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## The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?

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## The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?

Stephen Meili\*

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ARTICLE

THE CONSTITUTIONAL RIGHT TO ASYLUM: THE  
WAVE OF THE FUTURE IN INTERNATIONAL  
REFUGEE LAW?

*Stephen Meili\**

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*I. INTRODUCTION*

Domestic constitutions may be the best way to protect refugees in an era where the international refugee protection system has failed so miserably.<sup>1</sup> A system that was already in disrepair prior to the Syrian crisis of 2015-16 has only deteriorated since. Its inability to adequately protect approximately 22.5 million refugees around the world—the largest number since World War II—has been well documented.<sup>2</sup> These failings include, but are certainly not limited to, desperately underfunded humanitarian assistance programs, nearly universal disregard for the socioeconomic rights of refugees protected under international law, and inadequate and inconsistent refugee determination processes in various countries.<sup>3</sup> As a result, the world's refugees lack most of the legal, social, and economic guarantees to which they are entitled under international law.

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1. For a review of the critiques of the international refugee protection system, *see generally* ALEXANDER BETTS & PAUL COLLIER, *REFUGEE: RETHINKING REFUGEE POLICY IN A CHANGING WORLD* (2017).

2. *See Figures at a Glance*, UN HIGH COMMISSIONER FOR REFUGEES (“UNHCR”), (June 19, 2017), <http://www.unhcr.org/en-us/figures-at-a-glance.html>; *see also* Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 60 (2016); Lisebeth Guild, *Does the EU Need a European Migration and Protection Agency?* 28 INT’L J. OF REFUGEE L. 585, 586 (2016); *Global Trends: Forced Displacement in 2015*, UNHCR, p. 5 (2016), <http://www.unhcr.org/576408cd7>. Refugees are only a subset of the unprecedented sixty-five million displaced persons around the world. *Id.* Most people who are forced to flee their homes because of persecution, war, famine, or environmental disaster do not cross the border into another country. *See generally* BETTS & COLLIER, *supra* note 1.

3. BETTS & COLLIER, *supra* note 1, at 7-8. The authors note that contrary to popular belief, most refugees around the world live in urban areas rather than in camps, in the Middle East and sub-Saharan Africa rather than in Europe, and are often left unsupported by their host countries. *Id.* Under the Convention Relating to the Status of Refugees (“Refugee Convention”), refugees are entitled to the right to health care, education, employment, and other socioeconomic benefits, but these often go unfulfilled. *See generally* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]. The Refugee Convention was limited both temporally and geographically, applying only to refugees who had been displaced by World War II. *Id.* at art. I(A)(2). It was seen as a temporary measure to deal with that particular refugee crisis. Subsequent geopolitical events, such as the decolonization movement in Africa and the refugee migrations resulting from it, made it obvious that the world’s refugee problem was neither temporary nor confined to Europe. DEBORAH ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 2 n.1 (2014) (explaining the context of the creation of the Protocol). Hence, the Protocol Relating to the Status of Refugees (“1967 Protocol”) removed the temporal and geographic restrictions from the Refugee Convention. *See* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6233, 660 U.N.T.S. 267 [hereinafter *1967 Protocol*].

In this article I analyze the circumstances under which a constitutionalized right to asylum could assist refugees seeking relief from harm. This analysis will include an exploration of the emerging importance of the constitutionalization of asylum law in some parts of the world, primarily the Global South<sup>4</sup>, and how lawyers in other parts of the world, primarily Europe, might make better use of a constitutional right to asylum in protecting clients in the midst of large refugee migrations.<sup>5</sup> In making this argument, I will draw on the findings from my recent study of a case before the Constitutional Court of Ecuador, in which both domestic and transnational cause lawyers utilized the constitutional right to asylum to protect their clients.<sup>6</sup> For, as Rosalind Dixon and Tom Ginsburg have noted, constitutions are often aspirational statements of ideals or reflections of conflict between a state's political actors; whether they have any real meaning in democratic societies depends on whether they "promote greater democratic consciousness, debate, dialogue and

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4. The Global South is most easily understood as developing countries, what was formerly referred to as the "Third World." Caroline Levander & Walter Mignolo, *Introduction: The Global South and World Dis/Order*, 5 *Global South* 1, 2-4 (2011). It is thought of as "those parts of the world that have experienced the most political, social, and economic upheaval, and which have suffered the brunt of the greatest challenges, facing the world under globalization." Alfred J. López, *Preface & Acknowledgements*, 1 *Global South* v (2007). The descriptor refers to "cultures ranging from Africa, Central and Latin America, much of Asia, and even those 'Souths' within a larger perceived North, such as the U.S. South, the Caribbean, and Mediterranean Europe." *Id.*

5. "Constitutionalization" here refers to "a process through which [a] congress, a constitutional assembly, and national or international judges grant international human rights treaties constitutional rank." Manuel Eduardo Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Jus Commune*, in *TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA* 237 (Armin Von Bogdandy et al., eds., 2017). In some cases, this is accomplished through an explicit reference to a particular treaty in a national constitution. In other cases, it is accomplished through a more general reference to all international human rights instruments ratified or otherwise acceded to by a state. And still in other cases it involves adopting certain provisions from a particular human rights treaty rather than the entire treaty. *See id.* at 235-53; *see also* Stephen Meili, *The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador*, 31 *GEORGE IMMIGR. L. J.* 347, 348 n.5 (2017).

6. *See* Meili, *supra* note 5, at 349. Cause lawyering refers to lawyers who advocate on behalf of individual clients as well as larger causes. *See* STUART SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING* (2004). The Ecuador case study is an example of the liberal trend in asylum practices in Latin America over the past thirty years, which stands in contrast to the more restrictive refugee policies enacted in the Global North during the same period. *See* David Cantor, *Bucking the Trend? Liberalism and Illiberalism in Latin American Refugee Law and Policy*, in *A LIBERAL TIDE? IMMIGRATION AND ASYLUM LAW AND POLICY IN LATIN AMERICA* 185, 195 (David James Cantor et al., eds., 2015).

mobilization around issues of social, economic and political justice.”<sup>7</sup> In this article, I will explore the circumstances under which the constitutionalized right to asylum might help mobilize refugee lawyers to provide greater protection for their clients. In so doing, I mean to explore whether constitutional asylum, in Europe in particular, has any real meaning, or whether it is merely a series of words on a page.

At the outset, it is important to distinguish between constitutional asylum and typical statutory asylum law. In most cases, the latter is the result of a state incorporating into its domestic law the Convention Relating to the Status of Refugees (“Refugee Convention”), which limits asylum to those who can demonstrate a well-founded fear of persecution on account of at least one of the five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group.<sup>8</sup> Most of the 148 states party to the Refugee Convention or its Protocol Relating to the Status of Refugees (“1967 Protocol”) have developed administrative and civil court processes for adjudicating asylum claims under the Refugee Convention.<sup>9</sup> Constitutional asylum, on the other hand, is provided to asylum seekers under only thirty-five percent of the world’s national constitutions, and utilized far less frequently by asylum seekers and their advocates than protection under the Refugee Convention.<sup>10</sup> The

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7. Rosalind Dixon & Tom Ginsburg, *Comparative Constitutional Law in Latin America: An Introduction*, in *COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA* 1, 5 (Rosalind Dixon & Tom Ginsburg eds., 2017).

8. See Refugee Convention, *supra* note 3, art. I(A)(2) (“For the purposes of the present Convention, the term “refugee” shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

9. See *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR (Apr. 2015), <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>; see also Refugee Status Determination, UNHCR, <http://www.unhcr.org/en-us/refugee-status-determination.html> [<https://perma.cc/23EQ-48JZ>] (last visited Jan. 23, 2018).

10. See Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219, 1244 (2017). A constitutional right to asylum is significant for many reasons, especially that there is some question about whether such a right exists in international law. See, e.g., María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT’L J. OF REFUGEE L. 3 (2015). Article 14 of the non-binding Universal Declaration of Human Rights (“UDHR”) contains such a right, G.A. Res. 217 (III) A, art. 14 (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries

protection offered under these constitutions is generally broader than the five specific bases for protection enumerated in the Refugee Convention.<sup>11</sup> Nevertheless, and despite its potential for assisting refugees whose reasons for fleeing their homeland fall outside the scope of the Refugee Convention, the constitutional right to asylum has been utilized infrequently. Most asylum claims are decided under the Refugee Convention.<sup>12</sup> Thus, one of the two puzzles explored by this article is why constitutional asylum is not more frequently utilized by cause lawyers and other advocates for refugees.<sup>13</sup> The other puzzle concerns the circumstances under which constitutional asylum has been used effectively, and whether those are generalizable to other national contexts.

An emphasis on the constitutional right to asylum is particularly important in an era of growing nationalism, where state governments are becoming increasingly skeptical of globalization and other manifestations of what they and their constituents view as international pressure on domestic decision making. In such an environment, a constitutionalized right to asylum cannot be characterized as an imposition from an international body or treaty; rather, it is the law of the land. As such, it is less vulnerable to a

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asylum from persecution.”), but the Refugee Convention, *supra* note 3, which is a binding international treaty, does not. Rather, it sets out a definition of refugee status and lists the rights that attach once an individual meets that definition. However, Gil-Bazo concludes that it is a general principle of international law after considering its prevalence in a variety of international instruments and national constitutions.

11. Examples of the different ways that the right to asylum is phrased in various constitutions is discussed in Part V of this article, *infra*.

12. The other main category of relief for asylum seekers is subsidiary, also known as complementary protection, which is available to asylum seekers who fail to meet the definition of a refugee under the Refugee Convention but may be eligible for relief under human rights treaties not specifically designed to protect refugees, such as the Convention Against Torture, the Convention on the Rights of the Child, or the European Convention on Human Rights. See generally JANE MCADAM, COMPLIMENTARY PROTECTION UNDER INTERNATIONAL LAW (2007).

13. See Scheingold & Sarat, *supra* note 6. Sarat and Scheingold edited five volumes about cause lawyering between 1998 and 2008; see also Debra Schleef, *Book Review of Cause Lawyers and Social Movements*, 41 L. & SOC’Y REV. 503 (2007). See generally CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); THE WORLD CAUSE LAWYERS MAKE (Austin Sarat & Stuart Scheingold eds., 2005); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006); THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008).

nationalist critique than the application of international treaties that a particular state has ratified.

This article is organized as follows: Part II sets out its theoretical framework, with references to the relevant literature, which it intends to supplement. Part III discusses the exponential increase in the right to asylum in the world's constitutions over the past few decades. Part IV reviews an example from Latin America of the use of constitutionalized human rights law by cause lawyers in protecting refugees. Part V analyzes the possibility of a greater use of a constitutionalized right to asylum in Europe, specifically in France and Italy. Part VI explores the prospects for a more robust utilization of the constitutional right to asylum throughout the world. Part VII contains concluding remarks.

## II. THEORETICAL FRAMEWORK

The constitutionalized right to asylum is under-analyzed in the vast literature on refugee protection. Most legal scholarship on refugees understandably focuses on the principle source of international refugee protection, namely, the Refugee Convention.<sup>14</sup> As noted above, a person is recognized as a refugee under the Refugee Convention, and thus eligible for protection from the host state, if the person has a well-founded fear of persecution on account of specifically enumerated grounds.<sup>15</sup> A vast majority of the world's countries, including those who host most of the world's refugees, have ratified the Refugee Convention and have incorporated it into their domestic law, which means it can be enforced by domestic courts.<sup>16</sup>

Much of the scholarship on refugee law criticizes the Refugee Convention for a variety of reasons.<sup>17</sup> For one, because the definition

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14. See Refugee Convention, *supra* note 3. For a summary of this scholarship, see Kowalczyk and Versteeg, *supra* note 10, at 1223, nn.13 & 14. For an example of the overall analysis of the Refugee Convention, see GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (3d ed. 2007), and JAMES HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* (2d ed. 2014).

15. See Refugee Convention, *supra* note 3, art. I(A)(2).

16. See Stephen Meili, *Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom*, 48 VAND. J. TRANSNAT'L L. 123 (2015) (noting that one of the most important factors associated with human rights treaty effectiveness is incorporation into domestic law). See also *supra* note 9.

17. For a summary of these criticisms, see Kowalczyk & Versteeg, *supra* note 10, at 1223, nn.13 & 14.



of refugee under the Refugee Convention explicitly references those individually targeted for persecution, it does not include those who flee conditions of general harm or danger, including armed conflict or the effects of climate change.<sup>18</sup> Another common criticism of the Refugee Convention is that its terms are vague and undefined, leaving much room for interpretation by individual states that could be driven by political interests rather than a moral obligation to protect refugees.<sup>19</sup> Others fault the Refugee Convention for placing the onus of refugee protection on individual states, rather than on a more collective approach that would allow for burden-sharing among states.<sup>20</sup>

Until recently, very few scholars had addressed the constitutionalized right to asylum as an alternative to the Refugee Convention. This is not terribly surprising given that (1) the main source of protection for asylum seekers is the Refugee Convention, and (2) far fewer states have included the right to asylum in their constitutions than have ratified the Refugee Convention or 1967 Protocol.<sup>21</sup> But in part because of the criticisms of the Refugee Convention, a few scholars have turned their attention to the constitutionalized right to asylum as an alternative form of relief for refugees. For example, Lucas Kowalczyk and Mila Versteeg note that when the right to asylum is included in a state's constitution, as opposed to merely included in its statutory law, it is more difficult for the state to renege on its commitments to refugees as a result of regime change or shifts in popular sentiment.<sup>22</sup> Teresa Gil-Bazo

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18. *Id.*

19. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 14, at 9.

20. See, e.g., Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 408 (Gil Loescher & Laila Monahan eds., 1989); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

21. See *infra* p. 386.

22. Kowalczyk & Versteeg, *supra* note 10, at 1249. The authors, who have compiled a comprehensive database of the countries that have constitutionalized the right to asylum, note that over time there have been two distinct versions of the right to asylum in national constitutions: (1) a broad human right and (2) a more narrowly tailored ideological statement, which resulted in conditioning asylum on a shared ideology with the host state. *Id.* at 1260. Through quantitative analysis, the authors concluded that the adoption of a constitutional right to asylum is positively associated with several factors, including democracy, population (states with larger populations are more likely to adopt a constitutional right to asylum), legal system (common law countries are less likely to constitutionalize the right to asylum than countries with a socialist legal tradition), and the age of the state's population (a state with a more

argues that the right to asylum enshrined in national constitutions is broader than refugee status under the Refugee Convention and other international instruments, thus affording broader protection to those fleeing persecution and other forms of harm in their origin states.<sup>23</sup>

However, constitutional asylum is not without limits. For example, Kowalczyk and Versteeg point out that constitutions can be amended and judges can defer to executive will.<sup>24</sup> Lambert, Messineo, and Tiedemann argue that because countries such as France, Germany and Italy have chosen to adjudicate asylum claims almost exclusively according to the Refugee Convention, constitutional asylum in those countries has become virtually meaningless.<sup>25</sup> Moreover, in many cases, states include an “escape clause” in their constitutionalized right to asylum, allowing the right to be interpreted according to national law.<sup>26</sup> Moreover, in some situations constitutional asylum is based on the same limited criteria as the Refugee Convention.<sup>27</sup>

Although the recent scholarship on the constitutionalized right to asylum is important for illuminating the motivations behind the creation of the right of asylum and for positioning it as a fundamental

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elderly population dependent on a younger work force is more likely to constitutionalize the right to asylum). Perhaps most significant for purposes of this article, Kowalczyk and Versteeg note that ratification of the Refugee Convention is negatively associated with constitutionalizing the right to asylum, suggesting that many countries view constitutional protections as a substitute, rather than a compliment, to international protections for refugees. *Id.* at 1284-85.

23. See Gil-Bazo, *supra* note 10, at 4 (“the conceptual distinction [between asylum and refugee status under the Refugee Convention] remains soundly established in law and practice”).

24. Kowalczyk & Versteeg, *supra* note 10, at 1249-50.

25. See Hélène Lambert et al., *Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?*, 27 REFUGEE SURV. Q., no. 3, 2008, at 16, 17.

26. My thanks to my University of Minnesota colleague Chris Roberts for this term. For example, the Portuguese Constitution states, in relevant part, “The status of political refugees shall be defined by law.” CONSTITUTION OF THE PORTUGUESE REPUBLIC Apr. 25, 1974, art. 33(7). Similarly, the Polish Constitution states, in relevant part, “Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute.” THE CONSTITUTION OF THE REPUBLIC OF POLAND Apr. 2, 1997, art. 56(1).

27. For example, the Constitution of Hungary states, in relevant part, “Hungary shall grant asylum to all non-Hungarian citizens as requested if they are being persecuted or have a well-founded fear of persecution in their native countries or in the countries of their usual residence due to their racial or national identities, affiliation to a particular social group, or to their religious or political persuasions, unless they receive protection from their countries of origin or any other country.” MAGYARORSÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY.

principle of international law, it does not address whether the constitutionalized right to asylum makes any difference to refugees seeking protection from persecution.<sup>28</sup> That is, we have no idea whether a constitutional right to asylum in a particular country of refuge makes it any more or less likely that a given asylum seeker will be granted asylum. Similarly, we do not know whether a constitutionalized right to asylum makes a particular country's asylum adjudication system more or less favorably disposed toward asylum seekers.

These are the questions that this article begins to address. That is, under what circumstances is a constitutionalized right to asylum likely to help asylum seekers obtain protection. In so doing, this article contributes to three areas of scholarship. The first, most obviously, is the burgeoning literature on the constitutional right to asylum, which is a subset of the literature on the expansion of the constitutionalization of human rights law more generally.<sup>29</sup> Secondly, because the success of a constitutionalized right to asylum law depends in large part on the lawyers who utilize it, this article will contribute to scholarship on cause lawyering.<sup>30</sup> Third, the article will contribute to the literature on the effectiveness of human rights treaties, given that the constitutionalization of human rights law has been recognized as one of the factors positively associated with improved state behavior.<sup>31</sup>

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28. Kowalczyk and Versteeg acknowledge this explicitly. Kowalczyk & Versteeg, *supra* note 10, at 1284 (“Although we do not provide an answer to the question whether the right to asylum is effective, the apparently self-serving motivations for including asylum rights are not necessarily detrimental to asylum-seekers nor do they necessarily undermine the right”).

29. For a review of recent literature on the constitutionalization of human rights law, see Guilherme Leite Gonçalves & Sérgio Costa, *The Global Constitutionalization of Human Rights: Overcoming Contemporary Injustices or Juridifying Old Asymmetries?*, CURRENT SOC., Mar. 2016, at 311.

30. The cause lawyering literature has been criticized as being under-theorized, focusing more on descriptive narratives of various cause lawyers, rather than on any overarching analysis of cause lawyering. See Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 AN. REV. L. & SOC. SCI., Nov. 2014, at 301; see also Christos Boukalas *Politics as Legal Action/ Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering*, 22 SOC. & LEGAL STUD., Sept. 2013, at 395; see also Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CAL. L. REV. 575, 579 (2005).

31. Several scholars have identified constitutionalization of human rights law as a mechanism that heightens the effectiveness of human rights treaties. See, e.g., Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 64-65 (2013) (“we find that . . . international [human rights] instruments have a powerful coordinating effect on the contents of national constitutions . . . This finding also suggests that international law is most effective when it works with domestic

### III. THE GROWTH IN THE CONSTITUTIONALIZED RIGHT TO ASYLUM

The expanding right to asylum in national constitutions around the world is a part of the exponential growth in constitutionalized human rights law in general over the past seventy years.<sup>32</sup> In 1950, only eleven percent of constitutions contained a right to asylum.<sup>33</sup> In most cases, the right was created in the immediate aftermath of World War II and was thus influenced by two geopolitical factors: in cases such as France and Italy, the right to asylum was included in the state constitution as a token of gratitude toward those states that had accepted French and Italian refugees before and during World War II;<sup>34</sup> and in Soviet Bloc countries such as Poland, the right to asylum was conditioned on shared ideologies.<sup>35</sup>

By 2017, the percentage of countries with constitutions containing a right to asylum had risen to thirty-five percent, with the

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institutions, including constitutional structure.”); see also Wayne Sandholtz, *Treaties, Constitutions and Courts: The Critical Combination*, in *THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE* 37-38 (Alison Brysk ed., 2013) (finding that “the constitutional status of treaty law and the independence of courts influence the level of human rights protections” within a given country); Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1976-1996): Are They More than Mere ‘Window Dressing?’*, Mar. 2002, 55 POL. RES. Q., at 111 (finding a statistically significant relationship between positive human rights outcomes and the constitutional rights to a public trial and to a fair trial). For a general summary of the literature on the effectiveness of human rights treaties, see generally Kevin L. Cope & Cosette D. Creamer, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT’L L. 459 (2016), Alison Brysk & Arturo Jimenez-Bacardi, *The Politics of the Globalization of Law*, in *THE POLITICS OF THE GLOBALIZATION OF LAW*, *supra* note 31, at 1, Emilie M. Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 WORLD POL. 360 (2009), RYAN GOODMAN AND DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013); Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT’L L. & POL. 97 (2012); Oona Hathaway, *The Promise and Limits of the International Law of Torture*, in *TORTURE: A COLLECTION* 199, 234 (Sanford Levinson ed., 2004).

32. The number of rights in national constitutions and the number of countries with such rights in their constitutions have steadily increased since the mid-20th century. See Elkins et al., *supra* note 31, at 63. As Sandholtz notes, “by the 21st century, constitutional protection of human rights had become the global standard.” Sandholtz, *supra* note 31, at 31.

33. Kowalczyk & Versteeg, *supra* note 10, at 1260-61.

34. See Lambert et al., *supra* note 25, at 17-18, 21-22.

35. Kowalczyk & Versteeg, *supra* note 10, at 1311. One example of such an ideologically-framed constitutional right to asylum is contained in the 1952 version of the Polish Constitution: “The Polish People’s Republic grants asylum to citizens of foreign countries persecuted for defending the interests of the working people, for fighting for social progress, for activity in defence of peace, for fighting for national liberation or for scientific activity.” CONSTITUTION OF THE POLISH PEOPLE’S REPUBLIC, July 22, 1952, art. 75.

greatest increase occurring during the 1990s.<sup>36</sup> As Kowalczyk and Versteeg note, most of these constitutional provisions, as well as the provisions initially included in domestic constitutions after World War II, frame asylum as a human right available to all displaced people rather than as a limited right available only to those persons who can demonstrate a well-founded fear of persecution on account of one or more of the five grounds enumerated in the Refugee Convention.<sup>37</sup> Thus, under most versions of a constitutionalized right to asylum, the right is available to non-citizens who have been denied their human rights in their host countries. In this way, the constitutionalized right to asylum mirrors what has come to be known as the human rights approach to asylum law, which links asylum to the denial of human rights protections in one's home country or territory, rather than limiting it to persecution for one of the five grounds enumerated in the Refugee Convention.<sup>38</sup> As such, the constitutionalized right to asylum provides an especially potent form of protection for refugees. As noted above, such domestic constitutional protection may be particularly important in an era of populist nationalism that is accompanied by hostility toward globalized norms and standards.

#### *IV. CONSTITUTIONALIZED ASYLUM'S POTENTIAL REALIZED: PROTECTION FOR COLOMBIAN REFUGEES IN ECUADOR*

The potential for strategically utilized constitutional asylum was realized in recent litigation challenging Presidential Decree No. 1182 ("Decree 1182")<sup>39</sup>, which limited the rights of asylum seekers in Ecuador, most of whom had crossed the border from neighboring

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36. Kowalczyk & Versteeg, *supra* note 10, at 1219.

37. See Refugee Convention, *supra* note 3, art. I(A)(2). Kowalczyk and Versteeg also note the trend since the Cold War era away from limiting the right to asylum to persons whose ideologies were consistent with the host country. Kowalczyk & Versteeg, *supra* note 10, at 1256.

38. See Hathaway & Foster, *supra* note 14, at 194; see also Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 143 (2002) (finding that the human rights approach assists both the refugee law and human rights law regimes). The human rights approach manifests itself most prominently through domestic court interpretation of undefined terms in the Refugee Convention, such as "being persecuted." To proponents of this approach, it is appropriate and logical to rely on human rights treaties because these treaties reflect a global consensus about the scope of persecutory harms. See Hathaway & Foster, *supra* note 14, at 194.

39. Decreto Presidencial No. 1182 (June 19, 2012), Registro Oficial 727 (Ecuador).

Colombia to escape the decades-long armed conflict in that country.<sup>40</sup> Decree 1182, issued in 2012 by then-President Rafael Correa, drastically reduced the amount of time to apply for asylum and to appeal an initial decision denying an asylum application.<sup>41</sup> It also effectively rescinded Ecuador's adherence to the Cartagena Declaration of 1984, which had broadened the protective scope of asylum to include those fleeing armed conflict such as the one in Colombia.<sup>42</sup> A coalition of lawyers and NGOs brought a lawsuit against Decree 1182 before the Constitutional Court of Ecuador.<sup>43</sup> They invoked Ecuador's 2008 Constitution, which was the first version of the Ecuadoran Constitution to include an explicit right to asylum,<sup>44</sup> as well as a prohibition against discriminating against persons on the basis of several protected classifications including nationality and migratory status.<sup>45</sup> In addition to their legal

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40. See Meili, *supra* note 5 at 349.

41. *Id.* at 349.

42. *Id.* The restrictions of Presidential Decree No. 1182 ("Decree 1182") on the rights of asylum seekers had their intended effect: both the number of asylum applications and the asylum grant rate declined dramatically following its announcement. *Id.* at 371.

43. The cohort of legal organizations that challenged Decree 1182 included those operating both domestically and transnationally such as Asylum Access Ecuador and the Law Clinic at the Universidad de San Francisco, both based in Quito, as well as Human Rights Watch and the Human Rights and Atrocity Prevention Clinic at the Benjamin N. Cardozo School of Law in New York.

44. Article 41 of the Ecuadoran Constitution states "[The] rights to asylum and sanctuary are recognized, in accordance with the law and international human rights instruments." CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 41. It is noteworthy that this provision guarantees the right to asylum and not merely the right to *seek* asylum, which is contained in human rights instruments such as the UDHR and the American Convention on Human Rights ("ACHR"). See G.A. Res. 217 (III) A, *supra* note 10, art. 14; Organization of American States, American Convention on Human Rights art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The inclusiveness of this provision in the Ecuadoran Constitution incorporates instruments such as the Cartagena Declaration, which, broadens the scope of the right to asylum to include persons fleeing generalized violence. Ecuador is only one of many Latin American countries that recognize the right to asylum in its constitution. See Maria-Teresa Gil-Bazo, *Asylum in the Practice of Latin American and African States* (UNHCR Research Paper Series, No. 249, 2013).

45. Article 11(2) of the Ecuadoran Constitution states:

All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging, *place of birth*, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, *migratory status*, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.

arguments, the lawyers made reference to Ecuador's reputation as sympathetic to refugees in their public relations campaign associated with the litigation.<sup>46</sup>

In August 2014, the Ecuadoran Constitutional Court issued a decision striking down Decree 1182's limitations on the right to asylum.<sup>47</sup> The decision reinstated the previous deadlines for filing asylum applications and appeals on the grounds that the shorter time limits imposed by Decree 1182 discriminated against asylum seekers when compared to other persons applying for various benefits under Ecuadoran law.<sup>48</sup> And the Court reinstated the Cartagena Declaration's broad definition of a refugee on the grounds that (1) the Declaration had been incorporated into Ecuador's Constitution and (2) restricting asylum to the five grounds enumerated in the Refugee Convention violates the principle of *non-refoulement*, a principle specifically enshrined in the Ecuadoran Constitution.<sup>49</sup>

From a human rights perspective, the Constitutional Court's decision was noteworthy for three reasons. First, it demonstrated the Court's willingness to reject the executive's attempt to restrict the human rights of asylum seekers. In a country with a history of a non-independent judiciary, this is no small feat.<sup>50</sup> Second, the decision

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The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.

CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 11(2) (emphases added).

46. See Richard E. Bilsborrow, *The Living Conditions of Refugees, Asylum Seekers and Other Colombians in Ecuador: Millennium Development Indicators and Coping Behaviour*, 5 (Oct. 2006), <http://www.unhcr.org/45adf2d82.pdf> [<https://perma.cc/JJ2M-AF7C>] (archived Dec. 21, 2017); see also Ian McGrath, *New Issues in Refugee Research: Enhanced Refugee Registration and Human Security in Northern Ecuador* 3 (UNHCR Research Paper Series, No. 198, 2011), <http://www.unhcr.org/4d35556e9.html> ("Despite its security and development challenges, Ecuador is often viewed as a model of refugee integration because of its open borders, generous rights entitlements and lack of encampment policies."). See Meili, *supra* note 5, at 374-75.

47. Sentencia N. 002-14-Sin-CC, Case No.: 0056-12-IN y 0003-12-IA, August 14, 2014. [hereinafter "Const. Court decision"].

48. *Id.* See also, Meili, *supra* note 5, at 378.

49. See Meili, *supra* note 5, at 376-79. The Constitutional Court's decision was not, however, an unvarnished victory for the lawyers who filed the case. The Court rejected their argument that Decree 1182 was an unconstitutional exercise of executive power. *Id.* As a result, the President retains the ability to rule on important matters of constitutional law by executive fiat, rather than through the legislative process.

50. In studies conducted in 2016 by the World Justice Project, Ecuador ranked 91st out of 113 countries in the world and 25th out of thirty in Latin America and the Caribbean in adherence to the rule of law and scored below average on most measures of judicial independence, including corruption within the judiciary and effective judicial limits on

invoked international human rights law and instruments that had been made part of the 2008 Constitution. In this way, the Ecuadoran Constitution, and the human rights law it incorporates, was a mechanism for the mobilization of civil society to achieve positive rights outcomes. That mobilization is likely to have a lasting impact, as it improved the reputations and strengthened the credibility of the refugee advocates in the eyes of the government.<sup>51</sup> Third, the decision – as well as the litigation leading to it – suggested several factors that appear to have influenced the degree to which cause lawyers and NGOs were able to utilize constitutionalized human rights law to achieve their objectives. These factors include the following: (1) the presence of domestic cause lawyers who challenge state practices on the grounds that they violate constitutionalized human rights norms; (2) the presence of transnational cause lawyers who challenge state practices by referencing international human rights law that has been incorporated into the domestic constitution, either through reference to international instruments or to provisions derived from such instruments; (3) the country's global reputation for protecting human rights, which allows principled agents to engage in shaming tactics; and (4) the extent to which the rights-based challenge advanced by the cause lawyers threatens key state actors.<sup>52</sup> In the next section of this article, this article will analyze whether these factors are generalizable to other countries that are experiencing an increase in refugee migration.

In sum, the successful utilization of the constitutionalized right to asylum in Ecuador is a concrete example of the impact such a right can have on state actors. Were it not for that constitutional provision, and more importantly, the use of that right in strategic litigation by lawyers operating both domestically and transnationally, the right to asylum in Ecuador could continue to be severely limited. It remains to be seen whether the Ecuador case is generalizable to other regions currently experiencing large refugee flows. That is, can the utilization of the constitutionalized right to asylum by lawyers and other

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government power. *Rule of Law Index: 2016*, WORLD JUSTICE PROJECT, at 21, 23, [https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf) [http://perma.cc/FQA9-YH3M] (last visited Dec. 21, 2017). In the latter category, it ranked 103rd out of 113. *Id.* at 29; accord Santiago Basabe-Serrano, *Determinants of the Quality of Justice in Latin America: Comparative Analysis of the Ecuadorian Case from a Sub-National Perspective*, 35 JUST. SYS. J., no. 1, 2014, at 104, 108.

51. See Meili, *supra* note 5, at 378.

52. *Id.* at 384-85.



advocates impact the behavior of state actors on a larger geographic scale? An obvious case for investigation of this question is the current refugee situation in Europe. Thus, we now turn to the question of whether constitutional asylum could provide a means of expanding refugee protection to those from Syria and elsewhere seeking refuge in Europe.

### V. THE CONSTITUTIONAL RIGHT TO ASYLUM IN EUROPE

As Hélène Lambert observed, “Europe has the most advanced regional [refugee] protection regime in the world.”<sup>53</sup> Indeed, asylum law in Europe operates as a regional project, most notably through the development of the Common European Asylum System (“CEAS”), which was designed to homogenize the procedures and substance of asylum law across EU Member States.<sup>54</sup> Moreover, EU Member States are bound by the European Convention on Human Rights, which provides protection to refugees beyond that afforded under the Refugee Convention.<sup>55</sup> The rights afforded by these international instruments are contested mainly at the regional level through the European Court of Human Rights and the Court of Justice of the European Union, which have created a significant body of precedent. Several NGOs in Europe advocate for the rights of refugees at both the regional and national levels.<sup>56</sup> Indeed, one could argue there exists a separate refugee protection regime for Europe alone.

As a result of this regional emphasis, some commentators have noted that constitutional asylum at the national level in Europe is

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53. Hélène Lambert, *Introduction: European Refugee Law and Transnational Emulation*, in *THE GLOBAL REACH OF EUROPEAN REFUGEE LAW* 1 (Jane McAdam ed., 2013).

54. See Fullerton, *supra* note 2, at 64-73.

55. For example, article 8 of the European Convention on Human Rights (“ECHR”) protects the right to family life, which many lawyers have argued prohibits EU Member States from deporting non-citizens who have established a family life in that Member State, even if they do not meet the Refugee Convention’s definition of a “refugee.” Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 8, 213 U.N.T.S. 222; see also Meili, *supra* note 16.

56. Ninety-eight NGOs operating in forty countries comprise the European Council on Refugees and Exiles (“ECRE”), a pan-European alliance formed to protect and advance the rights of refugees, asylum seekers and displaced persons. *Mission Statement*, ECRE, <https://www.ecre.org/mission-statement/> [<https://perma.cc/2PHC-RTU6>] (last visited Dec. 21, 2017). According to its mission statement, ECRE’s purpose is “to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law.” *Id.*

moribund.<sup>57</sup> However, Gil-Bazo argues that the increased availability of the right to asylum under constitutions around the world suggests that asylum constitutes a general principle of international law that is legally binding when interpreting the nature and scope of states' obligations towards individuals seeking protection.<sup>58</sup> Moreover, asylum is broader than refugee status and, as the Court of Justice of the European Union has noted, "Member States may grant a right of asylum under their national law to a person who is excluded from refugee status."<sup>59</sup>

In addition, the European regional asylum model has come under increasing criticism for its failure to adequately protect refugees in the so-called "refugee crisis" that began when large numbers of Syrians started arriving in various EU Member States in 2015.<sup>60</sup> Some of the criticisms lodged at the CEAS include (1) that it encourages a "race to the bottom" by destination countries who do not wish to be seen as having more generous asylum standards,<sup>61</sup> (2) that it has failed to agree on a responsibility-sharing arrangement among EU Member States, leaving states of first entry, such as Italy and Greece, with a disproportionate share of the burden of asylum seekers,<sup>62</sup> and (3) that it has resulted in Member States adopting policies intended to make their countries less attractive to asylum-seekers.<sup>63</sup> Thus, it is worth exploring whether the regional model for refugee protection in the European Union might be buttressed and improved by greater emphasis on constitutional asylum law at the national level. Such an

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57. See Lambert et al., *supra* note 25 (arguing that although the French, Italian, and German constitutions contain a right to asylum, international obligations such as the Refugee Convention and commitments under EU law have rendered such constitutional provisions redundant and virtually obsolete).

58. See Gil-Bazo, *supra* note 10, at 5 (citing Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] EC I-10979). In the European context in particular, Gil-Bazo argues that asylum is an enforceable right given its inclusion in the EU Charter of Fundamental Rights. See María-Teresa Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*, REFUGEE STUD. Q., Jan. 2008, at 33.

59. Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] EC I-10979 ¶ 121; see also Gil-Bazo, *supra* note 10, at 2.

60. See generally NATASHA ZAUN, EU ASYLUM POLICIES (2017).

61. See Elspeth Guild, *Does the EU Need a European Migration and Protection Agency?* 28 INT'L J. REF. L. 585, 600 (2016); see also Júlia Mink, *EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment*, 14 EUR. J. MIGRATION & L. (2012), at 119, 121-24, 148-49; ANNA MRATSKOWSKI, ASYLUM RELATED ORGANISATIONS IN EUROPE 268-69 (2017).

62. ZAUN, *supra* note 60, at 254.

63. *Id.* at 256.

emphasis might provide a work-around the limitations of the Refugee Convention while still providing the durable solution of asylum law (i.e., a pathway to citizenship).

#### *A. The Right to Asylum in European Constitutions*

The constitutions of slightly less than half of the EU Member States contain the right to asylum, though it is articulated slightly differently in each constitution.<sup>64</sup> For example, in establishing the right to asylum, the Hungarian Constitution mirrors the Refugee Convention's definition of refugee.<sup>65</sup> The constitutions of the Czech Republic, Germany, and the Slovak Republic are more limited than the Refugee Convention, providing asylum only to those who were persecuted for their political opinions.<sup>66</sup> On the other hand, the constitutions of several other countries, most notably France and Italy, take a broader view, couching the right to asylum in terms of the violation of fundamental rights and freedoms.<sup>67</sup> Moreover, Italy does not require a showing of individualized persecution as a prerequisite for asylum, rather, it is presumably enough that the applicant has experienced some kind of serious harm in their native state.<sup>68</sup> This would seem to open the door to asylum for those fleeing armed conflict, generalized violence, and the ravages of climate change.

One of the most prominent and significant features of the constitutionalized right to asylum in Europe is the way that most states link its implementation to the state's domestic law. For example, the Italian Constitution states that qualifying "foreigners" have a "right to asylum in [Italy] in accordance with the provisions of

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64. The EU Member States with constitutions containing a right to asylum are Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Poland, Portugal, the Russia Federation, Romania, Serbia, Slovakia, Slovenia, and Spain. See Kowalczyk & Versteeg, *supra* note 10, at App. A. Although the Greek Constitution does not contain a right to asylum per se, it does prohibit the extradition of freedom fighters. See 2001 SYNTAGMA [SYN.][CONSTITUTION] 5 (Greece).

65. See MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNYE.

66. See Ústavní zákon č. 43/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic]; GRUNDGESETZ [GG] [BASIC GERMAN LAW], art. 16a, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [<https://perma.cc/NC7F-NTUT>] (last visited Dec. 21, 2017); CONSTITUTION OF THE SLOVAK REPUBLIC Oct. 1, 1992, art. 53.

67. See 1958 CONST. art. 53-1 (Fr.); Art. 10 Costituzione [Cost.] (It.). The texts of these constitutional provisions are discussed in more detail later in this article.

68. See Art. 10 Costituzione [Cost.] (It.).

law.” Similarly, the Bulgarian Constitution states that “the conditions and procedures for granting asylum are established by law.”<sup>69</sup> These “escape clauses”<sup>70</sup> are significant because they enable countries to scale back what might otherwise be a broad conception of asylum under international norms to a narrower form of relief in accordance with domestic law. In those countries which have incorporated the Refugee Convention into their domestic law, this could mean limiting constitutional asylum to those who meet the Refugee Convention’s definition of a refugee, meaning those who can show individual persecution on account of one or more of the five enumerated grounds. It also means that the grounds for asylum can change much more rapidly, such as through the legislative process, than through the more complicated and difficult constitutional amendment process. And finally, as in the case of Italy, failure of the legislature to enact implementing legislation can leave the constitutional right to asylum moribund.<sup>71</sup> In short, these escape clauses render constitutional asylum, at best, no more powerful than other national law, and, at worst, virtually meaningless.

Figure 1 summarizes the key features of the asylum provisions in the Constitutions of EU Member States. It indicates the grounds for asylum, meaning whether they are more limited than, equivalent to, or broader than the Refugee Convention, whether it is necessary to demonstrate persecution in order to receive asylum, and whether the constitution contains an “escape clause” linking the right to asylum to domestic law.

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69. CONSTITUTION OF THE REPUBLIC OF BULGARIA July 12, 1991, art. 27.

70. See *supra* note 26.

71. See Lambert et al., *supra* note 25, at 24-25 (noting that the lack of domestic legislation implementing the right to asylum in the Italian Constitution has resulted in it being applied “very marginally” in comparison to refugee status determination pursuant to the Refugee Convention, which was incorporated into Italian domestic law through implementing legislation passed in 1990).

**Figure 1: Comparison of Key Features of Constitutional Asylum in EU Member States**

| <b>Country</b> | <b>Basis for asylum</b>                           | <b>Persecution Required</b> | <b>Domestic Law “Escape Clause”</b> |
|----------------|---|-----------------------------|-------------------------------------|
| Bulgaria       | Internationally recognized rights and freedoms    | Yes                         | Yes                                 |
| Czech Republic | Political rights and freedoms                     | Yes                         | No                                  |
| France         | Pursuit of freedom or other grounds               | Yes                         | No                                  |
| Germany        | Political grounds                                 | Yes                         | Yes                                 |
| Hungary        | Refugee Convention grounds                        | Yes                         | No                                  |
| Italy          | Democratic freedoms                               | No                          | Yes                                 |
| Poland         | In accordance with international agreements       | Yes                         | Yes                                 |
| Portugal       | Individual freedoms and rights                    | Yes                         | Yes                                 |
| Serbia         | Refugee Convention grounds, plus gender, language | Yes                         | Yes                                 |
| Slovakia       | Political rights and liberties                    | Yes                         | Yes                                 |

|          |  |     |     |
|----------|--|-----|-----|
| Slovenia | Human rights and basic liberties         | Yes | Yes |
| Spain    | Refugee Convention Grounds <sup>72</sup> | Yes | Yes |

Figure 1 paints a rather bleak picture of the potential for constitutional asylum to make a difference for refugees who manage to get to the European Union. Except for Italy, all of the constitutions require an asylum seeker to demonstrate that she or he was individually persecuted, which apparently rules out broader, human rights based claims for relief. Moreover, nearly all of those constitutions, with the exception of those in the Czech Republic, France, and Hungary, contain an “escape clause” tying the determination of asylum to domestic law and requiring some form of implementing legislation to enforce it. Of those three countries, only France contains a broad, human rights based conception of asylum status; it grants asylum to “any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds.”<sup>73</sup> Hungary limits asylum to those who are persecuted on the same five grounds enumerated in the Refugee Convention.<sup>74</sup> The Czech Constitution allows for a grant of asylum “to aliens who are being persecuted for the assertion of their political rights and freedoms.”<sup>75</sup> While the assertion of political rights and freedoms may be somewhat broader than the expression of a political opinion (one of the five Refugee Convention grounds), it is nevertheless limited to *political*, rather than economic or social rights and freedoms. Notably,

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72. Section 13(4) of the Spanish Constitution recognizes the right to asylum but says nothing as to its scope. *See* CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 13(4), Dec. 29, 1978. However, domestic legislation restricted constitutional asylum to those who meet Refugee Convention’s definition of a refugee. *See* Implementing Decree of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum, amended by Law 9/1994 (May 16), Section 1, Article 5(1) Law 9/1994 of 19 May 1994; *see also* Constitution of Spain Section 13(4).

73. *See* 1958 CONST. art. 53-1 (Fr.).

74. *See* MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNYE.

75. *See* Ústavní zákon č. 43/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic].

the French Constitution contains no such limitation on the basis for seeking asylum.

Thus, with the possible exception of France, these limitations suggest that constitutional asylum has had a negligible impact on the treatment of refugees in those European states where it exists. Although a quantitative analysis of the statistical significance of constitutional asylum is beyond the scope of this article, data relevant to the asylum grant rates in EU Member States offers at least some insight into this question. Figure 2 compares the asylum grant rates over the past decade in EU Member States with and without a constitutionalized right to asylum.<sup>76</sup> It includes the number of asylum applications considered by each country during that period, the number of favorable decisions by the tribunal of first instance, and the percentage of the applications that were granted.<sup>77</sup>

**Figure 2: Asylum Recognition Rates in the European Union by Country, 2008-2016**<sup>78</sup>

| <b>Countries with Constitutional Right to Asylum</b>           | <b>Total Applications Decided</b> | <b>Total Positive Decisions</b> | <b>Percentage Approved</b> |
|--|-----------------------------------|---------------------------------|----------------------------|
| Bulgaria   | 22,540                            | 17,470                          | 77.5                       |
| Czech Republic   | 8,435                             | 2,600                           | 30.8                       |
| France   | 502,330                           | 103,460                         | 20.6                       |
| Germany  | 1,245,025                         | 690,410                         | 55.5                       |
| Hungary  | 24,265                            | 3,355                           | 13.8                       |
| Italy  | 325,985                           | 152,290                         | 46.7                       |
| Poland   | 32,540                            | 9,150                           | 28.1                       |
| Portugal   | 2,175                             | 1,100                           | 50.6                       |
| Serbia   |                                   |                                 |                            |
| Slovak Republic  | 2,390                             | 1,195                           | 50.0                       |
| Slovenia   | 1,525                             | 400                             | 26.2                       |
| Spain  | 37,910                            | 12,745                          | 33.6                       |
| <b>Total for Countries with Constitutional Right to Asylum</b> | <b>2,205,120</b>                  | <b>994,175</b>                  | <b>45.1</b>                |

76. The data in Figure 2 reflect the first instance grant rates for three types of relief typically sought by asylum seekers: (1) asylum under the Refugee Convention; (2) subsidiary, or complementary, protection; and (3) humanitarian asylum, which is occasionally granted in some countries for applicants unable to meet the requirements of the first two categories, but who present compelling cases for protection nonetheless, usually related to the applicant's health or age.

77. Figure 2 does not include figures from appellate decisions; those figures were not available for EU Member States during this period of time.

78. *Asylum Recognition Rates in the EU/EFTA by Country, 2008-2016*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2016> [https://perma.cc/7RX7-EJHH] (last visited Dec. 21, 2017).

| Countries without constitutional right to asylum                  | Total Applications Decided | Total Positive Decisions | Percentage Approved |
|---|----------------------------|--------------------------|---------------------|
| Austria   | 160,055                    | 76,180                   | 47.6                |
| Belgium   | 176,640                    | 60,415                   | 34.2                |
| Denmark   | 52,300                     | 31,735                   | 60.7                |
| Estonia   | 670                        | 285                      | 42.5                |
| Finland   | 44,560                     | 17,500                   | 39.3                |
| Iceland   | 1,160                      | 230                      | 19.8                |
| Ireland   | 15,700                     | 1,990                    | 12.7                |
| Greece  | 114,630                    | 9,815                    | 8.6                 |
| Latvia  | 955                        | 290                      | 30.4                |
| Lithuania   | 1,955                      | 605                      | 30.9                |
| Netherlands   | 155,895                    | 90,040                   | 57.8                |
| Romania   | 9,980                      | 3,540                    | 35.5                |
| Switzerland   | 147,435                    | 78,390                   | 53.2                |
| Norway  | 107,935                    | 51,765                   | 48.0                |
| Sweden  | 365,250                    | 198,130                  | 54.2                |
| UK  | 244,460                    | 79,630                   | 32.6                |
| <i>Total For Countries without Constitutional Right to Asylum</i> | <i>1,599,580</i>           | <i>700,540</i>           | <i>43.6</i>         |

As Figure 2 shows, the average annual grant rate from 2008 to 2016 of the EU Member States with constitutions containing a right to asylum was 45.3% compared to a grant rate of 43.6% in those countries without such a constitutional right.<sup>79</sup> Certainly, there are other factors contributing to a particular country's asylum grant rate, and there is no attempt here to assert a cause and effect relationship between a constitutional right to asylum and a country's grant rate. Nevertheless, these figures suggest that the constitutional right to asylum is not having a demonstrable impact on asylum seekers' ability to obtain asylum in those countries where it exists.

This conclusion is buttressed by anecdotal references to specific national policies and grant rates. For example, the country with perhaps the most restrictive response to the Syrian refugee crisis is Hungary, which closed its border with Serbia in 2015 and whose policies have been the subject of challenges to the European Court of Human Rights.<sup>80</sup> Hungary, as noted above, has a constitutional right to asylum, but its grant rate over the past decade was 13.9%, among the lowest in the European Union during that period. Similarly,

79. The annual figures for each country between 2008 and 2016 are included in Appendices A and B.

80. See *European Court of Human Rights on Hungary's Refugee Policy*, HUNGARIAN SPECTRUM, (Mar. 15, 2017), <http://hungarianspectrum.org/2017/03/15/european-court-of-human-rights-on-hungarys-refugee-policy/> [https://perma.cc/6JQX-UEKU] (archived Dec. 21, 2017).



France, which decided the second highest number of asylum applications during this period and has a constitutional right to asylum, granted only 20.6% of applications filed. On the other hand, Sweden, which is generally regarded as welcoming towards refugees from Syria and elsewhere over the years, has no constitutional right to asylum.<sup>81</sup> Its grant rate over the past decade was 54.2%, one of the highest in the European Union, and higher than every country with a constitutional right to asylum except for Bulgaria.

Although Figure 2 cannot be the basis for any conclusions regarding the actual impact of a constitutionalized right to asylum, it, together with the summary of constitutional provisions in Figure 1, reveals the *potential* for enhanced utilization of the constitutionalized right in two particular countries: France and Italy. As Figure 1 illustrates, the constitutional provisions providing a right to asylum in these countries provide an opening for increased protection for refugees. Both contain broad grounds for asylum, extending well beyond the confines of the Refugee Convention. Moreover, the Italian Constitution does not require a showing of individual persecution<sup>82</sup>, and the French Constitution does not contain an escape clause tying the administration of asylum decisions to domestic law. Furthermore, Figure 2 shows that France and Italy are two of the most frequent destinations for asylum seekers in Europe, with far more asylum applications acted upon over the past decade (502,000 and 326,000, respectively) than any other country in the European Union with the exception of Germany, which decided 1.245 million applications during that period. Thus, if constitutional asylum were to become a more common form of relief sought in these two countries, a larger number of asylum seekers could potentially benefit.<sup>83</sup> For this reason, this article now turns to a more in-depth analysis of the potential for increased utilization of constitutional asylum in France and Italy to see whether the factors which contributed to the effective use of constitutional asylum in Ecuador apply in these two countries.

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81. While Sweden's initial response to the influx of Syrians was welcoming, it has adopted more restrictive policies in response to public pressures. See Dan Bilefsky, *Sweden Toughens Rules for Refugees Seeking Asylum*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/22/world/europe/sweden-immigrant-restrictions.html>.

82. See *supra* Figure 1.

83. Such a benefit might be particularly noticeable in France, where the asylum grant rate over the past decade (20.6%) was near the bottom of the EU pack. See *supra* Figure 2.

*B. Prospects for Increased Utilization of Constitutional Asylum in  
France and Italy*

1. France

The right to asylum is prominent in the French Constitution. Indeed, the French Constitution of 1946, unique among the other EU Member State constitutions, includes the right to asylum in its Preamble, which sets forth the key values of the French Republic as it emerged from World War II and what it terms the “victory. . . over the regimes that had sought to enslave and degrade humanity.”

[The people of France] . . . further proclaim, as being especially necessary to our times, the political, economic and social principles enumerated below:

. . . . .

Any man persecuted in virtue of his actions in favour [sic] of liberty may claim the right of asylum upon the territories of the Republic.<sup>84</sup>

Underscoring its prominence in the Constitution, the right to asylum is listed second in the Preamble, immediately after the equal rights of women and men. This is not surprising given that France played a key role in accepting refugees from Germany both before and after World War II.<sup>85</sup> The inclusion of a constitutional right to asylum in the 1946 French Constitution is also noteworthy because that constitution was enacted prior to the Refugee Convention, which was the first time the international community as a whole recognized the need to address what it termed the “refugee problem” in Europe.<sup>86</sup>

Although certainly a bold statement regarding the importance of asylum in principle, in practical terms asylum as articulated in the Preamble is limited to those who had participated in some form in the cause for freedom. As such, it would presumably exclude those who had been passive victims of persecution and those who had been persecuted for reasons such as race, nationality, religion, or other

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84. 1946 CONST. pmbl. §§ 1-2, 4. The Preamble to the 1958 French Constitution (the most recent in that country) incorporates the principles enumerated in the 1946 Constitution. See 1958 CONST. pmbl.

85. 1946 CONST. pmbl. § 4.

86. The Preamble to the Refugee Convention expresses “the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.” Refugee Convention, *supra* note 3, at pmbl.

characteristics.<sup>87</sup> It would also exclude those fleeing non-individualized harm, such as armed conflict or climate change. Accordingly, one could interpret this statement of asylum as more limited than that the five grounds covered in the Refugee Convention.

What makes the French constitutional right to asylum more intriguing as a potential additional source of relief, however, are the amendments to 1958 French Constitution, the most recent version. Article 53-1 of the 1958 Constitution was the first time the constitutional right to asylum appeared in the substantive articles of French Constitution. Although that provision mirrors the Preamble in terms of requiring persecution for participating in the pursuit of freedom, it adds a catch-all phrase that includes anyone “who seeks the protection of France on other grounds.”<sup>88</sup> This is the broadest basis for the constitutional right to asylum in the European Union, allowing asylum claims based on a host of grounds, including, presumably, armed conflict and climate change, as well as gender, domestic violence, sexual preference, and other grounds not explicitly covered by the Refugee Convention.

Although the French courts and legislature have authorized the use of the constitutional right to asylum, there has been some debate about its scope vis-à-vis the Refugee Convention. In 1993, the French Constitutional Court held that the constitutional right to asylum in France is a fundamental right of a constitutional state, thus allowing it to be enforced by individuals and protected by the constitutional legal order.<sup>89</sup> This decision transformed constitutionalized asylum in France from words on paper to an enforceable right. Then, in 1998, France passed the Aliens Act, which deemed administrative authorities competent to decide asylum claims under both the Refugee Convention and the Constitution.<sup>90</sup> This “principle of unity” among the different bases for asylum extended to asylum procedure and to the legal status awarded to a successful asylum claim, regardless of the source of that claim (i.e., the Refugee Convention or the Constitution) but not necessarily to the standards for deciding such a

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87. Many of these bases for persecution would be addressed a few years later in the Refugee Convention. *See* Refugee Convention, *supra* note 3, art. I(A)(2).

88. 1958 CONST. Art. 53-1.

89. Conseil constitutionnel [CC] [Constitutional Court] decision No. 93-325, Aug. 12, 1993. For a more detailed description of this decision, see Lambert et al. *supra* note 25, at 19, n.11.

90. *See* Lambert et al., *supra* note 25, at 19-20.

claim.<sup>91</sup> As such, it would appear that the French Constitution allows asylum seekers to bring asylum claims on other bases than those permitted under the Refugee Convention.

Nevertheless, according to some commentators, the constitutional right to asylum has not been taken seriously in France, given that French authorities prioritize the Refugee Convention as the main source of protection for refugees.<sup>92</sup> One recent exception is a case in which the Administrative Tribunal in Nantes found that the denial of a short-term visa to a Syrian asylum seeker in order to apply for asylum in France violated the French Constitution's right to asylum.<sup>93</sup> This case suggests that while perhaps on life support, constitutional asylum is not completely obsolete in France, and may be poised for a revival. For as the next several paragraphs of this article indicate, when analyzed according to the factors which were conducive to the effective utilization of constitutionalized refugee law by cause lawyers in Ecuador, the political and legal context in France would seem to support a similar effort in that country.

As noted above, recent litigation over refugee rights in Ecuador revealed that the effective use of constitutionalized human rights law (including the right to asylum) in that case depended on several factors, including cause lawyers acting both domestically and transnationally to navigate the political and legal context within which the limitation on rights occurred, the willingness of the judiciary to act independently of the executive and legislative branches, and the state's reputation for welcoming refugees. As described below, these factors augur well for an increased utilization of constitutional asylum in France.

France scores very high on several rule of law factors, including an independent judiciary that is necessary to counteract political pressures regarding refugees and asylum-seekers in the current climate.<sup>94</sup> In the World Justice Project's Rule of Law Index for 2016,

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91. *See id.*

92. *See id.* at 21.

93. *Met autres v République Française*, Case No. 1407765 (Sept. 16, 2014), 3–4.

94. While the victory of Emmanuel Macron over Marine Le Pen in France's Presidential election in May 2017 brought some hope for a more generous attitude toward refugees, his policies have not changed in any significant respect from his predecessors. For example, France has yet to meet its quota of accepting additional refugees that grew out of an EU agreement in 2015, and it still refuses to allow French vessels that pick up migrants in the Mediterranean Sea from docking in French ports. *See France's Macron Tests Italy's Patience*

France was ranked twenty-third among 113 countries (thirteenth out of twenty-four countries regionally) in the category of civil justice, which includes the independence of the judiciary.<sup>95</sup>

France has an active civil society on immigration and refugee matters. Among the groups that advocate for the rights of refugees and asylum seekers are Forum Réfugiés-Cosi, France Terre d'Asile, and Pour une Planète sans Frontières.<sup>96</sup> Each of these organizations is a member of the European Council on Refugees and Exiles ("ECRE"), which describes itself as a pan-European alliance of ninety-eight NGOs advancing and protecting the rights of refugees.<sup>97</sup> ECRE supports strategic litigation, and coordinates other legal activities, on refugee issues throughout the European Union. In addition, France has an experienced and active immigration and refugee law bar that has proven adept at strategic utilization of procedural tools to advance the interests of their clients.<sup>98</sup>

Like many other countries, France's attitude toward immigrants generally, and refugees in particular, is dependent on three primary factors: marginality, economic self-interest, and contact.<sup>99</sup> France has a history of accepting refugees from Germany both before and after World War II, though the impact of this legacy on current attitudes is not clear. It appears that elites are more favorably disposed toward

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*over Refugees*, FIN. TIMES (July 20, 2017), <https://www.ft.com/content/2db5a7ba-6c7e-11e7-bfeb-33fe0c5b7eaa> (last visited August 26, 2017).

95. *Rule of Law Index: 2016, France*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/FRA> [<https://perma.cc/RJP4-2TKL>] (last visited on Dec. 21, 2017).

96. For further information on these organizations, see generally FORUM RÉFUGIÉS, <http://www.forumrefugies.org/> [<https://perma.cc/5MSW-H6ZK>] (last visited Dec. 21, 2017); FRANCE TERRE D'ASILE, <http://www.france-terre-asile.org/> [<https://perma.cc/V6YM-ESBH>] (last visited Dec. 21, 2017); and POUR UNE PLANETE SANS FRONTIERES, <http://www.pouruneplanetesansfrontieres.eu/> [<https://perma.cc/6YT7-HYVP>] (last visited Dec. 21, 2017).

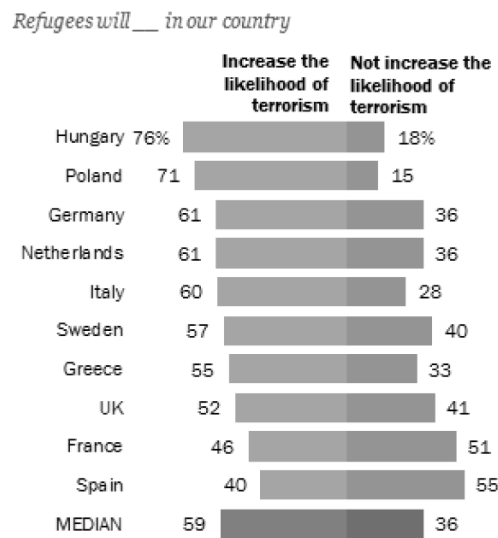
97. *See Our Work*, EUROPEAN COUNCIL ON REFUGEES AND EXILES ("ECRE"), <https://www.ecre.org/our-work/> [<https://perma.cc/CU9N-575X>] (last visited Dec. 21, 2017).

98. *See generally* LEILA KEWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE* (2015).

99. *See* JOEL S. FETZER, *PUBLIC ATTITUDES TOWARD IMMIGRATION IN THE UNITED STATES, FRANCE, AND GERMANY* 1-24 (2000). In Fetzer's analysis, marginality refers to the extent to which immigrants are marginalized within society, which tends to affect their perception among the native-born population in a negative way. Economic self-interest refers to the phenomenon whereby native born citizens are more apprehensive about immigrants during periods of economic insecurity. And contact refers to the phenomenon whereby native born citizens will have a more favorable view of immigrants if they encounter them more often in their daily lives. *Id.*

immigrants than the rank and file population. On the other hand, in comparison with some of the other immigrant and refugee-destination countries within Europe, the French public is much more receptive toward refugees in particular. Figures 3, 4, and 5, based on recent survey data from the Pew Research Center, illustrate this phenomenon:

**Figure 3: Public Opinion Linking Refugees and Terrorism in the European Union**

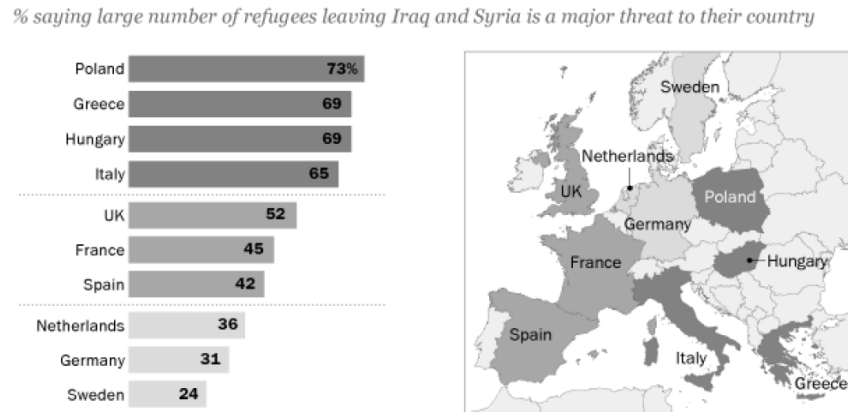


Source: Spring 2016 Global Attitudes Survey.

PEW RESEARCH CENTER

According to these data, the French public is less likely than nearly any other EU Member State surveyed to link refugees with terrorism. These figures are particularly striking given that the data were collected after the terror attacks at Charlie Hebdo headquarters and at the Bataclan Theater in January and November 2015, respectively (though before scores of pedestrians were killed by a truck in Nice on Bastille Day in 2016). It is also somewhat surprising that the public attitude toward refugees in France is more accepting than in Sweden, given the latter country's reputation for tolerance toward refugees.

**Figure 4: Public Opinion of Refugees from Syria and Iraq in the European Union**



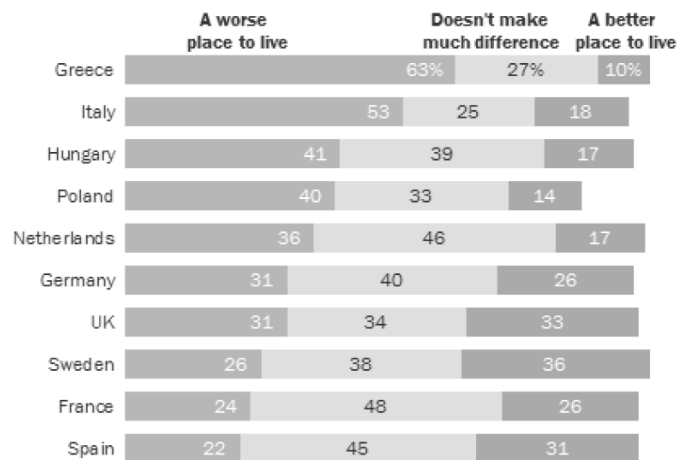
Source: Spring 2016 Global Attitudes Survey.

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The data revealed in Figure 4 is somewhat less surprising than in Figure 3, as there appears to be a correlation between perceptions of threat from refugees (at least those from Syria and Iraq) and geographic proximity to their countries of origin. Respondents from European countries that are either on or near migration routes from North Africa and the Middle East (whether via boat or on foot) are more fearful of refugees than respondents from countries further removed from those routes. Here, the French public is considerably more apprehensive about refugees than several other EU Member States, including Sweden.

**Figure 5: Public Opinion on Increasing Diversity in the European Union**

*Overall, do you think having an increasing number of people of many different races, ethnic groups and nationalities in our country makes this country a better place to live, a worse place to live or doesn't make much difference either way?*



Source: Spring 2016 Global Attitudes Survey.

PEW RESEARCH CENTER

The subject of the question presented in Figure 5 is broader than refugees, which may help to explain why its results depart from Figure 4. Nevertheless, it is striking for the relative tolerance of “the other” registered in France vis-à-vis other EU Member States (of course, given the demographics of the French population, many of the respondents were likely diverse themselves). When combined with the data from the other two Figures, they suggest that while France may not have an enduring reputation for welcoming refugees, and the government may have no interest in cultivating such a relationship (unlike in Ecuador), it appears that the public would be somewhat sympathetic to such efforts. Or, at least more sympathetic than the majority of EU Member States.

In sum, when measured according to the factors which were conducive to the successful use of constitutionalized human rights provisions in Ecuador, France would seem to be a site for a more concerted effort to include constitutionalized asylum in the legal toolkit of cause lawyers and other advocates. It has one of the most



independent judiciaries in the world.<sup>100</sup> It has an active civil society devoted to the issue of refugee rights, featuring lawyers who work both nationally and transnationally. Although it does not have a particularly strong reputation (or record) for protecting refugees that might otherwise be used for “naming and shaming” purposes, the French public is among the least hostile to refugees within the European Union. Significant barriers to the increased utilization of constitutional asylum remain, but the potential for such an increase is surely present.

## 2. Italy

The asylum provision in the Italian Constitution of 1948 is one of the most broadly worded in the European Union, the result of the debt of gratitude that the country felt towards those nations who received refugees from Italy during World War II.<sup>101</sup> It holds that: “A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.”<sup>102</sup>

Thus, anyone who is deprived of rights available to Italian citizens can seek asylum in Italy. As Lambert points out, this provision, at least in theory, allows for asylum for non-citizens who have been denied an array of rights in their home country, including *habeas corpus*, freedom of movement within their home state’s borders, freedom to participate in political parties, the right to secrecy, voting rights, and labor rights including wages in proportion to the quantity and quality of their work, a weekly day of rest, and annual paid holidays.<sup>103</sup>

Of course, Italy’s constitutional asylum provision also contains an escape clause, though the government has never passed implementing legislation. On the one hand, this deficit has had the advantage of leaving it to the courts to determine the scope of the

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100. As noted above, the World Justice Project ranked France twenty-third out of 113 countries on its civil justice scale. Ecuador was ranked ninety-first on the same scale, and twenty-fifth out of thirty countries regionally. See *Rule of Law Index: 2016, France*, *supra* note 95.

101. See Lambert et al. *supra* note 25, at 22; Fullerton, *supra* note 2, at 73.

102. Italian Constitution, article 10.

103. Lambert et al., *supra* note 25, at 23-24 (citing articles 13, 16, 49, 48 and 36 of the Italian Constitution).

constitutional right. In two key decisions, those courts have affirmed that the right to asylum in the Constitution is an individual right directly enforceable in civil courts.<sup>104</sup> The first of these was a 1997 decision of the Italian Supreme Court of Cassation (Italy's highest court) holding that the constitutional right to asylum is a binding legal norm.<sup>105</sup> Following a series of subsequent legislative enactments containing a number of exceptions rendering that decision virtually meaningless, the Italian Constitutional Court reaffirmed the Court of Cassation decision in 2004 and 2006.<sup>106</sup>

On the other hand, the lack of implementing legislation has resulted in a number of court decisions limiting the scope of constitutional asylum, including a decision by the Supreme Court of Cassation holding that it only entitles an asylum-seeker to enter Italy and remain in the country while their application for refugee status under the Refugee Convention is processed.<sup>107</sup> The lack of implementing legislation has also meant that there are no special procedural rules for constitutional asylum claims, leaving applicants to the general rules of civil procedure which, in Italy, means among other things delays for as long as ten years in civil court.<sup>108</sup> In contrast, having ratified the 1951 Refugee Convention and passed implementing legislation pursuant to it, Italy has adopted various EU procedural rules governing the processing of asylum applications. As a result, the vast majority of asylum applications filed in Italy proceed

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104. These decisions made it clear that the constitutional right to asylum is more than a so-called "legitimate interest" of the person claiming the right, but enjoys the status of a "subjective right." Under Italian law, a "legitimate interest" is legally protected only so far as it comports with the public interest or results from the lawful execution of administrative power. Administrative courts generally have jurisdiction over legitimate interests, while civil courts will hear claims involving subjective rights. *See* Lambert et al., *supra* note 25, at 22-23.

105. Italian Supreme Court of Cassation (Corte Suprema di Cassazione), *Allen v. Ministry of the Interior*, no. 4674/1997 (sez. un. civ.), *Rivista di diritto internazionale*, Vol. 80, 1997, 843. This decision followed on several lower court decisions to the same effect. Lambert et al., *supra* note 25, at 22.

106. Italian Constitutional Court (Corte costituzionale), *Constitutional legitimacy of two provisions of the act regulating labor law in the public sector*, no. 204/2004, *Foro It.*, 2004-I, 2596; Italian Constitutional Court, *Constitutional legitimacy of a provision of the act regulating expropriation in the public interest*, no. 191/2006, *Foro It.*, 2006-I, 1625.

107. Italian Supreme Court of Cassation, *Ministry of the Interior and others v. Aday*, n. 25028/2005 (sez. I civile), *Foro It.*, 2006-I, 2851; Italian Supreme Court of Cassation, *Selimi v. Italian Ministry of the Interior*, no. 18549/2006 (sez. I civile), *Foro It.*, 2007-I, 1869. *See also* Lambert, et al., *supra* note 25, at 24.

108. Lambert et al., *supra* note 25, at 25.

through the Refugee Convention.<sup>109</sup> As Lambert puts it, constitutional asylum is only brought to occasional life by “random enlightened judges across the country.”<sup>110</sup>

Further clouding the picture for the prospect of more vigorous utilization of constitutional asylum in Italy are the set of “Ecuador Factors”, which are less favorable in Italy than in France. For example, in its Rule of Law Report, the World Justice Project has recently ranked the Italian judiciary forty-sixth out of 113 countries on its civil justice scale, which includes judicial independence, twenty-three places below France.<sup>111</sup> It was near the bottom of European countries in this category, ranked twenty-second out of twenty-four. Moreover, as Figures 3 through 5, above, reveal, the Italian public is less accepting of refugees than their counterparts in France. More than half of Italian respondents, according to the Pew Research Center, believe that (1) refugees increase the likelihood of terrorism in their country, (2) refugees from Syria and Iraq are a major threat to Italy, and (3) increased diversity has made Italy a worse place to live. Less than half of the respondents in France held the same views on each of these questions.<sup>112</sup>

On the other hand, Italy, like France, has an active civil society devoted to the legal rights of refugees and asylum-seekers. Italy-based members of the European Council on Refugees and Exiles include the Italian Council on Refugees, MOSAICO – Action for Refugees, ASGI (Association for Juridical Studies on Immigration), and Oxfam Italia Intercultura.<sup>113</sup> In addition, Italy, like France, sports an active immigration and refugee law bar.

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109. According to Lambert, the estimated number of recognized constitutional asylum claims in the years since the right was created “has not exceeded 200.” Lambert et al., *supra* note 25, at 25. In contrast, nearly 5,000 asylum-seekers were granted refugee status in Italy under the Refugee Convention in 2016 alone. See Migration Policy Institute, *supra* note 78 (select Italy from Nationality dropdown menu).

110. Lambert et al. *supra* note 25, at 25.

111. *Rule of Law Index: 2016, Italy*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/ITA> [<https://perma.cc/R78K-4VD4>] (last visited on Dec. 21, 2017).

112. See *infra* Figures 3-5.

113. For further information on these organizations, see generally CIR RIFUGIATI, <http://www.cir-onlus.org/en/> [<https://perma.cc/836R-PAP4>] (last visited Dec. 21, 2017); MOSAICO REFUGEES, [http://www.mosaicorefugees.org/site/?page\\_id=119&lang=en](http://www.mosaicorefugees.org/site/?page_id=119&lang=en) [<https://perma.cc/N49T-WNQE>] (last visited Dec. 21, 2017); ASSOCIAZIONE PER GLI STUDI GIURIDICI SULL’IMMIGRAZIONE, <https://www.asgi.it/chi-siamo/english-version/> [<https://perma.cc/EL9V-EU79>] (last visited Dec. 21, 2017); OXFAM ITALIA, <https://www.oxfamitalia.org/> [<https://perma.cc/V2ET-5LHS>] (last visited Dec. 21, 2017).

*VI. PROSPECTS FOR A MORE ROBUST UTILIZATION OF  
CONSTITUTIONAL ASYLUM*

There is little debate as to the inability of current legal mechanisms to adequately cope with ongoing refugee crises around the world. The chief international instrument designed to protect refugees from persecution, the 1951 Refugee Convention, was the product of a different time with far fewer factors compelling individuals to leave their homeland. While the Refugee Convention has proved remarkably flexible in addressing ever-changing forms of persecution (primarily because of the elasticity with which courts and other adjudicators have interpreted the “particular social group” ground for relief) the recent crisis caused by the armed conflict in Syria has demonstrated that additional means of legal protection are warranted.

One of those additional forms of protection is the constitutional right to asylum. Its presence in constitutions around the world has increased markedly in the past few decades. It has several advantages over asylum pursuant to the Refugee Convention, the most important of which is that it is often couched in broad terms, offering protection to individuals for violations of human rights writ large, rather than persecution based on one of five specific grounds. But it also has certain political advantages, which have come into sharper relief given the current geopolitical climate. For example, it is less vulnerable to political shifts than statutory asylum, which is typically the result of incorporation of the Refugee Convention into domestic law. Constitutions are generally more difficult to amend than statutes, and thus less susceptible to changes in political opinion and regimes. Because they express a nation’s highest moral and ethical ideals, they are generally impervious to nationalistic claims of influence from international forces.

Constitutional asylum is also superior to subsidiary or complimentary protection. Like asylum under the Refugee Convention, it provides a durable solution for refugees, rather than temporary protection that can be removed once the condition precipitating the applicant’s flight has abated. It can also be adjudicated in domestic courts under domestic law, without the need to interpret the international human rights treaties upon which subsidiary protection is often based. Judges, as well as administrative tribunals, are typically far more comfortable interpreting domestic law than international or foreign law.

Despite these inherent advantages, constitutional asylum has remained virtually dormant throughout the world. There are few reported cases interpreting it. It is safe to say that, at least up until now, it has been yet another example of international human rights norms that are agreed upon by states through ratified treaties or incorporated into domestic law but serve as window dressing rather than the means to actually improve human rights outcomes. They allow states to improve their self-image or make a political statement, but there is little real action behind the words.

Thus, while constitutional asylum allows states to proclaim support for refugees (or at least certain classes of refugees, depending on how the constitutional provision is worded) it has been left to the Refugee Convention to put meat on the normative bones. Once individual states ratified the Refugee Convention and incorporated it into their domestic law, it established a set of legal standards and administrative procedures that lawyers could engage with in court and administrative tribunals on behalf of their clients. The Refugee Convention left constitutional asylum in the dust.

But the tide may be turning, ever so slowly. The first signs of this are evident in Latin America, where the idea of “Transformative Constitutionalism” has taken hold, seeing national constitutions as a means of diffusing human rights standards throughout a region historically plagued by authoritarian regimes.<sup>114</sup> Although many scholars have expressed frustration at the disconnect between the proliferation of human rights provisions in Latin American constitutions and the persistence of poverty, injustice, corruption and other problems throughout the region, the presence of such provisions – including the right to asylum – provides cause lawyers with a potentially powerful tool for protecting the rights of refugees. The litigation over Decree 1182 in Ecuador is one example of how strategically-minded cause lawyers can navigate the political and legal context in order to breathe life into otherwise high-minded but ineffective constitutional provisions.<sup>115</sup>

The European context is obviously different. Human rights norms are already diffused throughout the regional asylum system in the European Union. Such norms provide the analytical framework for subsidiary protection under a variety of human rights treaties.

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114. See von Bogdandy et al., *supra* note 5, at 4.

115. See generally Meili, *supra* note 5.

Moreover, domestic courts in numerous European states have adopted the human rights approach to asylum law, under which judges rely on human rights treaties (and the jurisprudence that has been developed around them) in order to interpret undefined and vague terms in the Refugee Convention.<sup>116</sup> What role can domestic, constitutional asylum law play in such a system?

Plenty, as it turns out. This article has already articulated the advantages that constitutional asylum holds over the Refugee Convention. But in order for the potential of a revitalized constitutional asylum to take hold in Europe, two changes in mindset are necessary. The first is that such a change has less to do with human rights or moral authority than it does with the hard reality of domestic politics. For it is domestic politics that has brought the regional asylum system in Europe, described rather glowingly a decade ago by Helene Lambert as the most advanced in the world, to its knees.<sup>117</sup> Despite numerous attempts by the much-heralded Common European Asylum System to harmonize procedures, standards and, ultimately, asylum grant rates across EU borders, individual states, subject to increasingly hostile attitudes toward refugees among their populations, have stubbornly adhered to their own decision-making practices. The result, as Figure 2 above demonstrates, is a disparity of as much as 68.9% in asylum grant rates between EU Member States over the past decade.<sup>118</sup>

The second necessary change is by the lawyers who represent asylum seekers in Europe. Their overwhelmingly normal practice, based on years of experience, is to litigate asylum cases under some combination of the Refugee Convention and the human rights treaties upon which subsidiary protection is based.<sup>119</sup> They have looked to the jurisprudence of the European Court of Human Rights as precedent in

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116. See Hathaway & Foster, *supra* note 14, at 196-98 (documenting the many national judiciaries in Europe – and elsewhere – that have adopted the human rights approach to asylum law).

117. See Lambert, *supra* note 25 at 1.

118. Bulgaria's grant rate between 2008 and 2016 was 77.5%. Greece's was 8.6%. See *infra* Figure 2.

119. As I have noted elsewhere, judges are far more skeptical of subsidiary protection claims than those brought pursuant to the Refugee Convention. According to lawyers representing refugees in Canada and the United Kingdom, judges often think that lawyers who assert subsidiary claims are overcompensating for weak claims under the Refugee Convention, and are inclined to deny relief as a result. See Meili, *supra* note 16; see also Stephen Meili, *When Do Human Rights Treaties Help Asylum-Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 *OSGOODE HALL L.J.* 625 (2014).

arguing that their clients should be protected under one or both of these legal remedies. But that practice, however beneficial in some cases, may have blinded them to the potential benefits of asserting constitutional asylum claims in domestic court. There is little empirical data, thus far at least, demonstrating that a change in practice is warranted. The sample size of reported cases on constitutional asylum is far too small for any quantitative analysis revealing a statistically significant correlation between constitutional asylum and benefits for refugees. On the other hand, qualitative data from Latin America, most notably Ecuador, suggests that refugee lawyers should consider including constitutional asylum in their strategic toolkit.<sup>120</sup>

The benefits of constitutional asylum may be particularly salient in the two countries whose constitutional asylum provisions were analyzed in this article: France and Italy. The relevant constitutional provisions in both countries are significantly broader than the protection offered through the Refugee Convention: France's Constitution provides for asylum to those who are persecuted for activities in pursuit of freedom or for those who seek the protection of France "on other grounds." Italy's Constitution is nearly as expansive in this regard: it provides for asylum to those whose home countries deny them the freedoms guaranteed under the Italian Constitution. Moreover, The Italian Constitution does not require that an asylum applicant show that he or she was individually persecuted, which makes it easier to prevail on claims for relief from more generalized harm as a result of armed conflict or climate change. Further, the French Constitution lacks a domestic law "escape clause" requiring enabling legislation that might otherwise limit the scope of asylum under the Constitution. Although the Italian Constitution does contain such an escape clause, Italy has never passed implementing legislation, leaving interpretation of constitutional asylum to the domestic courts, which have responded by declaring that constitutional asylum is an individual right, enforceable in the civil courts of Italy.

As the previous paragraph makes clear, the text of the French and Italian Constitutions suggest a path to a more robust use of constitutional asylum. The route through the turbulent political and

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120. The author is currently conducting research on the use of constitutional asylum in Mexico as a means of challenging that country's draconian policies toward asylum seekers from Central America, many of whom are apprehended enroute to the United States.

social context in each country may be more difficult, particularly in Italy. But it is not impossible. Both countries have relatively independent judiciaries, though more so in France than in Italy. France also has the advantage of a more enduring legacy of assisting refugees, which is manifested in a far more receptive attitude toward refugees than in Italy, which is striking, given the political rhetoric demonizing refugees in France in recent years, particularly in the wake of high profile terrorist attacks there. Each country has an active and engaged civil society, featuring several NGOs advocating on behalf of refugees and an active immigration and refugee law bar. These lawyers and NGOs are frequently part of transnational networks of lawyers and other advocates, which enables them to leverage resources and expertise when necessary.

In sum, both the legal and socio-political environment in France and Italy would appear to be amenable to an increased utilization of constitutional asylum in those countries. As we know from Ecuador, it took creative and strategic lawyers operating both within and outside that country to devise an effective way to utilize constitutional human rights provisions within the national political context in order to achieve a result that benefitted their clients. France and Italy surely have similar legal talent. The time would seem to be right to capitalize on it.

## *VII. CONCLUSION*

Circling back to the two analytic puzzles identified earlier in this article, there are several reasons why constitutional asylum has been used very infrequently in those countries where it is on the books. Some of these barriers are textual, while others are more a matter of practice or habit. As to the former, in some cases the grounds for constitutional asylum are actually narrower than under the Refugee Convention, such as when it is limited to persecution for the expression of a political opinion. In other cases, constitutions condition asylum on the terms of domestic law. Such “escape clauses” can make constitutional asylum no more robust than asylum under the Refugee Convention (and possibly less so). If a state fails to enact implementing legislation, the resulting gap in the law can make the status of constitutional asylum unclear, and thus less attractive as a possible source of protection for refugee lawyers to pursue on behalf of their clients.



On the more practical side, most lawyers are simply not accustomed to utilizing constitutional asylum. This is primarily because there is so little jurisprudence on the subject, especially when compared to the voluminous amount of case law that has developed under the Refugee Convention, in regional and domestic courts. This is an example of what Marshall and Hale describe as the inherent conservatism of lawyers who, while they may be progressive politically, are not likely to take risks when representing their individual clients.<sup>121</sup> In such situations, lawyers are much more apt (and indeed bound as a matter of professional ethics) to pursue remedies that have been recognized by domestic courts.

Despite these barriers, the examples of France and Italy have provided at least preliminary answers to the other puzzle posed by this article: under what circumstances might constitutional asylum become increasingly relevant as a form of protection for refugees? Those circumstances are also both textual and practical. On the textual side, expansive constitutional provisions that link asylum to human rights violations rather than the more specific grounds of persecution enumerated in the Refugee Convention, are more likely to be utilized by lawyers hoping to expand existing protections for asylum-seekers. The lack of an “escape clause”, or at least one that has not yet been acted upon by the state, would also seem to be conducive to a more robust utilization of constitutional asylum. So too are constitutional asylum provisions that do not require the applicant to demonstrate that he or she has been individually persecuted. In such situations, it is more likely that a refugee can prevail on a claim for asylum as a result of flight from an armed conflict or environmental disaster.

On the practical side, at least three factors would appear to make constitutional asylum a more viable remedy for refugees in those countries where it is available: an independent judiciary; an openness toward refugees within the public; and an active civil society that includes cause lawyers willing to work strategically within the national political and legal context in order to maximize outcomes for their clients.

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121. See Marshall & Hale, *supra* note 30, at 316 (noting that lawyers and legal institutions are conservative, “channeling dissent into narrow and constrained areas dominated by those with power and resources”).

Further qualitative research in different national contexts will allow for additional conclusions about where constitutional asylum is more likely to benefit refugees. To the extent that such further research reveals that asylum-seekers enjoy greater protections in states whose constitutions include a right to asylum, it is likely to encourage lawyers and other refugee advocates to mobilize for such a right.

### APPENDICES<sup>122</sup>

#### APPENDIX A - EU ASYLUM DECISIONS, 2008-2016

| Countries with constitutional right to asylum    | 2016 A  | 2015 A  | 2014 A   | 2013 A | 2012 A | 2011 A | 2010 A | 2009 A | 2008 A | Total Applications Decided |
|--|---------|---------|----------|--------|--------|--------|--------|--------|--------|----------------------------|
| Bulgaria   | 3,045   | 6,175   | 7,435.00 | 2,810  | 640    | 605    | 515    | 645    | 670    | 22,540                     |
| Czech Republic                                   | 1,305   | 1,340   | 1005     | 920    | 735    | 685    | 510    | 535    | 1,400  | 8,435                      |
| France   | 87,485  | 77,910  | 68,500   | 61,715 | 59,830 | 42,220 | 37,610 | 35,295 | 31,765 | 502,330                    |
| Germany  | 631,180 | 249,350 | 97,415   | 76,360 | 58,765 | 40,365 | 45,400 | 26,855 | 19,335 | 1,245,025                  |
| Hungary  | 5,105   | 3,420   | 5,445    | 4,545  | 1,100  | 895    | 1,040  | 1,805  | 910    | 24,265                     |
| Italy  | 89,875  | 71,345  | 35,180   | 23,565 | 27,290 | 24,165 | 11,325 | 23,015 | 20,225 | 325,985                    |
| Poland   | 2,495   | 3,510   | 2,700    | 2,895  | 2,480  | 3,215  | 4,420  | 6,580  | 4,245  | 32,540                     |
| Portugal   | 595     | 370     | 230      | 305    | 230    | 115    | 130    | 95     | 105    | 2,175                      |
| Russia   | n/a     |         |          |        |        |        |        |        |        |                            |
| Serbia   | n/a     |         |          |        |        |        |        |        |        |                            |
| Slovak Republic                                  | 250     | 130     | 280      | 190    | 440    | 215    | 195    | 320    | 370    | 2,390                      |
| Slovenia   | 265     | 130     | 95       | 195    | 220    | 215    | 115    | 130    | 160    | 1,525                      |
| Spain  | 10,255  | 3,245   | 3,620    | 2,380  | 2,605  | 3,400  | 2,785  | 4,490  | 5,130  | 37,910                     |
| <b>Total</b>                                     |         |         |          |        |        |        |        |        |        | <b>2,205,120</b>           |
| Countries without constitutional right to asylum | 2016 A  | 2015 A  | 2014 A   | 2013 A | 2012 A | 2011 A | 2010 A | 2009 A | 2008 A | Total Applications Decided |
| Austria  | 42,415  | 21,100  | 9,405    | 16,640 | 15,905 | 13,270 | 13,780 | 14,845 | 12,695 | 160,055                    |
| Belgium  | 25,010  | 19,455  | 20,410   | 21,505 | 24,640 | 20,025 | 16,665 | 15,310 | 13,620 | 176,640                    |
| Denmark  | 10,430  | 12,255  | 8,090    | 7,010  | 4,695  | 3,595  | 3,300  | 1,675  | 1,250  | 52,300                     |
| Estonia  | 190     | 180     | 55       | 55     | 55     | 60     | 40     | 25     | 10     | 670                        |
| Finland  | 20,765  | 2,960   | 2,345    | 3,220  | 3,110  | 2,645  | 4,880  | 2,960  | 1,675  | 44,560                     |
| Greece   | 11,345  | 9,640   | 13,310   | 13,080 | 11,195 | 8,670  | 3,455  | 14,355 | 29,580 | 114,630                    |
| Iceland  | 540     | 180     | 55       | 180    | 65     | 40     | 15     | 30     | 55     | 1,160                      |
| Ireland  | 2,130   | 1,000   | 1,060    | 840    | 940    | 1,365  | 1,600  | 3,135  | 3,630  | 15,700                     |
| Latvia   | 260     | 170     | 95       | 95     | 145    | 90     | 50     | 40     | 10     | 955                        |
| Lithuania  | 280     | 180     | 185      | 175    | 390    | 305    | 190    | 145    | 105    | 1,955                      |
| Netherlands                                      | 28,875  | 20,465  | 18,810   | 12,215 | 13,670 | 15,790 | 17,580 | 17,565 | 10,925 | 155,895                    |
| Norway   | 19,345  | 9,515   | 7,680    | 11,830 | 10,695 | 9,590  | 15,505 | 14,760 | 9,015  | 107,935                    |
| Romania  | 1,295   | 1,320   | 1,585    | 1,435  | 1,625  | 1,080  | 425    | 540    | 675    | 9,980                      |
| Sweden   | 95,845  | 44,695  | 40,015   | 45,120 | 31,570 | 26,760 | 27,715 | 23,985 | 29,545 | 365,250                    |
| Switzerland                                      | 22,605  | 21,860  | 21,860   | 16,690 | 16,780 | 14,295 | 15,095 | 10,695 | 7,555  | 147,435                    |
| UK   | 31,020  | 38,265  | 26,005   | 22,570 | 22,045 | 22,970 | 26,690 | 31,100 | 23,795 | 244,460                    |
| <b>Total</b>                                     |         |         |          |        |        |        |        |        |        | <b>1,599,580</b>           |

122. *Asylum Recognition Rates in the EU/EFTA by Country, 2008-2016*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2016> [https://perma.cc/7RX7-EJHH] (last visited Dec. 21, 2017).

## APPENDIX B - POSITIVE EU ASYLUM DECISIONS, 2008-2016

| Countries with constitutional right to asylum | 2016 P  | 2015 P  | 2014 P | 2013 P | 2012 P | 2011 P | 2010 P | 2009 P | 2008 P | Total Positive Decisions | Percentage Approved |
|---|---------|---------|--------|--------|--------|--------|--------|--------|--------|--------------------------|---------------------|
| Bulgaria                                      | 1,350   | 5,595   | 7,000  | 2,460  | 170    | 190    | 140    | 270    | 295    | 17,470                   | 77.5                |
| Czech Republic                                | 435     | 460     | 375    | 345    | 175    | 320    | 175    | 100    | 215    | 2,600                    | 30.8                |
| France  | 28,755  | 20,630  | 14,815 | 10,705 | 8,645  | 4,615  | 5,095  | 5,050  | 5,150  | 103,460                  | 20.6                |
| Germany                                       | 433,910 | 140,915 | 40,560 | 20,125 | 17,140 | 9,675  | 10,450 | 9,765  | 7,870  | 690,410                  | 55.5                |
| Hungary                                       | 430     | 505     | 510    | 360    | 350    | 155    | 260    | 390    | 395    | 3,355                    | 13.8                |
| Italy   | 35,405  | 29,615  | 20,580 | 14,390 | 22,030 | 7,155  | 4,310  | 9,065  | 9,740  | 152,290                  | 46.7                |
| Poland  | 305     | 640     | 720    | 685    | 520    | 475    | 510    | 2,525  | 2,770  | 9,150                    | 28.1                |
| Portugal                                      | 320     | 195     | 110    | 135    | 100    | 65     | 55     | 50     | 70     | 1,100                    | 50.6                |
| Serbia  | n/a     |         |        |        |        |        |        |        |        |                          |                     |
| Slovak Republic                               | 210     | 80      | 170    | 70     | 190    | 115    | 90     | 180    | 90     | 1,195                    | 50.5                |
| Slovenia                                      | 170     | 45      | 45     | 35     | 35     | 20     | 25     | 20     | 5      | 400                      | 26.2                |
| Spain   | 6,855   | 1,020   | 1,585  | 535    | 525    | 990    | 610    | 350    | 275    | 12,745                   | 33.6                |
| <b>Total</b>                                  |         |         |        |        |        |        |        |        |        | <b>994,175</b>           | <b>45.1</b>         |

| Countries without constitutional right to asylum | 2016 P | 2015 P | 2014 P | 2013 P | 2012 P | 2011 P | 2010 P | 2009 P | 2008 P | Total Positive Decisions | Percentage Approved |
|--|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------------------------|---------------------|
| Austria  | 30,370 | 15,045 | 7,175  | 4,920  | 4,460  | 4,085  | 3,450  | 3,220  | 3,455  | 76,180                   | 47.6                |
| Belgium  | 15,050 | 10,475 | 8,055  | 6,280  | 5,555  | 5,075  | 3,510  | 2,910  | 3,505  | 60,415                   | 34.2                |
| Denmark  | 7,125  | 9,920  | 5,480  | 2,810  | 1,700  | 1,315  | 1,345  | 790    | 1,250  | 31,735                   | 60.7                |
| Estonia  | 130    | 80     | 20     | 10     | 10     | 10     | 15     | 5      | 5      | 285                      | 42.5                |
| Finland  | 7,070  | 1,680  | 1,270  | 1,650  | 1,555  | 1,065  | 1,595  | 960    | 655    | 17,500                   | 39.3                |
| Greece   | 2,715  | 4,030  | 1,970  | 500    | 95     | 180    | 105    | 165    | 55     | 9,815                    | 8.6                 |
| Iceland  | 95     | 50     | 30     | 10     | 10     | 10     | 10     | 5      | 10     | 230                      | 19.8                |
| Ireland  | 485    | 330    | 400    | 150    | 100    | 75     | 25     | 125    | 300    | 1,990                    | 12.7                |
| Latvia   | 135    | 20     | 25     | 25     | 25     | 20     | 25     | 10     | 5      | 290                      | 30.4                |
| Lithuania  | 195    | 85     | 70     | 55     | 55     | 25     | 15     | 40     | 65     | 605                      | 30.9                |
| Netherlands                                      | 20,810 | 16,450 | 12,550 | 5,970  | 5,505  | 6,830  | 8,005  | 8,245  | 5,675  | 90,040                   | 57.8                |
| Norway   | 12,780 | 6,250  | 4,910  | 5,770  | 5,180  | 4,015  | 5,300  | 4,510  | 3,050  | 51,765                   | 48.0                |
| Romania  | 805    | 480    | 740    | 915    | 230    | 75     | 70     | 115    | 110    | 3,540                    | 35.5                |
| Sweden   | 66,590 | 32,215 | 30,650 | 24,020 | 12,400 | 8,805  | 8,510  | 7,095  | 7,845  | 198,130                  | 54.2                |
| Switzerland                                      | 13,190 | 14,000 | 15,410 | 6,390  | 4,280  | 6,445  | 7,820  | 6,025  | 4,830  | 78,390                   | 53.2                |
| UK   | 9,935  | 13,955 | 10,125 | 8,550  | 7,850  | 7,240  | 6,490  | 8,395  | 7,090  | 79,630                   | 32.6                |
| <b>Total</b>                                     |        |        |        |        |        |        |        |        |        | <b>700,540</b>           | <b>43.8</b>         |

