by EU Member States in exceptional cases, namely when they 'consider it necessary on humanitarian grounds'.[69] Litigation thus ultimately found its way to the CJEU, as we will examine in the next Section.

3 A Cautious and Reserved Judicial Intervention

So far, litigation before the CJEU in an attempt to securing humanitarian admission to Europe for refugees has stumbled over the limits of the competence of the Court. In the *X. and X.* ruling, the CJEU ruled that these controversies fall outside the scope of EU law. The jurisprudential approach adopted by the Court is presented in sub-Section 1. In response to the question why the CJEU opted for a cautious and reserved stance, we argue in sub-Section 2 that the refusal of the Court to engage in debates on humanitarian admission to Europe reflects the shortcomings of the current EU legal framework. This in turn is to be seen in connection to a broader constitutional deficit, which the Court may not have the legitimacy to address in the current political social context characterised by strong divisions on migration that have amplified as a result of the 2015 'European refugee crisis'. We argue that not only these divisions, but also the constitutional deficit EU law is suffering from more generally speaking, help explain why attempts at involving the CJEU in the policy debate on humanitarian admission to Europe through litigation have failed so far.

3.1 The CJEU Invoking the Limits to its Competence of Judicial Review

In the *X. and X.* case, a Belgian court called on the CJEU to interpret the provision of the EU Visa Code on humanitarian visas. The Court of Justice was asked whether EU law may impose, under some exceptional circumstances, an obligation to issue such a visa. The position taken by the CJEU has been extensively discussed in the legal literature.[70] In a nutshell, the Court declined to address the merits of the case. It noted that the EU Visa Code covers short stays of less than three months only (the so-called 'tourist stay') and argued that it is not applicable to humanitarian visas requested by asylum seekers, who intend to apply for asylum and, thus, to

69 EU Visa Code (n 3), art 25.
70 See n 2.

stay longer than three months.[71] The Court supported that interpretation by citing the Dublin Regulation and the territorial scope of the CEAS. The Dublin Regulation allocates the responsibility to examine asylum applications to the various EU Member States on the basis of a variety of criteria, including the State of first entry to European territory.[72] The Dublin Regulation does not apply to humanitarian visa applications; such applications are to be submitted to the consular representation of the migrant's choice. Moreover, allowing asylum seekers to apply for humanitarian visas on the basis of the EU Visa Code would run counter the territorial nature of the CEAS. The scope of the CEAS is indeed limited to EU territory.[73] As underlined by the Court:

> to conclude otherwise [that is, to conclude that the EU Visa Code applies to applications for a humanitarian visa introduced by asylum seekers] […] would mean that Member States are required, on the basis of the Visa Code, de facto to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country.[74]

The position of the CJEU met with criticism among legal scholars,[75] some of whom expressed reservations about a strict distinction between the common visa policy and the CEAS. It is true that these policies have a different legal basis in the Treaty but, in practice, it is common for aliens to apply for a long-term residence status, including asylum, only after having en-

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71 In his Opinion, Advocate General Mengozzi considered, on the contrary, that 'the intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium *cannot alter the nature or purpose of their applications*'. He also considered that, as a consequence, there is an obligation to issue a humanitarian visa if refusal would mean that the applicant would suffer from serious human rights violations (Case C-638/16 PPU *X and X* [2017] EU:C:2017:93 Opinion of AG Mengozzi).

72 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

73 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art 3; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96, art 3.

74 *X. and X.* (n 2) at 48.

75 See the comments cited in n 2.

tered European territory on the basis of a tourist visa. There is a 'grey area'[76] between the common visa policy and the CEAS, which is well illustrated by the practices of some Member States, such as Belgium and Italy, where humanitarian visas are issued to refugees who are granted the benefit of resettlement programmes (Belgium) and in the case of the 'humanitarian corridors' (Italy).[77] In the *X. and X.* case, neither the Belgian court nor the administration initially contested the application of the EU Visa Code. That argument only came up later on, during the proceedings before the CJEU.[78]

In essence, these doctrinal criticisms are directed at the way the Court is fulfilling its constitutional role of guaranteeing the overall consistency of EU law and respect for primary law, including the EUCFR. What is regretted is the refusal of the Court to engage with ongoing legal and policy debates on humanitarian visas, and its decision to limit (or refuse to expand) the scope of EU law to addressing the issue of humanitarian admission to Europe. These criticisms are very similar to the ones targeting the approach adopted by the CJEU in the three cases *NF, NG and NM v European Council*, which concerns annulment proceedings brought against the 'EU-Turkey Statement' on the ground that, in violation of EU law, it prevents access to effective protection.[79] In an order adopted in that case a few months before the *X. and X.* ruling, the General Court of the CJEU declared that it did not have jurisdiction to rule on that legal challenge. It considered that the 'EU-Turkey Statement' was not adopted by the European Council, but by all the EU Member States acting in their individual capacity, and that it can therefore not been considered as a legal act of EU law falling under its competence of judicial review.

The *X. and X.* ruling thus seems to fit within a broader jurisprudential trend, showing that the CJEU prefers not to intervene in policy debates on humanitarian admission to Europe on account of the norms limiting its

76 R Colavitti (n 2).

77 See the contributions of S Bodart and K Bianchini to this volume.

78 S Sarolea, J-Y Carlier and L Leboeuf (n 2).

79 Cases T-192/6 *N.F. v European Council* [2017] EU:T:2017:128; T-193/16 *N.G. v European Council* [2017] EU:T:2017:129 and T-257/16 *N.M. v European Council* [2017] EU:T:2017:130. Appeals introduced against these rulings before the Court of Justice were ruled to be inadmissible for formal reasons relating (Cases C-208 to C-210/17 P *NF, NG and NM v European Council* [2018] ECLI:EU:2018:705), see: M H Zoeteweij and O Turhan, 'Above the Law – Beneath Contempt: the End of the EU-Turkey Deal?' (2017) 27 *Swiss Review of International and European Law* 2 151.

competence of judicial review.[80] Such a jurisprudential approach stands in stark contrast with the one adopted in other areas of EU law, where the CJEU has at times been accused of 'judicial activism' for expanding the scope of EU law in a way that overtly supports the harmonisation process.[81] This raises the question why the Court adopts such a 'cautious'[82] and reserved approach when it comes to issues regarding humanitarian admission to European territory. In our view, this approach cannot be disconnected from the broader European social context, marked as it is by extremely sensitive divisions and contrasting views on migration, and from some fundamental shortcomings in the current EU legal framework which the Court of Justice may not have the legitimacy to address. These factors are further identified and discussed in the next sub-Section.

3.2. Some Limits to the Intervention of Courts in Policy Debates on Humanitarian admission to Europe

It is the essence of the role of courts, and in particular of the higher courts entrusted with the constitutional function of safeguarding the overall coherence and integrity of the legal framework, such as the CJEU, to adapt

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80 T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2018) 31 *JRS* 2 216-239.

81 I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference' (2018) *EU Immigration and Asylum Law and Policy* <https://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/> (accessed 20 July 2019). In *Zambrano*, for example, the CJEU expanded the scope of EU law to guarantee the effective protection of the rights of EU citizens. It referred to the 'substance of the rights' of EU citizens as protected by the Treaties, holding that these rights may be invoked in purely internal situations that have no connections with the EU legal order, for example because EU citizens have not exercised their freedom of movement. Calls for the Court to apply a similar reasoning to determine the extent of the scope of EU law in situations arising outside of EU territory, allowing for its application in the case of a violation of 'the substance of the rights' established in the EU Charter, such as the right to asylum, have not been followed so far (J-Y Carlier and L Leboeuf, 'The *X. and X.* case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?' (2017) *EU Immigration and Asylum Law and Policy* <https://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/>, accessed 20 July 2019).

82 J-Y Carlier and L Leboeuf (n 2) 96.

the law to evolving social realities. The law is not fixed, but in constant evolution depending on court interpretations. However, the fact that the CJEU did not start engaging with policy debates on safe and legal access to Europe for refugees also points to the limits of the role which the judiciary can play in steering the development of the law. These limits pertain to both legal and social conditions, which are deeply intertwined.

The jurisprudential stance of the CJEU regarding litigation in the field of humanitarian admission to the CEAS reveals a broader 'constitutional deficit' when it comes to regulating the external dimensions of EU asylum and migration policy.[83] The reason why the Court is reluctant to review legal acts concerning migrants who are outside European territory, and to address the controversies on humanitarian admission to EU territory, arise from broader legal uncertainties pertaining to the content of the norms which guide its judicial review.[84] EU institutional rules and the EU fundamental rights framework turn out to be inadequate, in their current form, to govern in an efficient, coherent and transparent way issues surrounding access to European territory. Rules on the division of competence between the EU and the Member States are intricate[85] and the extent of fundamental rights obligations towards migrants who are (still) outside EU territory is unclear, to say the least.

Moreover, little guidance is available from the ECtHR, which is itself facing the limits of the 'jurisdiction' requirement as outlined above. It may further be questionable whether the (relatively) strong human rights guar-

83 On the 'constitutional deficit' of the external dimensions of EU asylum and migration law, see S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Cheltenham, Edward Elgar, 2019); L Leboeuf, 'La Cour de justice face aux dimensions externes de la politique commune de l'asile et de l'immigration: un défaut de constitutionnalisation?' (2019) 55 *Revue trimestrielle de droit européen* 1 55-66.

84 By 'EU constitutional framework', we refer to the fundamental rules as established by the EU Treaties to govern EU actions. These fundamental rules pursue two main objectives. *First*, they organise the institutional framework by establishing norms and principles on the division of competence between EU institutions and the Member States, and among EU institutions. *Second*, they set out the general objectives governing EU action, including the values to be respected while fulfilling these objectives. These values include respect for the fundamental rights established in the EUCFR.

85 P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *CMLRev* 1, 157–200; E Neframi, *Division of Competences Between the European Union and its Member States Concerning Immigration* (Brussels, Study for the European Parliament, 2011).

antees established for the benefit of those who are found on the territory of a State, can be extended as such to external situations with a view to embracing access to Europe as well. The evolution of international human rights law has led to a body of guarantees that include protection against removal and some residence and minimal rights, such as adequate reception conditions for asylum seekers and access to the social assistance system for refugees.[86] One may wonder whether the extension of these guarantees to every migrant risking a violation of Article 3 ECHR or other forms of persecution, would be a realistic move, given the potentially unlimited number of persons concerned. As noted by the ECtHR in the inadmissibility decision it adopted in the *Abdul Wahab Khan v the UK* case concerning the refusal of a visa application grounded on a risk of ill-treatment in the home country, another interpretation 'would, in effect, create an unlimited obligation on Contracting States to allow entry to an individual who might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself'.[87] It is thus most likely that any move towards the establishment of some kind of humanitarian admission to Europe for refugees will also require the establishment of additional criteria, such as a focus on some particular vulnerabilities similar to the one developed in UNHCR-sponsored resettlement programmes, or, as indirectly suggested in the question addressed by the Belgian court to the CJEU in the *X. and X.* case, the requirement of a special connection with EU territory, for example, because family members are already living in Europe. These are major legal innovations, which go far beyond the mere extension of existing rules to situations that they were not initially designed to cover.

For these reasons, engaging in the debate on humanitarian admission to Europe would have required the development of innovative legal interpretations without a stable and clear constitutional foundation. It would have required engaging in the interpretation not only of the scope of the law, but also of its substance, in a new and groundbreaking way. The overall social context within which the CJEU is currently operating may not support such evolution. There does not seem to be an overall consensus for increasing judicial intervention in debates on 'legal avenues' and 'safe pathways' to Europe for refugees. The high legitimacy cost that may result

86 On that evolution, see among others: M Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *RSQ* 1, 11-42.

87 *Abdul Wahab Khan v the UK* (App No 11987/11) ECHR (dec.) 28 January 2014, para 27.

from intervening in that debate was apparent in the *X. and X.* case, which can also be regarded as an attempt, by domestic judges, to safeguard their own legitimacy in the face of heavy internal criticism.[88] The request for a preliminary reference was addressed to the CJEU in a context of significant internal tensions concerning humanitarian visas. A previous ruling by the Belgian courts ordering the issuance of a humanitarian visa provoked outcry and an intense public debate in which some argued on the basis of fundamental rights considerations whilst others accused judges of exceeding their constitutional prerogatives and engaging in a 'government of judges'.[89] The proceedings before the CJEU in *X. and X.* thus fit into a broader judicial strategy to make up a legitimacy deficit at national level.[90]

Lastly, other social and policy factors, at EU level, may help explain why the CJEU declined to delve into the controversy and avoided dealing with the (major) shortcomings of the current EU constitutional framework. In other recent cases in the field of asylum and migration, the CJEU was confronted with social and policy controversies that resulted from concurring pressures aimed at questioning the fundamental principles of the EU *acquis* in the field of asylum and migration. For example, attempts have been made to circumvent the prohibition of systematic internal border controls, as clearly established by the Schengen Border Code. In the *Touring Tours und Travel and Sociedad de Transportes* case, in particular, the CJEU opposed the externalisation of internal border controls by Germany, which required private companies to systematically check passengers embarking on the territory of other Member States before transporting them to German territory.[91] The court's ruling referred to the useful effect of the

88 L Leboeuf, 'Visa humanitaire et recours en suspension d'extrême urgence. Le Conseil du contentieux des étrangers interroge la Cour constitutionnelle et la Cour de justice de l'Union européenne' (2016) *Cahiers de l'EDEM* <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-c-e-assemblee-generale-8-decembre-2016-n-179-108.html> (accessed on 17 July 2019).

89 On that controversy, see De Standaard, 'Heeft de rechter de scheiding der machten geschonden?' (9 December 2016) <https://www.standaard.be/cnt/dmf20161209_02617185> (accessed on 17 July 2019).

90 Running parallel to the case before the CJEU, the Belgian court addressed a preliminary reference to the Belgian Constitutional Court, asking it to specify the extent of the power of judicial review on the part of lower courts. The Constitutional Court declined to address the issue. See: Belgian Constitutional Court, Judgement of 18 October 2018 in the case 141/2018. See also the contribution of S Bodart to this volume.

91 Joined Cases C-412/17 and C-474/17 *Bundesrepublik Deutschland v Touring Tours and Travel GmbH and Sociedad de Transportes s.a.* [2018] EU:C:2018:1005.