Chapter 8 Variation in Asylum, Migration and Border Control



8.1 Introduction

Human migration is an outstanding example of a policy domain in which the links between European countries and their surroundings are revealed. The policy domains of asylum, migration and border control touch on international mobility, the protection of fundamental human rights, and international security all around Europe and within it. They also provoke intense debate among populations. These are policy domains where unexpected changes may arise (such as the sharp increase in refugees and migrants from conflict zones since 2014), where cooperation within Europe is clearly of added value (as in the case of joint surveillance of external borders), but where policy harmonisation may also prove extremely complicated (as in the case of asylum applications). Moreover, national politics may have an enormous influence in these domains, such as the German decision in 2015 to suspend a protocol that obliged Syrian refugees to apply for asylum in the EU Member State where they had first arrived (if that could be determined at all), and Prime Minister Viktor Orbán's decision in the same year to close the southern and eastern borders of Hungary.

International cooperation on migration is often undermined by obstructions, a lack of solidarity, and an unwillingness to face problems. That is no different in the EU. At the same time, policies in this domain give the EU an opportunity to make its geopolitical position clearer, for example by using mobility management to try to influence neighbouring regions.

International migration is a complex phenomenon, however, involving complex relationships; simple push-pull models are inadequate.³ Migration is usually the result of multiple factors, for example inequalities, conflicts, demographic trends, scarcity and climate change, but very often also of a very human tendency to seek out and explore opportunities and move on when prospects change. Moreover, migration is not only exogenous to Europe; political choices made in the past also influence people's motives.

The challenges are considerable and overlap with other issues, such as security, human rights, foreign policy and the functioning of the internal market. The purpose of this chapter is to describe how the different policy domains of asylum, borders and migration are related, to survey the main trends and events, and to analyse which topical issues merit attention in terms of harmonisation, integration and policy variation. The focus here is on the movement of persons, not goods (although that is obviously another important aspect of border control). As in the previous chapter, we analyse variation in the issues of migration and in the positions and responses of the Member States, and explore other possible variations in European cooperation. We also identify the conditions and limits of variation.

8.2 History of the Policy Domain

The history of Europe is one of individuals, groups and peoples moving across the continent. Empire-building, the Great Migration, countless wars and, in the twentieth century, the two world wars that erupted from European conflicts caused people to drift from place to place, again and again. After the Second World War, millions of people were forced to move elsewhere. Suppression of the uprisings in Hungary in late 1956 and in Czechoslovakia in 1968 led to the displacement of hundreds of thousands of people in each case. The Yugoslav Civil War once again displaced millions of people, with some 2.4 million fleeing to other countries.

As the European Communities and the European Union took shape, migration gradually became a main focus of interest and (controversial) point of decision-making. The free movement of workers provided for in the Treaty establishing the European Economic Community (now Article 45 TFEU) was transformed in the Single European Act of 1986 into the free movement of persons (now Article 3(2) TEU). It is important to note that from 1986 to 1995, the European Communities consisted of nine territorially contiguous Member States, namely the six original Member States as well as Denmark, Portugal and Spain, and three Member States separated from the others by seas, namely the United Kingdom, Ireland and Greece. Although there were usually border controls between these states, there were no fences or walls preventing border crossings (unlike in the case of the Iron Curtain). Enforcement of admission and residence rules depended to a large extent on domestic supervision of aliens. The continental part of the European Communities had the most to gain from the free movement of persons and therefore gave it the greatest level of support.

In 1995, the original Member States, with the exception of Italy, agreed to abolish internal border controls while simultaneously introducing a common visa system, closer cooperation in law enforcement, and external border checks (Schengen Agreement). The system did not enter into force until 1995 and required an Implementing Convention and a variety of practical facilities, such as separate areas at international airports for intra-Schengen and extra-Schengen flights. In the meantime, the other continental Member States had joined the system, although

implementation in Italy was delayed until 1997. Greece had to wait until 2000, pending the implementation of satisfactory measures at the external borders,⁷ and the Scandinavian Member States until 2011, when the other states in the Nordic Passport Union became part of the Schengen Area.

Parallel to implementing the Schengen system, all EU Member States agreed in the 1990 Dublin Convention that, in principle, the Member State of first entry would be responsible for examining asylum applications. This protocol was meant to discourage asylum seekers from travelling on to those countries where they expected to have better prospects. The Convention eased the workload for countries such as the Netherlands and Germany, even though many asylum seekers continued to arrive at airports. In the Netherlands, political opponents to the Convention mainly argued that some of the asylum seekers who had passed through the country should be taken in. The Convention entered into force on 1 September 1997.

The Schengen and Dublin systems were thus established in separate treaties, outside the structure of the European Communities. The Maastricht Treaty (1992), which became effective in 1993, merged police, judicial and migration cooperation into a Third Pillar under the auspices of the European Union. The Treaty of Amsterdam (1997), which became effective in 1999, subsequently integrated asylum and migration into the Community structures so that the matters covered under the Schengen Agreement and the Dublin Convention could henceforth be governed by EC regulations, supplemented by treaties with non-Member States. Initially, the Schengen and Dublin systems were applied mainly by a socially and economically convergent group of Member States, along with Sweden, Finland and Austria from 1995 onwards.

The situation changed dramatically when a total of 13 Central and Eastern European states joined the EU in 2004, 2007 and 2013. Socio-economic convergence programmes were established for these new members, but their reorientation in terms of the rule of law and citizenship required a cultural change that proved difficult to organise. In their accession (although the three states that acceded most recently were, temporarily, not accepted into the Schengen Area), uniformity was prioritised over variation without considering the public tasks that needed to be fulfilled in this case.

8.3 Tensions

The tensions associated with the policy domain of asylum, migration and border control arose long before 2015, when large numbers of people arrived from the Eastern Mediterranean and Africa. Ever since the EU's major enlargement in 2004, a discrepancy has been visible between the Community arrangements and the reality of this policy domain. Internal and external changes have played a role in this. *Internally*, the free movement of persons—not only of workers, but also of (quasi) self-employed service providers—sparked an increase in migration, especially from Poland. From a legal standpoint this was strictly a matter related to the functioning of

the internal market, but in the Member States' official statistics and in the eyes of many of their people, these fellow European citizens were aliens. *Externally*, the end of repression-induced stability in North Africa and the Middle East had huge consequences. Against the background of terror caused by al-Qaeda's attacks, many people fled to Europe after the invasion of Iraq in 2003, the 'Arab Spring' in 2010–2011 and, in particular, the Syrian civil war from 2011 onwards, seeking refuge in particular in the older part of the EU, where conditions for their reception and integration were more favourable than in the Member States that had acceded since 2004. The stream of refugees reached its climax 2015–2016, aggravated by migration from Sub-Saharan Africa and the Horn of Africa. These events were all the more dramatic because many of the refugees had taken huge risks crossing dangerous regions and seas and exposing themselves to exploitation by human traffickers.

Western Europe thus quickly became part of a worldwide pattern of refugeeism, migration and urbanisation that had been noticeable for much longer. In the public's view and in statistics used in policymaking, these very different groups of migrants became one 'flow'. The common area that was the aim of the Schengen Agreement and the Dublin Convention was, in fact, divided into countries on the external border struggling to cope with the many arrivals (mainly Italy, Spain, Malta and Greece, which was also in the throes of a disruptive budgetary crisis), countries in Central and Eastern Europe that were averse to immigration and that offered few prospects to the refugees who came anyway, and countries in Western and Northern Europe (in particular Germany), which absorbed the lion's share of the refugees.

The European Union tried to stabilise this situation mainly by harmonising procedures and criteria for admission and residence, building on the 'acquis' of the Schengen and Dublin regulations. The European Asylum System, introduced in 1999, includes guidelines on asylum procedures and the reception, recognition and return of asylum seekers that have gradually been clarified. Since the revised Asylum Procedures Directive (2013/32/EU) became effective, stricter requirements have also been imposed on the quality of the judicial procedure. In addition, a relocation and quota policy was instituted; although it was rejected by some Central European Member States, it has now been approved by the Court of Justice (6 September 2017, ECLI:EU:C:2017:631). Surveillance of the external borders is regulated in a series of European directives; some are implemented by the FRONTEX, formerly the European Agency for the Management of Operational Cooperation at the External Borders of the European Union, which in 2016 became the European Border and Coast Guard Agency.

8.4 Intractable Realities

The Common Asylum System has smoothed out many of the differences in the way Member States assess asylum applications and enforce decisions. Nevertheless, discrepancies remain. Some of these are related to the effective implementation of 8.4 Intractable Realities 127

the system. Without assistance from other EU states, it is impossible for Greece, with its many islands, to carry out effective border surveillance involving the registration of country of entry. Other Mediterranean Member States face similar problems. And as long as registration does not take place, it is equally impossible for the other EU Member States to invoke the Dublin protocol allowing them to transfer asylum seekers to the country of entry.

More important, however, are the actual circumstances of reception, accommodation and integration into society. For many asylum seekers, these are the deciding factors in their choice of destination, leading to a very uneven distribution of refugees among the Member States. Council decisions in 2015 and 2016 concerning the redistribution of asylum seekers, adopted on a proposal by the Commission and with the advice of the European Parliament, were meant to reaffirm solidarity between Member States at a time when vast numbers of asylum seekers were arriving in Europe. A follow-up is a proposed revision of the Dublin Regulation, now under negotiation after discussion by the European Parliament. Instead of each Member State being responsible for reception and processing, a pan-EU approach is to be taken to the issue, with implementation tasks being divided between the countries.

The past two decades have raised serious doubts as to whether the system as it stands is tenable. After all, the Member States have such differing attitudes to asylum and migration that there is little prospect that a policy based on harmonising procedures and on redistribution will succeed. These differences are both external and internal in nature. Asylum seekers want to arrive in a country that not only protects them from bombing and torture but that also allows them to start afresh. That is why they want desperately to escape from the hopelessness of local refugee camps or reception centres in Greece and other border countries. At the same time, migrants have become less welcome in Western Europe, partly because social cohesion based on traditional patterns has eroded, but also because in the same period, neoliberalism undermined the protections afforded by the social democratic state.8 The change in the political and social climate has been even more pronounced in Central and Eastern Europe. An overly hasty transition from a nationally motivated struggle against Marxism to a (hyper)liberal economic system has raised acute fears of a loss of national 'identity' in the Member States that acceded in 2004 and afterwards, making them even less willing to accept asylum seekers.

8.5 Solidarity in Migration Policy?

The task of coordinating asylum and migration policy and European and international law raises the necessary questions. Much of the current policy ignores the fact that the group of irregular migrants from Libya, for example, is mixed. Although the majority of people who cross over are economic migrants who do not qualify for asylum status, some are refugees entitled to international protection.

Recognising variation in legal status is essential to guaranteeing fundamental human rights, both in European and African territory. This approach requires policies that allow for an internationally legitimate assessment of individuals on African territory, and not only after refugees have made the dangerous crossing into EU territory. Legal access channels to Europe are important in this respect. There must be further discussion of establishing external hotspots where asylum applications can be submitted, so that Europe can meet its international obligations. ¹⁰ The policy for regulating the influx of economic migrants is also inadequate. They constitute the vast majority of migrants arriving on European territory and do not have the right to residence status. At present, the return policy of many EU Member States is weak, despite the Return Directive (2008/115/EC). This means that the majority of asylum seekers who have exhausted all the legal procedures do not actually return to their country of origin, stoking public dissatisfaction and chipping away at any public goodwill towards migrants who are entitled to asylum status. ¹¹

The issues facing the EU and the Member States are numerous: from the future of Schengen and a possible Dublin IV or V to the geopolitics of international migration management by means of mobility partnerships, and from the future of the ceas and the EU Blue Card to the mandate given to the European Border and Coast Guard and the design of data information systems. Instead of evaluating each component, the aim of this section is to understand issues as 'public goods', with a balance continuously being struck between the logic of appropriateness and the logic of consequences.

A logic of appropriateness could be based on solidarity. Article 80 of Chap. 2 of the Treaty on the Functioning of the European Union, entitled 'Policies on Border Checks, Asylum and Immigration', explicitly refers to the notion of solidarity.

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Does this provide a legal basis? Not necessarily. The concept of solidarity as laid out in the Treaty also raises questions. Solidarity between whom? Commentators have pointed out that the point here is not solidarity between the EU and other countries, nor with or between individuals, but solidarity between Member States. ¹² Moreover, as the EU's foreign policy with regard to border control has intensified, there is the question of whether such solidarity can be limited to the EU. After all, the logic of appropriateness and the logic of consequences extend to countries to the east and south of the EU, far into Africa and the Middle East. There must be a certain measure of solidarity in migration deals too if they are to last.

When solidarity has only limited usefulness as a starting point for policy, the most sensible approach is to shift to strengthening the institutional basis for that policy, as a mitigated logic of consequences. Examples include the transformation of FRONTEX into a European Border and Coast Guard Agency, the endorsement by the Court of Justice of the quota policy, and the Commission's mandate to continue building mobility partnerships.

The question, however, is whether the rationality of the internal market—such as setting quotas for the admission of asylum seekers—provides sufficient grounds for an asylum and migration system that is sustainable in the longer term. In a keynote address delivered on 20 March 2015, Prof. Guy Goodwin-Gill pointed out the possibility of establishing an agency to oversee Member States' compliance with international obligations related to refugees and migrants. Such an institution may be the answer to the 'how' of policy. But the 'how' in this case addresses the balance between the two logics, of appropriateness and consequences. According to Guild, ¹³ such an institution's most important contribution would be to improve international solidarity within and outside the EU. And improvement is necessary in that respect, despite there being a European Asylum Support Office (EASO) and the Fundamental Rights Agency (FRA). The proposed institution should have more far-reaching powers without being 'coercive', something that would not promote solidarity.

This approach has received theoretical support from Rossi (2017), who, inspired by a 'public goods approach', outlines a quota system, reinforced by binding criteria for the rights of asylum seekers. Rossi described the European asylum system as a 'non-cooperative game'. Although the EU does have some of the features of game theory and all its associated dilemmas when it comes to burden-sharing, it is nevertheless based primarily on the 'games real actors play'. This means that the playing field is ample and mobile: Member States that refuse to participate in one round of negotiations, for example on the distribution of refugees, may feel the effects later in another round on a completely different subject, for example the distribution of agricultural subsidies. As a result, game theory does not always apply in full to the practice of politics and policymaking.

Whereas institutionalisation points down a narrow path in navigating between the two logics, the 'public goods approach' emphasises the content of the issues at stake: protection of people and borders, national sovereignty and identity, security and geopolitics. Institutionalisation should not lead to an instrumental management approach to policymaking, in any event. As one Dutch commentator stated in a now-famous essay, 'A refugee is not a cod'. ¹⁷ Quotas, distribution keys and relocation mechanisms are internal market instruments that work very well in certain policy domains, but their effectiveness is severely limited when they are applied without further ado in the area of migration. Policy in that area must be based on a certain measure of solidarity. The 'trade-offs' and 'distribution mechanisms' that may subsequently prove necessary must in some way or another be sensitive to the public goods at stake in this case: international mobility, security, and the protection of people and borders.

8.6 Conclusion: Ways Forward for Variations in Policy

Migration is a critical factor in Europe's geopolitical position because controlling international mobility is important to the exercise of sovereignty vis-à-vis non-EU countries. The policy on asylum, migration and border control allows us to observe just how far cooperation can go and at what point national preferences make a difference. It should be noted, first and foremost, that issues of migration must be considered from a variety of different perspectives: that of the migrant, that of the citizens of the host community, and that of international economic and political relations. The fundamental guarantees laid down in the Geneva Convention on Refugees, Article 3 of the ECHR, and Article 18 of the Charter of Fundamental Rights of the European Union establish a legal minimum for the treatment of asylum seekers: expulsion must not expose them to persecution or degrading treatment. These obligations are incumbent on both the Member States and the Union as a whole. In all further questions of policy and legislation, the point is to assess the most appropriate model of action.

The policy domains of asylum, migration and border control already provide several examples of variation that can be broken down into the different forms discussed in this book (variation in policy content, decision-making method, and membership). 'Flexible solidarity' with regard to the resettlement of asylum seekers qualifies as an example of variation in policy content. The EU-Turkey Statement of 18 March 2016 (the 'deal') is an example of variation in the decision-making method, as it takes the place of a Treaty and does not adhere to the usual procedure¹⁸ Instead of the Community method, intergovernmental decision-making was applied within the European Council to reach this agreement. Similar variations in decision-making method could be helpful in the event of future refugee crises. Schengen is an example of variation in membership: not all EU Member States are part of the Schengen Area, while some non-EU Member States are part of it.

Arguments derived from the logic of appropriateness (such as encouraging meaningful participation in society) and from the logic of consequences both play a role in all these forms and examples, and they are not mutually exclusive. It would be difficult to consider questions of border surveillance and admission as anything other than shared questions, at least as far as the continental Member States are concerned. By contrast, there is still a great deal of discretion for national labour market policy, while matters of public order concerning foreign nationals who have neither been legally admitted nor expelled tend to come up more at the local level. Such considerations could lead to multiple variations in future migration policy, possibly including a range of different choices as to the Member States covered by the policy.

The concept of collective appropriateness is defined by Article 18 of the Charter of Fundamental Rights of the European Union, which incorporates the asylum guarantees of the Geneva Convention on refugees into European law. However, this human rights standard does not necessarily imply a uniform migration policy and

even leaves scope for variation in the way in which asylum is ensured; only *refoulement* (forcibly returning people to a country where they are likely to be persecuted) is in any case unlawful. However, there is also a *need* for European unity stemming directly from the requirements of the internal market and its open borders. In addition, certain dimensions of this policy belong more to the national political domain, for example labour market policy and the integration of newcomers. The latter dimension influences the destination favoured by asylum seekers and migrants, who prefer to go where they and their families have the opportunity to make a fresh start.

There is an urgent need to review the objectives and patterns of migration policy. Public acceptance of current policies is eroding, while at the same time events in Africa and, even more so, the longer-term effects of climate change will drive up the pressure to admit migrants, whether or not as asylum seekers. The legal distinction between refugees and other migrants is debatable if we consider migration driven by exploitation and climate change ¹⁹ and it requires that asylum procedures should be assessed on a case-by-case basis. The question is whether and how the EU and its Member States will cope with these developments, and also whether the EU can itself survive disruptive conflicts between Member States.

We must further assess any variation in fulfilling these European public tasks with a view to strengthening democratic support for migration policy. Social and political differences between the Member States suggest less unity, but the nature of the problems may in fact require more. In terms of this book's analytical framework, this means that the choice of institutional order will be influenced in part by different opinions concerning the motivations for collective action.

Variation can take many different forms. Migration policies are so closely intertwined with other public tasks that different forms of variation may be required, depending on the subject In 2016, the Advisory Council on International Affairs (AIV) recommended creating more scope for variation in migration policy within the circle of Schengen countries.²⁰ The AIV drew attention to the possibility of closer cooperation as defined in the EU Treaty (Article 20 TEU) between Member States wishing to implement the Schengen Agreement within the framework of a fully functioning common asylum system, including similar forms of reception and integration, the acceptance of distribution keys, sharing information on abuses, coordination with the UNHCR on resettlement, and agreements with safe countries outside the EU regarding the return of migrants. Other Schengen countries would maintain open internal borders under normal circumstances and share responsibility for external borders and the common visa policy, provided that they agree to share costs, jointly manage external borders and perform selective checks at internal borders (for example verification of travel documents at airports and key sea ports). This proposal allows for societal differences between Member States. After all, there is little point in forcibly transferring a refugee to a Member State that does not want to take in asylum seekers. In terms of the EU's own development, it is important that this variation does not jeopardise the socio-economically valuable single market.

The EU has placed restrictions on migration and border crossings from outside Europe, which are meant to regain control of mobility, but has not yet moved to give specific groups of people extra opportunities for migration. There has also been little headway in setting up systems for commencing the asylum application procedure outside the EU's borders. The embassies of EU Member States could play a more active role in this respect ('diplomatic missions policy').

Labour market policy associated with migration and the policy on knowledge migrants enrolled in study programmes are not fully harmonised within the context of the internal market. This discrepancy must be considered when the inevitable follow-up question arises: can we prevent the asylum procedure being used for economic reasons by lowering the threshold to legal labour migration? Such a move would be advantageous for only a few Member States, among them the Netherlands and Germany. Here too there may be an opportunity for variation at a fundamental level: Member States would be offered the option of permitting 'circular migration' under an agreement concluded with other countries. The fourth Balkenende government had already experimented with this possibility in a pilot project. Admission would be temporary, but upon returning to his or her country of origin, the labour migrant would have gained enough experience and accrued enough start-up capital to participate in economic life there. States that agree to such arrangements would be expected to cooperate with the return policy.

One of the major issues in the EU's foreign and security policy is how to prevent an unmanageable flow of people to other countries and continents. It is an issue that has been given little notice in migration policy to date, with the exception of controversial attempts to conclude agreements with countries on the other side of the Mediterranean that are tantamount to the obstruction of migration. Betts and Collier²¹ came up with more sweeping proposals. They recommend putting more emphasis on training and employing for the millions of people currently living in refugee camps, as part of a coherent refugee policy. Their assertion is that participation in the host country's economy creates opportunities for refugees, whether they gain long-term refugee status or return to their country of origin. The final step for refugees who have no meaningful prospects would be a programme of resettlement in EU Member States or elsewhere.

Fijnaut²² has also highlighted the importance of a 'transnational political deal' to 'reimburse' third countries that tighten up surveillance of their borders with Europe by investing in their economies and setting up legal migration programmes. This idea has been elaborated in the proposals published by the Centre for European Policy Studies (CEPS) (12 October 2017). It advocates a 'trade-off' in that European countries can fast-track the processing of asylum applications and permit a broader, but targeted, work permit policy in exchange for African countries, in particular, doing more to take in those whose asylum applications have been rejected. To some extent, this idea is in line with Dutch proposals aimed at circular migration as part of an overhaul of migration policy. The Commission's European Agenda on Migration already acknowledges the importance of returning migrants to third countries and linking this to the need for legal migration channels that permit temporary labour migration.

The two logics, of appropriateness and of consequences, go hand in hand—but never without friction. Even considerations of solidarity are thus subject to an inevitable cost-benefit trade-off and can be supported by greater institutionalisation. Policy based on the two logics is not limited to the Member States, but also affects non-EU countries with which the EU has established partnerships. These ideas can be incorporated into an overhaul of migration policy that is no longer buckling under the pressure of maintaining an appearance of unity. At the same time, they preserve what the European Asylum System *can* achieve, i.e. unity in terms of procedures and policy content pursuant to the basic prohibition against *refoulement* as set out in the Geneva Convention. Finally, it is important to recognise that any serious preventive policy can only be the work of a European Union that presents a united front on the international stage. The Union must pursue a common policy on country of origin and take proactive measures to avert fresh crises.

Notes

- 1. de Haas (2016).
- 2. International migration as a percentage of the world's population has remained fairly constant since the Second World War. In a world population of 7.4 billion people, around 3% are international migrants (excluding refugees). The percentage of refugees has been less stable. At the moment, approximately 0.3% of the world's population are refugees. The vast majority of these (about 85%) remain in developing countries; about 15% reach more prosperous countries (Haas de 2016).
- 3. Jennissen et al. (2007), Geddes and Scholten (2016: 4-5).
- 4. Oltmer (2016: 101).
- 5. Oltmer (2016: 103).
- 6. On that occasion, Article 7a was inserted into the EEC Treaty, charging the Community with the task of establishing the internal market, an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, by 31 December 1992 at the latest.
- 7. The extent to which Greece can effectively meet these requirements remains to be seen; this is not a question of unwillingness, but of the geographical reality of a vast archipelago with external borders.
- 8. Supiot (2010).
- 9. AIV (2017a).
- 10. Palm (2017).
- 11. Barslund and Ludolph (2017).
- 12. Farcy et al. (2016).
- 13. Guild et al. (2016: 586).
- 14. Rossi (2017: 57).
- 15. Rossi (2017).
- 16. Scharpf (1997).
- 17. van Middelaar (2016).

- 18. Idriz (2017).
- 19. Sassen (2014).
- 20. AIV (2016).
- 21. Betts and Collier (2017: 227-236).
- 22. Fijnaut (2017: 200).

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