore a refugees' perspectives on law. After briefly discussing the dominant narratives as embedded in legal changes initiated during and after the so-called 'migration and refugee crisis' in the EU, the article turns to analysis of alternative narratives on migrants and refugees, in particular the narrative of generativity taking it beyond the constraints of methodological nationalism and Eurocentrism. In particular, the article discusses the impact of exile experience on conceptualization of the figure of the refugee by looking at work of scholars exiled from Nazi Germany in the 1930s: Hannah Arendt, Louise Holborn and Otto Kirchheimer. The analysis shows the importance of shifting perspectives – from the primacy of statehood and law to the primacy of the figure of the refugee – to gain more insight into the situatedness of law and its development in the context of asylum and mobility.

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I. INTRODUCTION

The aim of this article is to shift the focus from legal discourses on refugees rooted in victimization/securitization narrative (Holmes & Castañeda 2016) towards an alternative perspective on the relationship between refugeeness and law. This new narrative strives to overcome the limits of methodological nationalism – an approach in research that takes the nation state as its main point of reference (van Baar 2016) – by turning to the 'figure of the migrant' (Nail 2015) as a starting point for analysis. The result of this shift in focus is the refugees' perspective on law.

The existing discourses on refugees embedded in the processes of management of those seeking protection in the EU have been widely analysed by scholars of various disciplines. In the fields of international and EU law, the dominant discourse is rooted in the seemingly irreconcilable conflict between the aim of states and the EU to control both the EU external border and, increasingly, their own national borders, and obligations deriving from the 1951 Refugee Convention and human rights instruments. The visible effect of this discourse – the protection of security and state sovereignty on the one hand, and protection of human rights on the other – is what Sandro Mezzadra and Bret Neilson (2013) call a fragmented refugee subject.

I believe that in order to break this circle an alternative narrative of refugeeness needs to be introduced that challenges the dichotomy of discursive framing of refugees in between securitization and victimization. It is however difficult to imagine such narrative as our thinking is dominated by the legal and political concept of the nation state forming a basis for distribution of people among the respective sovereign countries (Walters 2002). According to Rosi Braidotti (2010), such methodological nationalism is 'of hindrance, rather than assistance' in attempts to redefine the contemporary subject. In line with this approach, in this article, I offer an alternative take on refugeeness by challenging the victimization/securitization narrative (and similar narratives based on deservingness) oriented by methodological nationalism in legal approaches to refugees. I propose instead the narrative that takes its point of departure not from the stasis of statehood, but rather from the primacy of movement. Such approach does not mean negating the existence and the consequences of the nation state and its borders but rather is an attempt to shift the perspective to analyse them from the point of view or the experience of the refugee – a mobile person. In concrete terms, instead of the state-centred law's discourse and its impact on development of refugee subjectivities, the article turns to explore a refugees' perspective and understanding on law. It does so by focusing on one aspect of this relationship: the exile and refugee legal scholarship on the protection of refugees.

In what follows, in this article I first briefly introduce the dominant legal narratives on refugees in the international and EU law. Then I turn to analysis of alternative narratives on migrants and refugees, in particular the narrative of generativity taking it beyond the constraints of methodological nationalism and Eurocentrism. Finally, I focus on the impact of exile experience on refugee law by looking at selected works of German-Jewish scholars exiled in 1930s: Hannah Arendt, Louise Holborn and Otto Kirchheimer.

II. LEGAL DISCOURSE ON REFUGEES

There are many scholarly accounts of the array of subjectivities produced by the European legal, political, economic and cultural discourses that developed along the

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narrative of securitization of migration, and that are based on broadly understood deservingness of a genuine refugee. Holmes and Castañeda write that

> [a]cross many historical and geographic contexts, the discursive framings of the causes of displacement—particularly those involving the overlapping dichotomies of "voluntary"/"forced," "(im)migrant"/"refugee," and "economic"/"political"—have shaped how states and other actors have responded to displaced people. (Holmes & Castañeda 2016, 16)

In the international and EU legal context that I analyse in this article, this dichotomy is based on the discursive juxtaposition between the state sovereignty on the one hand and human rights of refugees on the other. The consequence of such juxtaposition is the fragmented refugee subjectivity (Mezzadra & Neilson 2013) and narrowing scope of legal protection both at the level of the Common European Asylum System and the national level (see for instance Den Heijer, Rijpma & Spijkerboer 2016).

I have written about this topic in more detailed manner elsewhere (Kmak 2015). In short, the two faces of the fragmented refugee subjectivity (the genuine refugee and the bogus asylum seeker) remain inter-related and dependent on one another and they imply their own respective modes of behaviour. On the one hand the asylum seeker, to be considered as deserving international protection, must fit into the passive and victimized narrative defined by the subjectivity of the genuine asylum seeker. Those who do not fit into this narrative may not be recognized as refugees, even though they might have a genuine basis for protection. In turn, since EU law significantly limits the possibility of an asylum seeker to enter EU territory in a regular manner and does not grant effective possibilities to seek asylum in other ways, those in need of protection are forced to use irregular migration channels or to overstay their visas (Scheel 2017), and to present themselves in a manner fitting into the victimization narrative. In consequence, any display of agency and adjustments of their own stories, made by asylum seekers to receive refugee status portray them as liars or opportunists, and therefore bogus asylum seekers (Kmak 2015) threatening 'Our European Way of Life'.

This discourse is based on the policy of deterrence and *non-entrée* (Spijkerboer 2018). As Catherine Dauvergne describes, however, a consequence of such approach for migrants and refugees is a further perpetuation of irregularity:

> [t]he more effort states put in to finding illegal migrants, the more illegal migrants there are. Similarly, because "illegality" is produced by law, the more laws there are constraining migration, the more categories of people exist who are in breach of those laws. (Dauvergne 2016, 46)

These measures, in turn, trigger yet stricter measures aiming to limit entry of protection seekers into EU territory. This process of circular tightening of the access to protection is very much visible in the reactions of the EU and its Member States to the recent so-called 'refugee and migration crisis', culminating in most recent measures adopted during the Covid-19 pandemic. In response to what den Heijer et al. (2016, 641) diagnosed as a serious structural problems of the Common European Asylum System (such as lack of genuine EU burden-sharing mechanisms, lack of a level playing field with regard to legal standards of protection, reliance on coercion or unrealistic expectations regarding the role of borders), the measures taken by the EU have only reproduced these problems as they were based 'on an intensification

of the prohibition of the cross-border movement of refugees, combined with neglect of the position of refugees in the region'. These responses do not bring about any meaningful changes in the position of migrants and refugees in the EU. Quite the opposite, they further intensify the fragmentation of the refugee figure along the lines of deservingness and victimization/securitization. Such intensification has been particularly visible in most recent developments such as pushbacks (including illegal pushbacks by the EU Agency Frontex (Fallon 2020)) as well as Covid-19-related measures, that effectively cancelled any possibility to apply for asylum in the EU and have been institutionalized in the recently proposed New Pact on Migration and Asylum (European Commission 2020). In consequence, many asylum seekers and refugees have been stranded at sea or in overcrowded and inhumane refugee camps without means and possibility to apply for refugee status (Spijkerboer 2020). The New Pact on Migration and Asylum (containing a comprehensive package of the draft EU legislation on the Common European Asylum System) published in September 2020 by the European Commission emphasizes even more border procedures and effective expulsions, contributing to further securitization (Carrera 2020). These measures have been conceptualized and discussed extensively in academia and beyond.

Most recently, refugee and migration studies became more focused on and combined with race and ethnicity studies where race and ethnicity embedded in colonial history have been increasingly considered as involved in constructing European migration and refugee discourses (Mayblin 2017). For instance, Lucy Mayblin shows how the idea of coloniality/modernity (where coloniality and modernity are understood as two sides of the same coin) orient current approaches to refugees based on differential humanity. In result, some asylum seekers (primarily those from outside Europe) are often marked 'as different in line with a narrative of unwanted, alien "others" from the "underdeveloped", "non-modern world"' (Mayblin 2017, 180), which in consequence affects their deservingness or undeservingness of protection. In her work on genealogy of moderated movement Hagar Kotef (2015) links this modern/non-modern dichotomy with movement as an ordering technology, showing how movement was crucial for the formation of modern liberal subject, but only if regulated by material, geographic or gendered conditions. Only such regulated movement could fit into the sedentarist ideology of the modern nation state and citizenship, leading to a split between moderated and excessive forms of movement. Whereas moderated movement of Western citizens represented and represents the liberal freedom, the excessive movement of colonized, racialized and gendered subjects has been historically considered and still represents a security threat that justifies different forms of violence affecting the treatment of contemporary, non-European refugees (Kotef 2015). Similarly, Mareike Gebhardt (2020) considers the securitization/victimization dichotomy in approaches towards asylum seekers as a consequence of gendered and racialized technology of necropolitics and coloniality. Such technology on the one hand 'aligns with the masculinized and racialized discourse position on migrants as a menace' and on the other with 'feminized or infantilized figurations produced by the discourse on migrant vulnerability' (Gebhardt 2020, 124–125).

Building upon these discussions, in this article I strive to look beyond the circularity rooted in securitization/victimization narrative and, by adopting the approach that takes refugee rather than the nation state as its main reference point, to provide alternative view on the relationship between law, migration and mobility.

III. BEYOND THE SECURITIZATION/VICTIMIZATION NARRATIVE

One of the solutions to the securitization/victimization discourse has been to show the generativity of exile and refuge, which usually means focusing on the benefits migrants and refugees create for instance for the economy or demography of the country (Maxmen 2018). The danger of this approach is that, by focusing only on the benefits migrants or refugees bring or create, it feeds the dominant distinction between the good and the bad migrant/refugee. The refugee is discursively framed as a good one or as a deserving one not when they fulfil the criteria of the 1951 Refugee Convention, but when they constitute a value for the state and the existence of this value is often used to justify protection. This problem has been recognized by Huub Van Baar, who underlined that,

> the mobility of those who can or cannot (easily) enter the EU, as well as the (contained) mobility of those EU citizens who travel the EU, is governed on the basis of their alleged contribution to the productivity, health, wealth, and security of the EU's population and, thus, on that of their biopolitical qualifications. (van Baar 2016, 217)

Mindful of the importance of this approach for discussing and creating migration and refugee policies in current sociopolitical and economic context, I nevertheless consider it as part of the dominant, state-centred processes of migration and refugee management through dehumanization, securitization and racialization (Bigo 2002; Gutiérrez Rodríguez 2018; Huysmans 2006). I believe that constructing a narrative alternative to methodological nationalism and Eurocentrism, the Janus-faced refugee and the biopolitical narrative of generativity would mean instead conceptualizing refugees not from the perspective of nation states or Europe, but rather turning the emphasis towards the refugee as a main point of reference, following Thomas Nail's (2015) call to rethink political theory based on the 'figure of the migrant' rather than on citizenship. In concrete terms, such approach would mean adopting the refugee and migrant perspective, rather than a state perspective, as the primary reference point for analysis. What does this approach mean in the context of law? In this article, I propose that instead of legal discourse on refugeeness and refugee subjectivity, one needs to focus on the refugees' perspective on law (see for instance Bierbrauer 1994; von Benda-Beckmann, von Benda-Beckmann & Griffiths 2005, Vítor Lopes Andrade et al. 2020) and investigate the impact of refugees on the processes of analysis and conceptualization of refugee law.

The law can manifest itself in various forms and various levels of social reality. According to Reza Banakar (2015, 12), law can mean the formal instrument of regulation; a body of rules and decisions; activities of lawyers, judges and other legal practitioners; a profession, an academic discipline and a form of learning, teaching and training. In line with such understanding of law, I propose that one of the starting points for analysis of refugees' discourse of law is the exile and refugee scholarship and its impact on understanding and developing of refugee law. To be sure, the impact of exiles on development of law has been addressed to some extent in first and second generation of exile studies – a field of research focusing on those academics who were forced to leave during the period preceding and during the World War II, and in consequence of that move have contributed to the development of legal knowledge and legal institutions both in the countries of exile as well as the

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home countries (Camurri 2014; Coser 1984; Fermi 1968; Heilbut 1997; Krohn 1993; Stephan 2005; Stiefel & Mecklenburg 1991). Most of the existing scholarship however focused primarily on biographies of renowned refugee scholars and recognized their great contribution to their receptive societies, contributing to the deservingness-based narratives (Coser 1984; Fermi 1968). Similar approach is visible also nowadays (see for instance Vatansever 2020). As Özdermir, Mutluer and Özyurek write:

> given that the prospect of their integration into the mainstream of Western societies is regarded as considerably brighter than that of other less-educated (yet real) refugees [...] academic exiles are expected to become new contributors to the European academic market. (Özdemir, Mutluer & Özyürek 2019, 18)

Yet this generativity narrative is again linked with victimization. As Özdemir et al. (2019, 18) write, at the same time refugee academics are treated following to the 'damsel in distress' fantasy with the focus shifted towards the accounts of victimization and the 'juicy escape stories of exiled scholars'.

To avoid being caught in this approach, I do not focus on the mere scholarly achievements of the exile and refugee legal scholarship but rather on what refugees and exiles' have to say about law. In other words, it looks at their perspectives, understandings and criticisms of law. This approach provides a different understanding of generativity – creation of a new perspectives influenced by the experience of displacement itself. Such perspective allows to approach generativity not in a form of tangible economic input but rather through the ability to unravel, explain or create a meaning that is rooted in individual experience. As sociologist Reinhard Bendix (1986), himself a refugee from Nazi Germany, wrote 'migrants see things differently, they can look into things that others are not looking or stopped looking'.

Before I develop my argument further, I want to underline that I understand the dangers of the essentialization by the concept of the refugee experience or the refugee scholarship and I have been criticising it elsewhere (Kmak & Björklund, forthcoming 2022). In particular, I do not intend to ascribe any concrete identity to exiles and refugees or to describe one dominant refugee experience. As Thomas Nail (2018) writes, homogenizing, macro perspective is rooted in the static and sedentary forms such as the nation state. In turn, mobility does not produce any essence. Therefore, any shift in perspective towards the primacy of movement and mobility requires analysing changes and developments on a micro scale, situated within political, cultural or socio-economic conditions (Eastmond 2007; Malkki 1995a), which necessarily are limited to concrete case studies, and escape essentializations and generalizations.

IV. REFUGEES' DISCOURSE ON REFUGEE AND ASYLUM LAW

To study the impact of the experience of refuge and exile on scholars' thinking about law and legal science, I initially turned to the most extensively researched group – the German-Jewish refugee scholars from Nazi Germany. The work of this group of professors is often considered as contributing to a paradigm change in legal science (von Lingen 2018; Tuori 2020). Even though the conditions of exile from Nazi Germany cannot be generalized onto contemporary refugee scholarship, it can nevertheless provide a fruitful basis for further discussions and analysis.

I wrote about the condition of scientific work in exile elsewhere (Kmak 2019; Kmak & Björklund, forthcoming 2022). In short, the situation faced by refugee scholars in the receiving countries such as the US was, first to enter different scholarly tradition, to start working in a foreign language, to abandon the prestige of their academic positions, often, to change the discipline, to start a new degree study, and so on. This experience exposed scholars (those whom we considered as successful in the academia, see however Tuori forthcoming 2022) to new set of ideas and conditions of doing science. Even though this experience has not automatically created conditions for new ideas and a new knowledge it surely left 'traces behind in the new scientific environment of the country of arrival' (Söllner 1996, 146–147).

To be sure, scholars sometimes reflected on their experiences and the impact of these experiences on their own thinking (see for instance Tillich 1961, 139) and sometimes exile became crucial for the scholars' rise to prominence. For Alfons Söllner (1996, 248), for instance, Hannah Arendt's influence in political theory was possible only because her work emancipated from the conditional experience of emigration. Overall, however, it is very difficult to verify the causal link between exile and the scientific work of scholars, when they are not aware of this influence or simply do not discuss it explicitly (Söllner 1996, 248; Tuori 2020, 63). Mindful of these methodological and conceptual difficulties, in studying refugees' discourse on law I chose to focus on academic writing of refugee scholars on the topic of refugee protection. Such focus is often considered as stemming from their own experience of being forced to leave their home countries (Brown 2015; Söllner 1988) and indeed many scholars in their writing engage with the conceptual and practical aspects of the protection of Jewish refugees from Nazi Germany and other European countries. In case of many, the academic analysis of the refugee protection constitutes possibly the only account of their experience and for that reason it is an important subject of analysis.

In studying the refugee's perspective on law, I chose to focus on the work of three exile scholars: Hannah Arendt, Louise Holborn and Otto Kirchheimer. Hannah Arendt is one of the most influential of the exiled scholars within the field of law and political science. Her work is widely known, and I will not be discussing it here extensively. Arendt remains one of the few scholars who directly reflects on her exile in academic work, understanding at the same time the importance of life histories and biographies for creation of meaning, sharing ideas and undertaking action (Arendt 1999). As Nanda Oudejans (2020, 533) writes, Arendt was plausibly one of the first political philosophers that reflected about the situation of refugees at the beginning of the twentieth century. Her analysis of rightlessness and the right to have rights continues to inspire contemporary refugee and human rights scholars and remains one of the most important area of scholarship focusing on challenging the dominant migration discourses, especially approaches towards the paperless migrants (Agamben 1998; Gündoğdu 2015; Kesby 2012; Noll 2010; Oudejans 2014, 2020; Rancière 2004).

On the other hand, the impact of exile on the work of Otto Kirchheimer is visible in the direction of his academic career and the change of scholarly discipline. Kirchheimer, a Marxist lawyer in exile joined the Frankfurt Institute of Social Research, first in London and at the Columbia University and later obtained academic positions in political science at the New School and Columbia University (Stiefel & Mecklenburg 1991). Kirchheimer himself was very silent on his personal exile experiences (Söllner 1988, 59). However, in his seminal work 'Political Justice', he wrote an extensive chapter on history and present situation of the political asylum. Söllner (1988, 58) claims that this is the part of Kirchheimer's work that shows the impact of personal history on his

academic work.[1] It is of course unclear whether this is so and whether Kirchheimer does not want to reflect on his experiences or whether he is just short-spoken (Söllner 1988).

Finally, Louise Holborn (professor of political science at the Connecticut College for Women) was considered as a pioneer of refugee studies and wrote extensively on the legal and factual position of refugees under the League of Nations and the UN. According to the archivist from the Schlesinger Library at Harvard (where Holborn's archives are now held) '[m]embership records, notes, and interviews confirm that Holborn drew critical parallels between her experience and the issues faced by international refugees' (Brown 2015). At the same time, her work is not widely known beyond the group of legal scholars working with the history of the refugee law (Goodwin-Gill 2017). One reason for this might be that her writings were very doctrinal, pragmatic and technical, and she has been accused of lack of critical reflection on the shortcomings of the refugee protection system and Europe-centric approach to refugee protection by the League of Nations and the UN.

> Holborn's research work conferred legitimacy and authority on the actions of refugee organizations: it aimed to preserve institutional memory, rather than to challenge institutions' actions. In effect, Holborn's access was quid pro quo for writing to explain, rather than to challenge, the existing institutional arrangements. (Long 2019, 226)

The concrete aspect of the impact of exile on her scholarly work were, however, not studied and any claim concerning directly linking Holborn's experience with her work with refugees would require further archival research.

To be sure, the legal regulation of asylum at the time when these scholars left Germany was primarily situated within the framework of group protection of minorities by the League of Nations. No generally binding international instrument was available and the scholars that arrived in the US did not go through the asylum procedure as we know it nowadays. Mostly they benefited from the migration quota exemptions that the US government granted to teachers and ministers in the National Origin Act of 1924 (Fermi 1968, 25). However, the work and experiences of scholars that I discuss below encompasses both the development of the legal definition of refugee, their legal status as well as the politics and the daily experiences of refugee protection arrangements. Four themes are most prominent: the change in the conceptualization of a refugee; humanitarianization and politicization of exile; feelings of humiliation and shame that are closely linked with asylum; and insufficiency of refugee law, on both conceptual and practical levels, to address the position and real problems faced by refugees. Interestingly, despite the differences in the legal regimes and the realities of refugee protection experienced by these writers, their analysis of the status of the refugees or the legal and political situation of asylum, feels particularly important considering contemporary approaches to refugees. The analysed writings document a 'historical moment' (Malkki 1995b, 497) in development of asylum and provide a window towards the contemporary paradoxes of the refugee protection regime. Sometimes these paradoxes were taken up in contemporary scholarship (Agamben 1998; Kesby 2012; Oudejans 2014, 2020; Rancière 2004) and sometimes they have not been discussed further.

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1   I am very grateful to Alfons Söllner for suggesting this interpretation of Otto Kirchheimers' work.

IV.1. CONCEPTUALIZATION OF REFUGE

It is clear from the writings of the three scholars that it is the interwar period, rather than period following the World War II, which constitutes such a historical moment for development of the refugee protection. The shift in conceptualization of exile and refuge that took place after the First World War has a very prominent place in work of Arendt and Kirchheimer. Their writings deal with the paradigm change in understanding of the position of refugees – that of the shift from the basis of persecution, from being persecuted for what one does to being persecuted for who one is. As Arendt writes in '*We Refugees*' in 1938:

> A refugee used to be a person driven to seek refuge because of some act committed or some political opinion held. [...] With us the meaning of the term "refugee" has changed. Now "refugees" are those of us who have been so unfortunate as to arrive in a country without means and have to be helped by refugee committees. (Arendt 2007, 264)

Similarly, Kirchheimer reflects:

> The Armenian survivor of Turkish massacres, the Russian "bourgeois" of the 1920's, the conscript soldier of the anti-Soviet "White" armies, the European Jew in Hitler's Europe, the Spanish conscript who fought on the loyalist side in the civil war, the member of an ethnic minority proscribed in the USSR in World War II – all these exiles ran from the threat of being penalized for what they were, not for what they had done, were doing or intended to do. Their appearance gave the word asylum a new connotation and let the authorities of the countries of refuge to put a different construction upon it. (Kirchheimer 1980, 353–354)

The shift in understanding of asylum was accompanied by a vast number of people seeking protection, that made its earlier exceptional position inapplicable and the protection itself impossible to find. As Arendt writes in *The Origins of Totalitarianism*, the problem arose when the new categories of persecuted persons were too large to be provided protection based on the unofficial practice that was destined for exceptional cases (Arendt 1985, 294), which resulted in abolition of the right of asylum as incompatible with the rights and interests of states (Arendt 1985, 280). It remained to be applicable only to political refugees, which were of much smaller number, even though not formally regulated (Arendt 1985, 295). Similarly, Holborn (1975, xvi), writing about the development of the international system of refugee protection under the UN, notices that traditional ways of providing protection was inadequate for meeting the needs of 'substantial numbers of human beings in all parts of the world'.

The accounts of the impossibility of providing protection on the international level, the lack of willingness of states to extend this protection that is linked with the vast numbers of persons is shown in writings of Holborn who in her article from 1938 documented the legal developments of the protection of various groups of refugees under the League of Nations that translate Arendt and Kirchheimer's more theoretical writings into practical legal problems. For instance, writing about the identity certificates, called Nansen passports, Holborn remarks on the consequences of the shift in understanding of refuge described by Arendt and Krichheimer:

> Countries were also unable to distinguish between the applications of bona fide refugees and those persons, who, although technically entitled to the

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certificates, were not really political refugees. The state of uncertainty led
to the reaction that the immigration countries regarded the holders of the
identity certificates with a certain amount of apprehension. (Holborn 1938,
686)

As the refugee protection was at that time granted mostly to concrete groups of
refugees, it was also very difficult to extend protection to other groups that were not
recognized, or to the stateless persons in general. Also, even though the protection
of certain groups was explicitly regulated, the courts of individual states would not
recognize it (Holborn 1938, 687). Writing about the number of conventions adopted
with the purpose of providing protection to groups of refugees, including the refugees
from Germany of 1938, Holborn states:

It was clear from the situation of refugees, both under the Nansen
International Office and the High Commission for Refugees from Germany,
as well as outside of the League, that what had been done was not
sufficient. The plans for the transfer of Armenians to Erivan, and of
Assyrians overseas could not be carried out. Unemployment threatened
the Russian refugees and the emigration of refugees from Germany was
still continuing. No real improvement had been brought about in regard to
ratification of the Convention of 1933. (Holborn 1938, 697)

IV.2. REFUGEE AS AN ANOMALY

The difficulty in providing legal protection to these groups of persons, which resulted
from denationalizations, resettlement and persecution, left these people, as Holborn
writes, living 'in no-man's land' (Skran & Daughtry 2007, 27). Similarly, Arendt (1985,
278) called these mostly stateless people as exception or 'legal freaks'. As the nation
states were considered the main providers of protection and rights, these 'legal freaks'
were excluded from the protection because it was indeed based not on the person's
humanity but on their link with political organization of a state (Arendt 1985, 297). In
other words, Arendt understood the anomaly of refugeeness as linked with refugees'
displacement that also resulted in their loss of rights (Oudejans 2020, 533). As Nanda
Oudejans writes, for Arendt 'the individual's enjoyment of rights and freedoms is
spatially limited, and an orderly freedom of movement is only thinkable in a world
divided by borders' (Ibid.). Therefore, through displacement from their countries
of origin refugees challenged the dominant view at that time that the primary
responsibility for refugees lies in their countries of origin. Arendt thought is similar
to Hagar Kotef's conceptualization of moderate and disorderly movement, where
refugee represents movement that is disorderly. As Oudejans writes, if nationality is
in Arendt's thought an element of order 'the refugee represents disorder' (Oudejans
2020, 534). At the same time, those in exceptional situation or considered an anomaly
in the nation-state system, grew to such numbers that, according to Holborn, they
required special protection and security that could only be granted not by the single
state but by the International Humanitarian Organization (Skran & Daughtry 2007, 28).

IV.3. HUMANITARIANIZATION AND POLITICIZATION OF
REFUGEE PROTECTION

The humanitarianization of refuge protection was also, according to Holborn (1938,
703), a consequence of depoliticization of the refugee question by lack of adequate
pressure imposed on the refugee-producing countries by other states and the League

of Nations, what would later be called dealing with root causes of refugee flows. As Holborn wrote in 1938, the League

> … handicapped itself in its work with refugees, first by always dealing with it as a humanitarian question instead of treating it as a political one and striking at the root of the problem […] by negotiations with the refugee-producing countries […]. (Holborn 1939, 134)

To be sure, refugee protection was not purely humanitarian (Goodwin-Gill 2008; Hathaway 1990) but rather became repoliticized at the international level as it raised to a matter of political relations among various involved states. The result was that refugees were confronted

> … with a conflict between two sovereign wills, the one expelling them, the other forbidding their entry. There was no place to go, and in many cases vagrancy or suicide were the only alternatives of the refugee. (Holborn 1938, 689)

Hathaway (1990) called the protection within the 1920s as 'humanitarianism qualified'. Nevertheless, as Holborn writes, humanitarianism became later inscribed in the non-political nature of the United Nations High Commissioner for Refugees (UNHCR) with whom individual states were willing to collaborate and finance its activities (Holborn 1975, xvi).

Politicization of refugee protection was also noted by Kirchheimer, who writes in 'Political Justice' that

> [r]esolutions passed by international lawyers' meetings, codification proposals, and, most recently, bills of rights on the national and international levels, even when supplemented by a few international agreements, have a lesser bearing on the asylum problem than attitudes of political regimes and the change, due to power shifts, in composition of the body of supplicants. (Kirchheimer 1980, 353)

Giving account of the politics of protection in the US, Kirchheimer (1980, 359) underlines the meaning of ideological basis for asylum rather than degree of persecution and suffering that would determine granting protection.

The basis for asylum emerges therefore in the analysed writings not as depoliticized, humanitarian problem but rather as a constant negotiation between political interests of the receiving states and its obligations stemming from their humanitarian or moral considerations. As Kirchheimer (1980, 352) writes about asylum, the institution is '[s]ituated at the crossroads of national and international law, compassion and self-interest, *raison d'etat* and human capacity for shame' requiring mediation between these elements. This constant negotiation between politics and humanitarianism presupposes the limit in the willingness of states to provide protection, mostly in case of those who do not constitute a burden for the receiving country. Writing about the situation of refugees from the Soviet Union, Holborn (1938, 683) remarks that 'there was a fear that the refugee, if nationalized, might more easily become a charge on public assistance'. Similarly, the refugees would not receive any special position and were often discriminated against as 'the receiving country stipulated the possibility of returning its immigrants to their country of origin if they proved unsatisfactory' (Holborn 1938, 684). As Kirchheimer concurs

[t]o governments today which must deal with huge masses of the politically persecuted, asylum is an economic, public welfare, and administrative headache of quite a different magnitude. (Kirchheimer 1980, 386)

IV.4. CONTROL OF REFUGEES AND SECURITIZATION OF REFUGEE PROTECTION

To be sure, refugees were considered not only an economic burden but also a threat to public order or even portrayed as a security threat. As Arendt wrote:

… long before the outbreak of the war the police in a number of Western countries under the pretext of "national security" had on their own initiative established the close connection with the Gestapo and the GPU, so that one might say there existed an independent foreign policy of the police. (Arendt 1985, 288)

Writing about the refugees as a problem of the police (rather than politics) Kirchheimer (1980, 354) pointed that '[t]here was no administrative or social problem. Once admitted, the seeker of asylum was on his own so long as he did not run afoul of the police or established national policy rules'. At the same time, lack of effective channels of protection also forced refugees to violate these rules. As Holborn noted:

[i]n order to live and to maintain their families, many procured false papers or penetrated secretly into states where they hoped there might be better opportunities. The result was a succession of trials, imprisonment and expulsion. (Holborn 1938, 689)

For that reason, refugees needed to be controlled and control of refugees rather than their protection became the main purpose of the refugee law (Behrman 2018). Behrman quotes Holborn writing in 1938 that

[d]isorganized groups of refugees are more difficult for hospitable countries to deal with than are organized groups, even if the latter are larger in numbers. A clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement. If coupled with adequate technical organization, refugees would be under more direct technical control than at present, and the possibility of subversive political activity against governments responsible for their exile would be greatly lessened. The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of "refugee". (Holborn 1938, 703)

IV.5. FROM HUMILIATION AND SHAME TO THE VANGUARDS OF THE PEOPLE

Finally, the humanitarianization of the refugee protection is also linked with humiliation[2] and shame. This concerned both the shame as a basis for humanitarianism and the humiliation arising from dependency on humanitarian assistance of others. In analysing

2   For the relationship between humiliation and shame, see Elshout, Nelissen and van Beest 2017.

the concept of asylum Kirchheimer juxtaposes shame with *raison d'etat* and considers human shame as the only basis for its functioning: 'Asylum – Herodotus already knew it – has its flaws. It is likely to remain mostly inoperative unless safely anchored in man's propensity for shame' (Kirchheimer 1980, 387). At the same time, the experience of this new form of refugee protection rooted in humanitarianism and hence stripped of agency, generated the feeling of shame and humiliation among the refugees themselves. As Arendt (2007, 268) wrote, '[i]f we are saved, we feel humiliated, and if we are helped we feel degraded'. However, shame, humiliation and consequent passivity is not the only characteristic of refugees. As Arendt (2007) writes in 'We Refugees', despite these experiences some refugees chose not to renounce their identity but insist on their presence in the world, through speaking up, storytelling, 'artistic transposition of individual experiences' and inserting oneself into the world (Horst & Lysaker 2021, 72). I believe such storytelling can provide the counter-narrative displacing the dominant discourses on refugeeness rooted in victimization and securitization. In addition, as Horst and Lysaker (2021, 8) write, such storytelling process 'can also be transformative for the listener, who gains access to alternative visions of not only past, but also future'.

V. DISCUSSION

The brief analysis of the conceptualization of a refugee by the three scholars shows the emergence of a figure of a refugee that is in a need of humanitarian help yet the reasons for such help remain uncertain. A refugee is therefore a suspicious person with unspecified legal position, which is being helped, with an attempt however not to negatively affect the relations with the refugee's country of departure. The refugee emerges as a problem and their protection is for that reason limited and measures must be undertaken to control their behaviour. Some of the refugees however are not content with this perspective and through presence and participation challenge it. The result of this paradigm change in the understanding of refugee protection and the constant negotiation between the political interests and obligations, first moral, then inscribed in international legal rules, was the insufficiency of legal protection of refugees on both conceptual and practical levels. As Kirchheimer observed, however, this insufficiency is not a flaw of the system but rather its intrinsic feature. 'The danger today is not that the institution be valued too little. It is in mistaking transitory considerations of expediency for the institution's intrinsic limitations' (Kirchheimer 1980, 387).

It is clear that what the three scholars wrote about foreshadows the contemporary processes of subjectivation and the discursive framework of the securitization/victimization of refugees. Perhaps, a careful study of these voices and discourses early on could have helped to reflect on the consequences of emerging refugee regime as the issues related to the refugee protection emphasized above have remained problematic and embedded in contemporary refugee law and politics. For instance, Catherine Dauvergne sees the origins of the recent asylum crisis in the sheer number of people who fulfil the refugee convention criteria. As she writes '[t]he asylum crisis arises because there are many more people in the world entitled to asylum than Western industrialized states want to welcome as refugees' (Dauvergne 2016, 45). It is hard to disregard the similarity of this statement to the analysis of the concept of a refugee by Arendt, Kirchheimer and Holborn. In her recent article Nanda Oudejans claims that Arendt's understanding of refugee condition from the perspective of displacement should also prove critical for rethinking the position of refugees today. By showing that the legal discourse on refugees tend to understand refugee status as protection rather than asylum Oudejans explains the reason for limiting of protection

in case of mass arrivals through building camps and in general externalization of protection. However, understanding of the refugee as a person without a legally warranted place of their own gives reason to take the notion of place back into the account of asylum. Therefore, turning to the concept of asylum understood by Arendt as an own place warranting access to rights could result in that '[i]n claiming asylum, the refugee not only claims protection, as is commonly believed but, above all, claims a legal place of his own where protection can be enjoyed again' (Oudejans 2020, 536). Such reconceptualization of the legal discourse on refugees by incorporating Arendt's thought could, according to Oudejans, help to clarify the normative scope of asylum and in consequence allow for thinking differently about the condition of refugees and their need for a place and in consequence rights (Oudejans 2020, 536).

What can be also noticed in the analysed work is the awareness of the scholars of the role of ideology and politics that affect the preferences of states as to which groups of refugees they are willing to admit and protect. Combined with recent work on coloniality and racialization of asylum and refugee protection as well as its intimate links with borders and the control of movement these perspectives help to understand better the contingency of contemporary refugee protection. Such contingency is embedded in historical roots of asylum and refugee protection as primarily a mean of control (Behrman 2018) and as Lucy Mayblin (2017) writes, in approaches to slavery and its abolition, denial of equality of races as well as exclusion of the citizens of decolonized countries from the Refugee Convention in consequence of territorial clause initially written into it.

VI. CONCLUSIONS

This article took off as an attempt to provide an alternative to the contemporary legal discourse on refugees that is in a midst of a 'seemingly' irreconcilable conflict between the aim of states to control their borders to limit the amounts of asylum seekers and states' obligations deriving from the 1951 Refugee Convention and other human rights instruments. The purpose of this article was however not to analyse the effects of this conflict or subjectivities constructed through it but to show the refugees' discourse or understanding of law that is not abstract and homogenizing but rather stems from their personal experiences and translation of this experience into their legal writing. By adopting such perspective, the article contributes to the ongoing shift in migration research from the sole focus on economy, law or societal impact towards the imaginative and experiential aspects of migration (Schielke 2020, 111). Turning to migrant and refugee narratives allows for gaining deeper insight into the situatedness of law and its development in the context of asylum and mobility. There is a clear need for more accounts on refugee and migrant narratives in other spheres than the refugee scholarship (see for instance Cantat, Cook & Rajaram, forthcoming 2022) to challenge the homogenic state-dominated and colonial discourses on refugeeness and migration and counter them by showing instead multiplicity of perspectives on refugeeness and refugee protection.

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