

Current EU refugee policies

Keynote speech for the Conference

“Migration and Refugee Crises: the EU and its member states between obligation, self-interest and goodwill”, Warsaw, 21.03.2018, Warsaw School of Economics¹

Thank you for inviting me to speak to you here today.

My objective in the following is to differentiate between different types of refugee policy in Europe and, on the basis of these, to identify current trends. I shall then evaluate these trends and determine possible policy actions for the future which result from them.

Although my - tentative – typology is initially an empirical-analytical one, I do not wish to sidestep making an explicitly political-normative statement and in doing so it is the human rights and the rights of refugees that constitute my normative compass. Enshrined in positive law, the challenges of migration management and refugee and integration policy can be interpreted and addressed productively: since the European Union generally refers to the human rights, these can be seen as a core theme when it comes to developing standards for future action:

These standards concern all the central topics addressed at this conference:

- They concern a future migration foreign policy as regards the cooperation with home states and transit states and policies at the external borders, which, in my opinion, lead to one of the most important research questions in both law and social sciences, that is the question as to *where* the human rights apply.
- They equally affect actions within the European Union as regards the no less crucial question how refugees and migrants should be treated once we have received them and consequently also questions concerning the revising of a Common European Asylum System. This is something we will almost certainly engage in lively debate about in the next few days with leading representatives in Germany.
- Finally, they also concern the question of integration since human rights always serve as the basis for a continual, discursive struggle when it comes to the interpretation of how flight, migration and integration should be classified. Ultimately, in my opinion, they serve as a basis for the affirmation of cultural pluralisation of the immigration society.

¹ A more extended version of this talk is going to be published as a full article in the German journal “Zeitschrift für Ausländerrecht”. The author would like to thank Christine Scharf for her support in translation.

In their economic, social and cultural alternative, the human rights form the rights-based foundation for participation with equal opportunities for everyone.

Let us begin with the empirical analysis, at the same time bearing in mind this normative compass:

1. Europe's refugee comprises four types

In order to determine the development of refugee, migration and integration policies within the EU, I will address three issues:

1. What, according to the Member States, should a migration policy look like?
2. Where do the Member States stand on the question of solidarity and shared responsibility among the Member States and what is the position of the Member States in respect of those standards already set by the Common European Asylum System?
3. What does their integration policy look like?

From this we can tentatively identify four types which could be placed on a continuum. A continuum would indeed indicate that the distinction between the groups I shall mention is not quite clear-cut, that there is rather quite a lot happening between them, and that these dynamics are exactly what will determine in which direction the refugee policy in Europe is moving. As such, I do not wish these four types to be understood as wholly exclusive of each other, but rather as types which overlap, and the actions of which are in a state of flux.

Despite all the differences, all four types have one – unfortunately rather negative - tendency in common, and that is a trend towards a restrictive policy at the expense of human and refugee rights. Allow me to now briefly present these to you and to illustrate them by means of some current developments.

1.1 Group 1: States along the southern external borders: without solidarity for more border control, extra-territorial asylum procedures and detention

The first group comprises the states along the external borders of the EU, in particular Italy and Greece, but also Cyprus, Malta, and – to a certain extent – Spain. Their main interest in the past few years has been to push for more shared responsibility in the EU. It is these countries which as hubs and with the hotspot approach should have ensured the establishing of permanent solutions: acceptance, routing or return of migrants and refugees. Due to a lack of administrative competence, a lack of willingness to receive on the part of other EU Member States, and also a lack of trust on the part of many refugees themselves, it was not possible to impose this hotspot approach within the timeframe and to the extent intended. The result of this was considerable human rights problems in the reception centres: fewer guarantees in the

asylum process, undetermined responsibilities on the European and national level, highly questionable living conditions, and even detention in the reception centres.

Even within Italy there is a trend towards the tightening of the refugee and migration policy: In early 2017 the country extended its practice of detaining refugees by way of the Minniti Decree. Reception and repatriation centres (CPR) were expanded and extended, with those seeking asylum being taken into custody before being repatriated. Italy has simplified and expedited the process of recognising asylum seekers and in doing so casually removed the legal possibility of appealing to the next instance entirely. Human rights organisations such as Coalizione Italiana Libertà e Dritti Civili have quite rightly condemned the fact that there must no longer be individual hearings in person, something which is clearly in breach of European law pursuant to the Asylum Procedures Directive.

The large proportion of the members of this group of states receiving refugees and the disappointment at the lack of solidarity in Europe are the reasons for this policy orientation. What is more, especially in the hotspot states, public opinion has seen a notable shift towards populist parties of various origins, such as currently in Italy the Movimento Cinque Stelle or the Lega Nord und Forza Italia.

Conservative governed Spain, in which in contrast there are *no* right-wing parties nationally, is geographically further away from the main countries of origin over the past few years than Greece or Italy. Nevertheless, at the time confronted with a considerable number of arrivals to the Canary Islands, already under the previous socialist government Zapatero (2004 - 2011) Spain relied on bilateral cooperation with the countries of origin by way of repatriation agreements, specifically with Morocco as well as with the whole of West Africa. For a long time it has relied on border controls in African waters and the martial isolation of its exclaves Ceuta and Melilla, situated on Moroccan territory. In this way, with its "Plan Africa" adopted already in 2006, Spain established itself as the forerunner of an externalised refugee policy under the mantle of "development cooperation as compensation for cooperation on migration control": In return for the prevention of "illegal entry" and the monitoring of the sea, it approved the normal entry of and the issuing of work permits for a certain number of migrants – a strategy which has now become the blueprint for the whole of Europe in the form of the new migration partnerships.

1.2 Second group: outward restrictions, inward integration – but with a declining tendency

France's president Macron also recently took a similar position as a fervent proponent of a greater externalisation of EU refugee policy, in particular in respect of extra-territorial asylum procedures. This is not a new idea, but rather dates back to the "New Vision for Refugees" and

“Reception camps in Africa” already proposed by Tony Blair in 2003 and a year later by Otto Schily. Now also Macron has announced that Niger pre-screening for the asylum process is already to take place in Chad and Niger.

With regard to the internal EU refugee policy, France is one of the countries which advocates a two-speed Europe, potentially shoulder-to-shoulder with Germany. In addition, last week Macron bilaterally signed a new refugee agreement with the United Kingdom, which amongst other things provides for an “enhanced police cooperation to control the border” in Calais. With regard to the solidarity with the Member States, with a total of 146,000 applications in two years, France was most recently only in fifth place in terms of the number of refugees received, far behind Germany, Italy, Hungary and Sweden. However, the country has tended to receive an increasing number of immigrants from Africa, and in 2017 passed the 100,000 mark, which resulted in the country introducing harsher controls on immigration.

The French integration policy, conversely, was - and up to now still is - characterised by precarious accommodation, long processing times for asylum applications and hardly any provisions for integration. According to the current, as yet unpublished *projet de loi*, asylum procedures should also become faster in France and those who are to be deported should be able to be held for longer in deportation detention centres. However, in the new Bill efforts are being made for the first time to improve integration policy, in part based on the German model as I was able to see for myself last week at the National Assembly. Macron calls this balancing act a “combination of humanity and hardship.”

If we are saying that the members of this second group have in common a coordinated migration foreign policy in Europe, an active repatriation policy and an active integration policy, then besides France we must also include Portugal, Luxembourg, recently Finland and Sweden and – up to now – Germany. Sweden, for example, for a long time an important ally of Germany’s in respect of the refugee issue, and which argued in favour of European solutions and binding distribution quotas, is reacting to an increased approval of the Sweden Democrats and an increasing polarisation of public opinion with limitations. Whereas on the one hand attempts have been made to make Sweden less attractive, on the other hand at the same time a number of initiatives and projects have been launched with the aim of better integration and quicker inclusion in the labour market.

How much longer Germany will be a part of this group will depend on the outcome of the coalition negotiations. With the Integration Act, we have been able to establish an initial improvement also in Germany, especially as regards the integration conditions for the labour market. However, if we follow the results of the coalition negotiations, we can identify in many areas a notably restrictive tendency; the parents of young persons granted subsidiary

protection will not be granted entry subsequently. The restrictions on family reunion in general aims at making integration more difficult in just the same way as accommodation in so-called ANkER institutions – central reception, decision-making and repatriation centres. Instead of broadly interpreting the right to a family (see, amongst others, Art. 16 (2) UDHR, Art. 23 (1) IntPbpR and Art. 8 (1) European Convention on Human Rights, ECHR), and the welfare of children in family reunion, the present coalition partners are focusing on quotas. Instead of ensuring access to the right to education for all children and young people as early and comprehensively as possible, and instead of making access to advice and support easy for everybody, in these institutions - which we know in Bavaria only too well - access to important integration provisions is limited.

With regard to the common EU refugee policy, in the years 2015 and 2016 this second group was still characterised as having a certain amount of willingness to relieve the States on the external boundaries of the EU through relocation. This policy of European solidarity and shared responsibility has been revoked, at the latest following the results of the German exploratory negotiations, though not because of them. In their Europe section of the exploratory negotiation results, the grand coalition partners promote a “Europe of democracy and solidarity”, but at the same time they are sending out the (from a European policy perspective rather counterproductive) message, that they intend to stop the reception programme for refugees from Italy and Greece, as Federal Minister of the Interior de Maizière confirmed. The second group, then, which traditionally stood for a rather more advanced European refugee policy, where necessary at two or more speeds, and which even in 2016 called itself the “coalition of the willing” is visibly disintegrating following the latest changes in government, in particular in Austria.

What remains is the small, traditionally migration-friendly Luxembourg, with its share of refugees based on its population size placing it at the top of the scale in Europe, with a consensus across the political divide *not* to set any upper limits and to continue to strive for *European* solutions. A consensus across party lines to receive a larger number of refugees than is provided for by EU regulations also exists in Portugal, which is only marginally affected by refugee immigration. The lack of a right-wing populist or right-wing extremist party and a positive political tradition in dealing with immigration are quite obviously important variables when it comes to explaining the openness of these two small countries.

1.3 Third group: Tightening of refugee and integration policies, discontinuance of European solidarity

Since the recent right-wing-conservative right-wing populist change in government, Austria, on the other hand, stands for a tougher refugee and integration policy. The alpine republic is in a

group together with all those conservative or conservative-liberal governed countries which have already denounced European solidarity and shared responsibility, noticeably focus on securing the borders and for fear of further pull factors are also simply restricting the integration of refugees. You will already have noticed that this group is visibly filling up, to come back to the image of the continuum.

Besides Austria, this group also includes Belgium under its right-wing-liberal government coalition, the conservative-liberal governed Netherlands with its “bed, bath and bread” accommodation policy, and - until the collapse of the government coalition - Finland (with the “True Finns”. Recently also centre-right governed Denmark has joined this group, a country which has anyway gradually been introducing tougher asylum laws since the 1990s and again in the 2000s. Restrictions on family reunion, shorter residence permits and benefit cuts are all components of a hard line in Danish politics, which are almost certainly in part attributable to a noticeably divided public opinion and the influence of the Danish People’s Party as the second strongest party in the parliament and which for the second time is functioning as a parliamentary majority provider for the conservative-liberal minority government.

1.4 Fourth group: Zero immigration, zero integration, zero solidarity

As you will no doubt have expected, the fourth group consists of those states which (with the exception of the Czech Republic) are located on the Eastern external borders: the nationalist-conservative to populist governed, EU-sceptical States Poland, Hungary, the Czech Republic and Slovakia. They oppose common European solutions and, sometimes resorting to the courts, refuse to receive refugees, very few of whom they have accept in any case. Indeed, most of those who were accepted have already left these Member States again. The trend is towards a policy of border control or closure. An integration policy is at best in operation in respect of specific groups of immigrants (e.g. from Ukraine), but is otherwise rejected as a potential pull factor. Three months before parliamentary elections on 8th April, the Hungarian government has even gone as far as to threaten to impose a tax on refugee organisations whose revenue comes mostly from abroad. This includes almost all Hungarian human rights and asylum aid organisations which look after refugees.

Common to the countries in this group is the fact that they have hardly any traditions when it comes to dealing with immigration, in particular immigration from Muslim countries, and a little-developed awareness of the human rights aspects of refugee policy.

Besides the geographical location, it is above all the ideological orientation of the government and the role of populist parties in the party spectrum which have proven to be responsible as an explanatory variable for the different axes in European policy. The political tradition when it comes to dealing with flight and immigration is also an important predictor for refugee policy,

as well as for the development of public opinion and the development of discourse. Ultimately, we are observing considerable polarisations and heated debates on identity almost everywhere in Europe, which are coupled with a notable EU-scepticism in the Visegrad countries.

In light of the considerable differences in the Council regarding the newly revised Common European Asylum System which have become more than clear both in December at the summit in Brussels and again today in Sofia, it is doubtful whether the current Bulgarian presidency will manage to mend the differences between Western and Eastern Europe and build a bridge to Turkey before Austria takes over the Council presidency in the second half of the year. There is much to suggest that Austria – and therefore the image of a continuum – could even position itself at the head of the Visegrad countries.

2. Tendencies, evaluation and scope for action

Which trends result from this for a future EU refugee policy and how should these be evaluated in terms of human rights? Allow me at this point to be both normative and political. “Europe is in danger of losing its soul by means of the refugee policy”. This is how a dossier by Janis Brühl on migration from Africa from 5th January this year ended. “Yes, the number of refugees in Germany is declining. However, we should not deceive ourselves: Europe has sold its soul for this” was how Georg Restle commented on it on 16th January in the news programme “Tagesschau”.

Hidden behind these - admittedly dramatic – statements are in my view four quite fitting analyses. These are proof to me, firstly, that European refugee policy is noticeably split along the lines of national and group interests and as such departs from the principles of solidarity and shared responsibility; secondly, that the European Member States are visibly operating a policy of externalisation of the responsibility to protect. The deal with the devil involves alliances with powers which are contrary to the objectives and ideals in respect of human and refugee rights, and thirdly, that European refugee policy threatens to dilute the EU’s own human and refugee rights standards which at one time had been agreed on.

3. What can we do?

Ladies and gentlemen, the very reason why for many refugees Europe has become a place of longing for freedom is because it invokes human dignity and human rights.

What is in danger are the rights of migrants and refugees to non-refoulement at the borders, the right to freedom of movement through detention, the question of the recognition of their status within Europe, their economic, social and cultural rights, their right to live together as a family and rights in connection with the asylum process.

Whilst the human rights on the one hand provide a normative orientation for dealing with plurality and differences in modern society, on the other hand they find themselves at the centre of ongoing controversies. In the context of the current crisis in individual Member States, but also the crisis of solidarity among the Member States, the human rights are noticeably called into question, and their assertion faces opposition with the wind blowing increasingly harder in the faces of those who defend human and refugee rights. And I am not just talking about Poland and Hungary.

Yet it is us, students of migration and integration policy, academic representatives and those representing think tanks, civil society, interpreters of law and “cause lawyers” who as advocates of human and refugee rights in research, academic policy consultation and practice further develop these human rights, and we do so by way of “forum shopping” on various political levels and in the various arenas. Be it by constantly checking whether or not it is correct when European governments refer to allegedly “legal vacuums” when it comes to the application of human rights in third countries. Be it by investigating how the extra-territorial application of human rights can continue to develop in public international law. We are the ones who advocate national and international mechanisms for the controlling of standards which reveal and denounce gaps in protection. We are the ones who disclose, expose and have influence on current political discourse. Those who work out the possibilities for solidarity and fair distribution. We are the ones who will hopefully continue to object when instead of integration and instead of equal participation, exclusion and discrimination become widespread.

Human rights, ladies and gentlemen, have always developed especially in times of crisis and upheaval, and in particular in the context of conflictual pluralising and differentiating societies. That is perhaps the optimistic counterpoint of my otherwise rather pessimistic insights into the topic of migration to Europe. And it is also the basis for the future credibility of Europe in the development of a global refugee and migration regime. We need to stay on the ball.
