doi:10.1017/aju.2018.4

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

THE EUROPEAN UNION AND MIGRATION: AN INTERPLAY OF NATIONAL, REGIONAL, AND INTERNATIONAL LAW

*Iris Goldner Lang**

If global migration law "includes all levels of the law,"[1] then the European Union represents the most developed instance of the interplay of national, regional, and international law. Migration law in the European Union involves the interaction of EU Member States' national laws, EU regional law, and international law. This complex interchange of different migratory legal regimes is the consequence of diverse, and sometimes conflicting, objectives and interests of the Union and its Member States, and the nature of EU law itself.[2] This essay explores the impact of these three levels of the law on the four migratory regulatory categories—EU citizens, "desirable" third-country nationals, asylum seekers, and all other third-country nationals—and the three objectives associated with these categories. The predominance of one legal regime over another varies depending on the regulatory category of migrants and the objectives associated therewith. While describing the existing legal systems, the essay outlines their attributes and shortcomings, the most prominent being: a clear rift between the rights granted to EU citizens and to third-country nationals; EU Member States' determination to reserve to their respective national territories a high level of national control over labor migration; and significant deficiencies of the EU asylum law which were brought to the surface by the recent refugee influx into the EU.

"Us" Versus "Them"

The first EU objective in relation to movement or migration is a clear divide between two crucial regulatory categories: Union citizens and third-country nationals; in other words, between "us" and "them." EU law grants nationals of all EU Member States the automatic status of Union citizens and an extensive set of rights pertaining to that status. Everybody else falls under the category of third-country nationals, who are granted only a limited set of rights by EU law. There are rare exceptions to the generally very clear rift between "us" and "them," the most prominent being special arrangements for nationals of the European Free Trade Association states, rights granted under some association agreements, and family reunification rights.

The extensive set of EU free movement rights applies to both EU citizens and their (third-country national) family members in all instances when they move from one EU Member State to another. Member States retain

* *Jean Monnet Professor of EU Law and Holder of the UNESCO Chair on Free Movement of People, Migration and Inter-Cultural Dialogue, University of Zagreb.* *The author is grateful to Jaya Ramji-Nogales and Davor Petric for their valuable help.*

[1] Jaya Ramji-Nogales & Peter Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1(2017).

[2] EU law is said to constitute a new legal order of international law, different from the legal orders of its Member States. *See* Case 26/62, Van Gend & Loos v. Neth., ECLI:EU:C1963:1.

only limited national control and a narrow set of derogations from such rights. In numerous decisions, the Court of Justice of the European Union has further extended EU citizens' free movement rights through its expansive reading of such rights and restrictive readings of national derogations therefrom.[3]

However, free movement rights apply primarily to EU citizens' cross-border movement between two EU Member States. Internal situations, which are exclusively linked to one EU Member State, generally fall outside the scope of EU law and are governed by the respective Member State's national law. This can lead to reverse discrimination, where domestic nationals are discriminated against in comparison to nationals of other EU Member States residing on the territory of the host Member State, as they cannot rely on EU free movement rights, but only on national laws of the respective Member State, which can be more restrictive than EU law. For example, if a Danish national, who lives and works in Denmark, marries a U.S. national, their residence and family reunification rights are governed by Danish law, as there is no cross-border movement between two EU Member States or no other element linking the situation with another Member State. If Danish law does not grant the U.S. spouse the right of residence in Denmark, the couple cannot rely on EU family reunification rules, as the situation falls outside the scope of EU law. However, if the couple decides to move to Sweden, the situation falls within the ambit of EU law and the Danish national can then rely on his/her EU family reunification rights, which grant his/her spouse the right to reside and work in the European Union. In such a hypothetical situation, a Danish national in Sweden would be better off than a Danish national in Denmark.

The application of EU-based free movement and residence rights to internal situations, linked only to one EU Member State, remains limited to the right of residence of minor, dependent EU citizens with third-country national parents, who have not exercised their free movement rights.[4] For example, a U.S. couple residing in Belgium with their minor Belgian-national child would be entitled to stay in Belgium, as their removal from the EU territory would deprive their dependent Belgian-national child of its EU citizenship right to move and reside freely within the territory of the European Union. The child's U.S.-national parents would consequently derive their right of residence in Belgium from the EU citizenship status of their minor child and the situation would exceptionally fall within the ambit of EU law despite the nonexistence of an EU cross-border element. Consequently, EU-based rights to move and reside on the territory of the European Union currently apply provided there is either cross-border movement of an EU citizen or a situation where the application of national measures would force an EU citizen to have to leave the territory of the Union. A situation where a national measure prevents a "static" EU citizen from residing together with his third-country-national family member in the Member State of his nationality, without having the effect of forcing the EU citizen to leave the territory of the European Union, remains outside the scope of EU law. This happens if the EU citizen is not maintained by his third-country-national family member. The Court of Justice of the European Union does not dare to cross the invisible line that separates EU and Member States' competences, leaving issues of legal immigration of third-country nationals partly within Member States' competence with a narrow group of exceptions, including family reunification.

On the other hand, third-country nationals are granted only a limited set of EU rights on their own. Their status is subject to their host Member State's national rules, which are very diverse. Such a visible discrepancy between a wide set of EU citizens' rights and a narrow set of third-country nationals' rights, as granted by EU law, is mirrored in the use of different EU terminology for EU citizens and third-country nationals. Whereas one refers to "free movement rights" in relation to EU citizens, third-country nationals are associated with the term "migration." The words "rights" and "free" are consciously omitted in reference to "migration." The term "mobility," on the other

[3] Case 41/74, Van Duyn para. 18, ECLI:EU:C:1974:133; Case 67/74, Bonsignore para. 6, ECLI:EU:C:1975:34.

[4] Case C-34/09, Ruiz Zambrano, ECLI:EU:C:2011:124; Case C-256/11, Dereci, ECLI:EU:C:2011:734.

https://doi.org/10.1017/aju.2018.4 Published online by Cambridge University Press

hand, can be used in relation to both EU citizens and third-country nationals, but it seems to refer exclusively to "desirable" migrants (e.g., tourists, students, researchers, business people, and short-term visitors) and is of a circular and temporary character.

National vs. Regional Law

The second EU migratory objective is the EU Member States' determination to preserve a certain level of national control over migration to their respective national territories. EU migration policy—together with asylum, visa, and external border control policies, judicial cooperation in civil and criminal matters, and police cooperation—is part of a wider policy area that falls under the title Area of Freedom, Security and Justice (AFSJ). The policy areas encompassed by AFSJ are considered of utmost national importance as they go to the core of national sovereignty. For this reason, the European Union is not granted exclusive power to regulate AFSJ policies, but shares its competence with its Member States.

Consequently, the migration of third-country nationals into the EU is only partly harmonized at the EU level. This policy area is still under strong national influence and regulatory powers, with considerable regulatory differences among EU Member States. This is best illustrated by two examples of the divide between the EU and Member States' regulatory powers in relation to third-country nationals.

First and most importantly, Member States retain the right to determine volumes of admission of third-country nationals to their territories for employment and self-employment purposes.

Second, instead of a cross-cutting, harmonizing Union act, encompassing the rights of all third-country nationals in the European Union, the Union has opted for a sectoral approach. It regulates only those narrow and "desirable" categories of third-country nationals and their rights as deemed acceptable by EU Member States. The EU-level regulated categories are: highly qualified employees (the "Blue Card Directive"), students and researchers, seasonal workers, intracorporate skilled transferees, family members of both EU citizens and of legally resident third-country nationals, long-term residents, and third-country national workers legally residing in a Member State. The so-called "Single Permit Directive" provides a single application procedure and issuance of a single permit covering both residence and work permits, as well as a common set of rights for third-country national workers legally residing in a Member State. However, this Directive does not grant a third-country national an EU-based right of access to the Union labor market. It has a narrow harmonizing scope, allowing the host Member State's law to determine third-country nationals' right of access to its labor market. Generally speaking, third-country nationals' labor migration into the European Union is, at this stage, only partly harmonized. In other words, it is strongly governed by national law.

Refugees: When National, Regional, and International Law Do Not Work[5]

The preceding sections have demonstrated the interplay between national and regional (EU) migration and free movement laws. International law comes into play as an additional legal layer on top of these two legal regimes in relation to the status of refugees in the European Union. The explicit reliance of EU asylum law on the UN Convention Relating to the Status of Refugees is the result of the third objective of EU migration law: the setting and preservation of a high level of human rights standards, in particular in relation to refugees as one of the most vulnerable categories of third-country nationals. Both EU primary law (Article 78(1) of the Treaty on the

[5] For an account of the impact of the refugee influx on EU migration and asylum law, see Iris Goldner Lang, *Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law*, *in* HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER (Silja Vöneky & Gerald Neuman eds., forthcoming 2018).

https://doi.org/10.1017/aju.2018.4 Published online by Cambridge University Press

Functioning of the European Union (TFEU) and Article 18 of the Charter of Fundamental Rights of the European Union) and its secondary legal acts provide a legally binding commitment to respect the Refugee Convention.

However, despite the fact that EU asylum law is designed to have a high threshold of human rights protection and a harmonizing effect on EU Member States' national asylum laws, the recent inflow of refugees to the European Union has brought to the surface significant deficiencies in the Common European Asylum System and called into question the human rights principles and values on which the European Union (and its Member States) is based.

The deterioration of the standards of human rights in practice with respect to the refugees reaching Europe in the past few years can be demonstrated in three respects. First, the EU political discourse related to refugees has been, at least partly, dominated by hate speech and discriminatory statements. Statements like "Islam has no place in Slovakia"—by the Slovak Prime Minister Robert Fico—and "All the terrorists are migrants" or "Migrants are 'a poison'"—by the Hungarian Prime Minister Viktor Orbán—demonstrate the language and tone used by some of the Member States' leading politicians.

Such political discourse has seriously challenged core EU values and principles of human dignity, freedom, equality, and human rights, as proclaimed by Article 2 of the Treaty on European Union (TEU). The antirefugee political narrative has also had practical legal consequences on the interplay between national, regional, and international law, as some political statements have been accompanied by national acts or practices that violate the respective Member State's EU law obligations such as certain Member States' disregard of the Council Relocation Decisions which resulted in the European Commission's launch of infringement procedures against the Czech Republic, Hungary, and Poland.

The second level of deterioration of human rights standards in relation to refugees in Europe is seen in the numerous instances in which Member States incorrectly implemented or simply did not apply EU asylum law. These instances have indicated the dismantling of the Common European Asylum System and the human rights standards on which it is based, as well as the urgent need for its in-depth reform. Certain instances of the nonapplication of EU asylum rules were the consequence of EU law's inability to respond to the high refugee inflows while maintaining high human rights standards. The Dublin state-of-first-entry rule is the most prominent example.[6] This rule lays the responsibility for examining an asylum application on the EU Member State where the asylum applicant first entered the European Union. This rule is problematic in many ways. It runs contrary to the principle of solidarity and responsibility-sharing, as stipulated by Article 80 TFEU. It relies on the principle of mutual trust between the transferring and receiving Member States, which has proven highly questionable in practice. Finally, it is based on the (incorrect) presumption of appropriate human rights standards in all EU Member States, which has proven incorrect since the landmark judgments of the European Court of Human Rights and the Court of Justice of the European Union in the *M.S.S.*[7] and *N.S.*[8] cases.

In other instances of Member States' violation of their EU asylum law obligations, the respective Member State has been unable or unwilling to respect human-rights compliant EU rules for different reasons, largely security fears, lack of capacity, or simply populist motives. Here, probably the most prominent example is Hungary which, in 2015, adopted national laws which enable fast-tracking of asylum seekers and criminalize both the refugees who break through the razor wire and anyone who helps them cross the border.

[6] 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 O.J. (L 180) 108.

[7] M.S.S. v. Belg. & Greece, App. No. 30696/09 (Eur. Ct. H.R. 2011).

[8] Joined cases C-411/10 and C-493/10, N. S. & M. E., ECLI:EU:C:2011:865.

https://doi.org/10.1017/aju.2018.4 Published online by Cambridge University Press

Finally, the Union's response to high refugee inflows and to Member States' reactions is the third level of deterioration of human rights standards applicable to refugees in Europe. This response has a twofold manifestation. First, it is visible in the EU institutional reaction to instances of Member States' human rights violations. Second, it is manifest in the Union's response to the high refugee inflows themselves.

The EU institutional reaction to Member States' violations of their human rights EU-based obligations has been conducted through infringement proceedings.[9] Infringement proceedings are a mechanism initiated by the European Commission against a Member State that fails to fulfill its EU law obligations. These proceedings can result in a decision of the Court of Justice to impose financial sanctions on the respective Member State. On September 23, 2015, the European Commission instituted forty infringement proceedings against nineteen Member States due to their potential infringement of EU asylum legislation. These decisions were followed by the opening of a further eight infringement proceedings against five Member States on December 10, 2015. This number adds to the already pending thirty-four proceedings in the area of EU asylum law. It illustrates both the inadequacy of the current EU asylum rules and the incapacity or unwillingness of EU Member States to implement the high standards set thereby.

However, the institution of infringement proceedings need not have any effect on the potentially failing Member State. Infringement proceedings take years to complete and during that time the respective Member State can continue its human-rights-non-compliant practices without any consequences. For that reason, infringement proceedings, though a powerful tool, do not suffice to prevent or alter Member States' violations of refugees' human rights.

The Union's direct response to high refugee inflows is marked by the EU-Turkey Statement of March 18, 2016.[10] The Statement enhances cooperation with Turkey and aims partly at preventing individuals from reaching European soil and partly at returning some of the newly arrived back outside the EU borders. This deal has been strongly criticized as violating both international and EU human rights standards and as being morally problematic. Despite the fact that it has reduced the number of refugees reaching European soil, it remains both legally and morally questionable and, therefore, mirrors the inadequacy of the EU response when viewed from a human rights perspective.

Concluding Remarks

The essay aimed to show that the level of rights and protection granted to migrants in the EU varies depending on the migratory category and the level of law which regulates a specific migratory category. The viability of the three objectives, associated with the four migratory categories, also varies. The clear division between EU citizens and third-country nationals (as the first objective identified in the essay) remains strong and maybe even more palpable than ever. Similarly, the EU Member States' determination to preserve national control over migration to their respective territories (the second objective) has become even more evident in the time of crisis. On the other hand, the third objective—of setting and preserving a high level of human rights standards in relation to all migrants and in particular in relation to refugees, as one of the most vulnerable categories—is being contested as the result of the refugee influx and other political and social developments in the European Union. Hopefully the Union stands firm against any violation and degradation of human rights standards in the future.

[9] Consolidated Version of the Treaty on the Functioning of the European Union art. 258, May 9, 2008 O.J. (C 115) 47.

[10] Press Release: EU-Turkey statement, European Council, Council of the European Union (Mar. 18, 2016).

https://doi.org/10.1017/aju.2018.4 Published online by Cambridge University Press