

# 1 MIGRATION AND BORDER MANAGEMENT: CHALLENGES AND PERSPECTIVES FOR REFORM

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*This contribution reflects the opening speech of the MAPS Jean Monnet Conference held at the University of Malta on 25 March 2022. It is meant to give an overview of the issues discussed at the conference and in the chapters that follow.*

Life as the underdog is tough. Let me clarify: I do not pity migrants, but I feel for migrants' causes, for their plight. Before proceeding further, I must emphasise that what I am about to say is purely my opinion. I have always remembered that whole nations have been built based on European migration: North America and Australia, to name but two. So, I consider resisting migration today ironic, given Europe's past performance in other continents.

Secondly, I have always remembered that birds, all kinds of animals and marine species migrate and cross whole continents and oceans as part of their natural reproductive cycle or merely to survive, to escape hunger and thirst. It is no wonder, it should come as no surprise, that human beings seek to do the same. Look at Ukraine, for example. I heard on BBC radio yesterday that it is the largest people displacement since World War II. It happens. Migration from Africa happens, too.

A small remark on territoriality: having territory is a trait we share with at least some other species. I recently watched a documentary about male lions – how a male lion will fight another male to the death if he dares enter his territory. So, territoriality may be a natural phenomenon for some species, including humankind. However, it is also a fact that countries, boundaries, nations and national identities are recent artificial creations to serve a purpose: preserve the status quo within the state. Years ago, I read a book called *States, Nations and Nationalism from the Middle Ages to the Present* by Hagen Schulze (English translation). Schulze accuses poets and writers of shaping literature to evoke a spirit of nationalism in their respective countries. At the same time, wars were largely responsible for the transition of the national mentality from the intellectuals' minds to the masses. According to Schulze, with the Great War (World War I), the whole society was at war, and the hour of the state had come. It has been so ever since.

So, we have raised artificial borders, we have made life very difficult for foreigners unless they are wealthy and willing to spend money in our 'territory' and we exploit migrants, leaving them to do the menial jobs that the locals do not wish to do. I have personally visited detention centres, including outside Malta, and have been amazed at what I perceive as a complete and utter failure of governments, for there is no other way to describe healthy people being confined to zoo-like conditions. I shook my head in initial disbelief a few years ago, when an earlier Prime Minister of Malta went on record saying that Malta profits from foreign workers because they pay national insurance but do not remain here long enough to claim a pension. In time, I realised that this was indeed the case. I was once assisting a foreigner and accompanied her to a government entity. The official asked me, 'Why does this person not simply return to her country? Who told her to come to Malta anyway?'

So, here I am talking about foreign workers, not migrants, but you get the picture. Look at the general approach to foreigners: they either serve a purpose or are not welcome. I sincerely hope that things will change and that the younger generation will do better as they grow up accustomed to living in a multiracial and multicultural society and will be more ready to embrace foreigners, including migrants, and not consider them to be some 'invasive species'. I trust that initiatives like today's will help to make this happen, this change, this move towards an easier transition for migrants to a better life.

Of course, there is the other side of the coin: migrants must do their part, namely, do their utmost to be law-abiding persons. I am in no way suggesting that migrants are any more criminal than the local population of any country, Malta included. You find less well-meaning people everywhere. Migrants must try to integrate and contribute to the nation's growth, thus advancing their cause.

## 2 EU MIGRATION LAW: FROM SCHENGEN TO THE EXTERNALISATION OF BORDER CONTROL – QUO VADIS?

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*This chapter aims to highlight the main features of EU migration law. It starts with Schengen and the context of removing border control at EU's internal borders to facilitate the flow of people internally and then moves on to how the EU has strengthened, and sometimes struggles to strengthen, its external border with third countries. Hence, while the EU encourages internal migration, it seeks to tighten regulations at the external border. Finally, the chapter discusses where this may lead the EU in the future by examining current European case law.*

### 2.1 INTRODUCTION

EU migration law has long been a controversial and debatable field of law. Why the EU initially lacked competence and still does not have exclusive competence plays an important role in evaluating EU migration law. The EU went from eliminating internal border controls to strengthening the external border through the Schengen acquis. However, the externalisation of border control brings up several potential human rights violations and raises the question of the positive obligation of states to protect human rights and strike a balance between the rights of migrants and the control of the external border. In the first part, this chapter provides a microcosm of the main EU migration law and policy. This is followed by how the EU went from removing control at its internal borders to strengthening and fortifying its external borders. However, this did not prove sufficient to stem a legal migration. So, the Member States sought to externalise border control, which brought about potential human rights violations. In the final part of this chapter, the discussion focuses on some examples of the case law of European courts in Strasbourg and Luxembourg and how they see the externalisation of border control.

## 2.2 EU MIGRATION LAW

Free movement of persons is one of the very foundations of the Treaty on the Functioning of the European Union (TFEU), which establishes the Internal Market through Article 45 TFEU. Free movement rights have been consolidated in the Citizens' Rights Directive.<sup>1</sup> Although the directive applies to EU nationals, it can be argued that the principles in the directive are gradually being widened to include third-country nationals. The relationship in EU migration law between Union citizens and third-country nationals is one of both convergence and divergence.<sup>2</sup> Convergence because the category of third-country nationals enjoying the same or similar rights as Union citizens is widening – a prime example being that of third-country national family members of Union citizens – although their treatment remains problematic. Divergence because in developing EU law on borders and admission, residence and status of third-country nationals, Member States have subjected the right of free movement of third-country nationals to barriers that the Court of Justice of the European Union (CJEU) has severely limited, and in many cases excluded, with regard to Union citizens. Guild identifies such barriers, for instance, in the lower threshold for their expulsion and in the additional requirements to access social security benefits.<sup>3</sup> The result is that the developing concept of EU citizenship is presumed to be based on discrimination between classes of citizens. For third-country nationals enjoying free movement rights, the dividing line between citizenship rights and discrimination against aliens remains rather blurred. This brings up the following questions: How to distinguish between free movement and immigration? Who are the citizens and the immigrants?

Third-country nationals are those who do not hold the nationality of a Member State. As clarified by the CJEU, the rights of workers, self-employed and service providers to have free movement are limited to the nationals of the Member States. The jurisprudence of the Court is more ambiguous about the rights of service recipients, such as tourists. In 1986, the Single European Act enlarged the scope of the right of free movement of service providers to include the ability to adopt measures for the free movement of third-country national service providers. This opportunity has not been taken up. Although the Commission proposed a directive to provide for this in 1999, it was withdrawn. The extension was reintroduced in the draft services directive in 2005

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1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States [2004] OJ L 158/77.

2 See Guild, E., 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons', in Baldacchi, A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 57.

3 *Ibid.*, p. 59.

but was withdrawn in the face of heavy criticism by some Member States and social partners.<sup>4</sup>

EU nationals, however, have a right to exercise free movement rights, which entails a movement right for third-country nationals. In particular, EU businesses that provide services across EU borders are entitled to deploy personnel of any nationality for this purpose.<sup>5</sup> While it appears that Member States can require that the third-country national personnel have been admitted to a Member State, other obstacles, such as obligatory periods of previous employment with the enterprise before the deployment, are not permissible.<sup>6</sup>

Third-country nationals are entitled to rely on all EU free movement rights except those of persons. Thus, for example, they are not excluded from the personal scope of the free movement of goods or capital under agreements between their country of origin and the EU. Some third-country nationals enjoy rights attached to the free movement of persons, such as security of employment and residence, equal treatment in social security and education.<sup>7</sup> The most extensive of such rights accrue to the Turkish workers under the EC-Turkey Association Agreement and the Decisions of the Association Council, in particular Decision 1/80, which has been the subject of substantial jurisprudence from the CJEU.<sup>8</sup>

Following the *communautarisation* (introduction to the then Community pillar) of the immigration and asylum issues into Title IV of the EC Treaty by the Amsterdam Treaty in 1999, now Title V of the TFEU, several new legislative instruments were created dealing with legal migration. A five-year period ending 1 May 2004 required adopting measures under the new powers. Regarding legal migration, the following measures have been adopted:

- a) Regulation 1030/2002 on residence permit<sup>9</sup>
- b) Regulation 859/2003 on third-country national's social security<sup>10</sup>
- c) Directive 2003/86 on family reunion<sup>11</sup>
- d) Directive 2003/109 on long-term residents<sup>12</sup>

4 See Baldacchi, A. et al., *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 39.

5 Case C-43/93 *Vander Elst* [1994] I-3803.

6 Case C-445/003 *Commission v. Luxembourg* [2004] ECR I-10191.

7 Romero-Ortuno, R., 'Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?', *Journal of European Policy*, 11, pp. 245-272, 2004.

8 See Groenendijk, *ILPA European Update*, June 2005. p. 7-10.

9 [2002] OJ L 157/1.

10 [2003] OJ L 124/1.

11 [2003] OJ L 251/12.

12 [2004] OJ L 16/44.